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FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight*

I. STATUS

A. INFORMAL MARRIAGE

THE elements of a Texas informal marriage have been long established: (1) an agreement of marriage, (2) a holding out within Texas by each party that the marriage exists, and (3) cohabitation as married.¹ In an action in which the issue of informal marriage is in dispute the proponent of the union must plead and prove every element. Prior to the formulation of the Family Code, there was authority² that a court might infer the agreement of the parties if the second and third elements of an informal marriage were proved. That rule was codified in 1969.³ The interpretation and application of that provision nevertheless produced much dispute,⁴ and in 1989 it was repealed, with the result that the permissible manner of proof of an agreement to marry was left in doubt.⁵ Along with the repeal of the provision allowing an inference of an agreement of marriage, the legislature enacted a new requirement that a proceeding to prove the existence of an informal marriage must be commenced within one year after the termination of the cohabital relationship.⁶ In *Dannelley v. Almond*,⁷ the constitutionality of the short time-limitation was challenged. The court concluded that the one year limitation is reasonable under both the Texas and United States Constitutions.⁸

The principal point at issue is whether evidence short of showing an exchange of an explicit agreement of marriage can prove the agreement. In *Russell v. Russell*,⁹ the Beaumont court of appeals concluded that circum-

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1. TEX. FAM. CODE ANN. § 1.91(a) (Vernon 1993); *Ex parte Threet*, 160 Tex. 482, 333 S.W.2d 361 (1960); *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124 (1913).

2. See *Consolidated Underwriters v. Kelly*, 15 S.W.2d 229 (Tex. Comm'n App. 1929, holding approved).

3. Act of May 16, 1969, 61st Leg., R.S. ch. 888, 1969 Tex. Gen. Laws 2707, repealed by Act of Sept. 1, 1989, 71st Leg., R.S., ch. 369, § 9, 1989 Tex. Gen. Laws 1461.

4. See Joseph W. McKnight, *Commentary on Texas Family Code, Title 1*, 21 TEX. TECH L. REV. 911, 939-41 (1990).

5. See *Flores v. Flores*, 1993 Tex. App. LEXIS 473 (Tex. App.—Waco 1993, n.w.h.); *Lorensen v. Weaver*, 840 S.W.2d 644, 647 (Tex. App.—Dallas 1992, writ granted).

6. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1993).

7. 827 S.W.2d 582 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).

8. TEX. CONST. art. I, §§ 3, 19; U.S. CONST. art. XIV.

9. 838 S.W.2d 909 (Tex. App.—Beaumont 1992, writ granted).

stantial evidence of a marital relationship for over nearly thirty years can suffice to show an exchange of promises to marry. In ruling on the inadequacy of proof in *Flores v. Flores*, the Waco court observed that the legislature has significantly tightened the standard of proof and indicated some guidelines toward meeting that standard.¹⁰

The dispute adjudicated in *Bradley v. Robertson*¹¹ arose out of a suit for divorce filed prior to the 1989 amendment to section 1.91. The petitioner alleged an informal marriage and sought a declaration of its validity while simultaneously praying for a divorce. The respondent denied the marriage, but prior to a hearing on the merits of the claim the respondent died and a proceeding for the settlement of his estate was brought in Colorado. The petitioner, therefore, amended her petition to drop the cause of action for divorce but reiterated her right to a declaration of the existence of the informal marriage. The Colorado executor then sought a writ of mandamus for dismissal of the Texas proceeding. The court concluded that the petitioner had a subsisting cause of action before the court that was not abated by the respondent's death.¹²

In *Buster v. Metropolitan Transit Authority*,¹³ there were simultaneous Texas proceedings in the district court and in the probate court in which the decedent's informal marriage was in issue. In the district court action for wrongful death both the decedent's mother and a man claiming to be her husband sought to recover. It was stipulated *between them* that the amount of damages sustained by the man depended on the trial court's determination of whether the alleged tortfeasor was precluded from contesting the existence of the informal marriage. If the court should rule that the defendant was precluded from contesting, it was agreed that the man would receive all of the claimed recovery. It was further agreed that if the court should rule that the defendant was not precluded from contesting the alleged marriage, the man stipulated that the marriage was not valid and that he should receive only \$15,000. By interpleader the alleged tortfeasor admitted liability and made a deposit with the court for recovery by the successful claimant. The suit in the probate court went to trial first, and the man was successful in establishing an informal marriage. The district court held that the judgment of the probate court did not preclude the alleged tortfeasor from litigating the validity of the marriage and found no marriage. The appellate court sustained this conclusion.¹⁴

Although there is some question regarding the applicability of Texas' law

10. 1993 Tex. App. LEXIS 473 (Tex. App.—Waco 1993, n.w.h.).

11. 832 S.W.2d 199 (Tex. App.—Houston [14th Dist.] 1992, writ dismissed). In another proceeding involving a preamendment alleged informal marriage, *Copeland v. Carpenters District Council*, 771 F. Supp. 807, 809 (E.D. Tex. 1991), the court held that the notice given to a claimant of a pension interest as an informal spouse was insufficient under ERISA (29 U.S.C. § 1133 (1988)).

12. *Id.* at 201-202 (distinguishing *McKenzie v. McKenzie*, 667 S.W.2d 568 (Tex. App.—Dallas 1984, no writ)).

13. 835 S.W.2d 236 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).

14. *Id.* at 237. The tortfeasor was not a party to the probate court proceeding.

of informal marriage to non-Texans,¹⁵ the Texas law of informal marriage clearly applies to a man and a woman who were Texas domiciliaries when the marriage was said to have occurred. Thus, as a consequence of the fact that section 2.22¹⁶ does not contain a provision that holding out must occur within this state as in section 1.91(a),¹⁷ it has been said that removal of a disability to a Texas informal marriage, while a Texas couple is cohabitating outside Texas, allows them to take advantage of the provisions of section 2.22.¹⁸ In *Texas Employers' Insurance Ass'n v. Borum*,¹⁹ the widow of a Texas worker, who had recovered under the Texas workers' compensation law for the wrongful death of her husband, moved to Kentucky. There she entered into a cohabital relationship that might be construed as an informal marriage if all the facts had occurred in Texas. It was, therefore, asserted by the obligor of payments under the employers' worker's compensation insurance policy that the widow had remarried and hence had lost her entitlement to payments under Texas law. The San Antonio court of appeals rejected this argument because under the facts as they existed neither Texas law nor Kentucky law would have found an informal marriage.²⁰

B. ALIENATION OF AFFECTION

The cause of action for alienation of affection was abolished in Texas in 1987,²¹ but causes of action arising under prior law were not affected.²² A suit was brought by a husband against a physician under the pre-1987 law for alienation of the affection of the plaintiff's wife.²³ The physician was the pediatrician for the couple's children and the wife became acquainted with her through that relationship. The physician demanded defense by her professional malpractice insurer. The insurer agreed to make the defense but also sought a declaratory judgment with respect to insurance coverage, which the insurer denied. The appellate court held that there was no coverage for the intentional tort of alienation of affection under the professional malpractice policy because the alleged alienation of affection was not the result of the rendition of professional services.

With respect to an alleged cause of action arising after the enactment of section 4.06 in 1987, the argument of a subsisting independent action for interference with familial relations has been rejected when the elements of the alleged interference are identical to those of alienation of affection.²⁴ An

15. See McKnight, *supra* note 4, at 943.

16. TEX. FAM. CODE ANN. § 2.22 (Vernon 1993).

17. See *Winfield v. Renfro*, 821 S.W.2d 640, 644 (Tex. App.—Houston [1st Dist.] 1991, writ denied). See also *Winfield v. Daggett*, 1993 Tex. App. LEXIS 102 (Tex. App.—Houston [1st Dist.] 1993) (mandamus concerning recusal of trial judge).

18. See McKnight, *supra* note 4, at 958-59.

19. 834 S.W.2d 395 (Tex. App.—San Antonio 1992, writ denied).

20. *Id.* at 398-400.

21. TEX. FAM. CODE ANN. § 4.06 (Vernon 1993).

22. 1987 TEX. GEN. LAWS 2030, ch. 453, § 3 at 2031.

23. *Cluett v. Medical Protective Company*, 829 S.W.2d 822 (Tex. App.—Dallas 1992, writ denied).

24. *Truitt v. Carnley*, 836 S.W.2d 786 (Tex. App.—Fort Worth 1992, writ denied).

action has also been successfully maintained against an attorney for bringing such a cause of action.²⁵ In a broader context, there is no right of recovery for damages for interference with familial relations unless those damages rise to the level of loss of consortium.²⁶

C. SPOUSAL GUARDIANSHIP

In 1983 the Texas Probate Code was amended to allow limited guardianship proceedings for persons other than those who are mentally retarded.²⁷ Under the amended provision a wife sought to be appointed limited guardian of her husband against whom two actions had been brought for the recovery of large sums of money.²⁸ The plaintiffs in those actions contested her application. The standing of the contestants was denied²⁹ in the light of the apparent intention of the legislature that a limited guardianship proceeding not be adversarial in the sense that the appointment is meant only for the *benefit* of the ward. A concurring judge suggested, however, that such cases should nevertheless warrant appointment of an *amicus curiae* to call and question witnesses to determine whether *bona fide* grounds for such a proceeding exist.³⁰

II. CHARACTERIZATION OF MARITAL PROPERTY

A. PREMARITAL AND MARITAL PARTITIONS

Although the Texas Supreme Court's decision in *Beck v. Beck*³¹ assured applicability of the 1980 constitutional amendment³² to prior as well as subsequent premarital and marital partitions, only one of three transactions recently reported by appellate courts dealt with a preamendment partition. In *Fanning v. Fanning*,³³ the Waco court of appeals dealt at considerable length with an unusual situation involving a premarital transaction made prior to the constitutional amendment and a marital partition made thereafter. In August, 1980, two young lawyers about to marry entered into a premarital agreement, evidently of their own confection. Though keenly aware that the proposed amendment had not yet been submitted to the people, they were apparently confident that it would be adopted and sought to take advantage of its provisions once in effect, at which time they would be already married.

25. See *Gillum v. Stites* (No. 325-172077-01, 325 Dist. Ct. Tarrant Co., Oct. 5, 1992), on appeal, *sub nom.* *Stites v. Gillum*, No. 02-92-00262-CV (Tex. App.—Fort Worth).

26. See *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978). See also *Transportation Ins. Co. v. Archer*, 832 S.W.2d 403, 405 (Tex. App.—Fort Worth 1992, writ granted); *Dougherty v. Gifford*, 826 S.W.2d 668, 681-82 (Tex. App.—Texarkana 1992, n.w.h.).

27. TEX. PROB. CODE ANN. § 130A (Vernon 1993).

28. *Allison v. Walvoord*, 819 S.W.2d 624 (Tex. App.—El Paso 1991, no writ).

29. *Id.* at 627.

30. *Id.*

31. 814 S.W.2d 745 (Tex. 1991), *cert. denied*, 112 S. Ct. 1266 (1992). See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 1831 at 1839-41 (1992).

32. TEX. CONST. art. XVI, § 15.

33. 828 S.W.2d 135 (Tex. App.—Waco 1992), *rev'd per curiam*, 36 Tex. Sup. Ct. J. 494 (1993).

Their product, however, was seriously flawed by a misunderstanding of the proposed provision that spouses may agree that the income from the separate property of *one of them* shall be the separate property of that spouse. After a recital that the amendment provides that spouses may agree "that the income from separate property owned *by either of them*, or thereafter acquired, shall be the separate property of the spouse owning such separate property,"³⁴ the parties agreed that all income from the separate property of *both* of them would be the owner's separate property if and when the amendment to article XVI, section 15 of the Texas Constitution would be effective. Though they did not use the amendment's language of partition or exchange, the parties' agreement as to other income was clearly meant to have that effect. They agreed that the income of each held in an account designated as the separate property of the depositor-spouse would be that spouse's separate property. The instrument also provided that the income of each from the practice of law would be the earning spouse's separate property. The parties did not provide for their future earnings from other sources otherwise deposited. It was agreed that in case of divorce, the court would divide all community property equally. After the parties' marriage the amendment was adopted as anticipated. In 1981, and again in 1986, the parties entered into written agreements purporting to partition specific existing property and the income from it as separate property, but they made no specific mention of earnings. If valid, either the 1981 or the 1986 partition would have fixed the character of some property ambiguously dealt with by the premarital agreement. Though the appellate court affirmed the trial court's conclusion that the 1986 transaction was invalid,³⁵ the 1981 partition was held to be valid.³⁶

The Waco appellate court dealt with each of these provisions individually. Because the terms of the agreement with respect to bank accounts were substantially similar to those approved in *Beck*, those terms were approved.³⁷ With respect to the provision concerning spousal earnings from their legal practices, the court relied on its 1977 decision in *Huff v. Huff*³⁸ to conclude that the premarital agreement was valid under pre-amendment law but, if not, it was certainly valid under the 1980 amendment as interpreted in *Beck*. With regard to the income from separate property, however, the court's approach was based on the parties' pointed reliance on a part of the constitutional amendment which they did not understand.³⁹

34. *Fanning*, 828 S.W.2d at 139 (emphasis supplied). Because they went on to deal with the income from the separate property of *both of them*, thus achieving a premarital partition of future acquisitions, this recital could have been treated as irrelevant.

35. *Fanning*, 828 S.W.2d at 147.

36. *Id.*

37. *Id.* at 139-40.

38. 554 S.W.2d 841, 842-44 (Tex. Civ. App.—Waco 1977, writ *dism'd*). *Huff* concerned a Louisiana premarital agreement of a couple who later moved to Texas where such agreements were then unconstitutional. Although the appellate court purported to apply the agreement in sustaining the trial court's division of property on divorce in Texas, the same result could have been achieved by sustaining the trial court's exercise of discretion in dividing the community estate.

39. In *Pearce v. Pearce*, 824 S.W.2d 195 (Tex.App.—El Paso 1991, writ *denied*), *dis-*

The clause of the amendment which the parties evidently saw as a limitation on the immediately preceding clause allowing spouses (or an engaged couple) to partition any of their future acquisitions really has no bearing on it at all. The constitutional amendment adopted in 1980 provides that "persons about to marry and spouses. . . may. . . partition between themselves all or part of their property, then existing or to be acquired."⁴⁰ *All* embraces every kind of property that is, or would be, community property in the future. The drafters of the amendment so explained it to the legislature and the bar.⁴¹ The succeeding clause dealing with interspousal "agreements" concerning income from "the separate property of one of them" has no application to partitions and exchanges by spouses or persons about to marry. It refers to spousal agreements with *unilateral* reference to income from separate property as the subject of a transaction favoring one spouse.⁴² As to the provision of the premarital agreement that in the event of divorce all community property would be divided equally, the court said that this undertaking did not deal with characterization but division of property. The court explained that because the Texas Constitution allows the legislature to define the rights of the spouses in relation to separate and community property, the enactment of section 5.41 of 1969 and section 5.41 of 1987 authorize the parties to make such a provision.⁴³ Those sections, the court said, thus modified section 3.63,⁴⁴ and hence the court's exclusive power to make a "just and right" division is altered.⁴⁵ This analysis is not supported by the

cussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 831, 1841-42 (1992), this clause was relied on by the parties for the purpose for which it was intended: a mere spousal agreement rather than a partition.

40. TEX. CONST. art. XVI, § 15.

41. See Joseph W. McKnight & Robert E. Davis, *For Constitutional Amendment No. 9*, 43 TEX. B.J. 921, 924 (1980). This statement of the objectives of the amendment is a shortened version of the commentary of the draftsmen presented to the Committee on Constitutional Amendments of the Texas House of Representatives. See also Joseph W. McKnight, *The Constitutional Redefinition of Texas Matrimonial Property as It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY'S L.J. 449, 457-64 (1982); JOSEPH W. MCKNIGHT & WILLIAM A. REPPY, JR., TEXAS MATRIMONIAL PROPERTY LAW 21 (1983).

42. A series of estate tax cases provided the immediate impetus for the amendment. Estate of McKee v. Commissioner, 47 T.C.M. (P.H.) 484, 489 n.7 (1978); Estate of Castleberry v. Commissioner, 68 T.C. 682, 686-87 (1977), rev'd, 610 F.2d 1282 (5th Cir. 1980); Estate of Wylly v. Commissioner, 69 T.C. 227, 233, later rev'd, 610 F.2d 1282 (5th Cir. 1980). The Internal Revenue Service had argued that a gift by one spouse to the other was only a partial divestiture of title in the donor because he was entitled to half the future income from that property as a matter of law. The amendment therefore specifically provided that *all* income from property given by one spouse to the other was presumed to be the separate property of the donee. So that future income from property a spouse had *already* received as a gift from the other spouse or from some other source could be easily converted to the separate property of the owner, the amendment also provided that the spouses might agree in writing that the income from the separate property of *one of them* would be that spouse's separate property. In 1987 the clause dealing with spousal agreements concerning income from "the separate property of one of them" was further clarified to read "the separate property of *only* one of them" to obviate any further confusion. The statutory counterpart of this constitutional provision is TEX. FAM. CODE ANN. § 5.53 (Vernon 1993). Because its subject-matter relates to gifts rather than to partitions, it would be more appropriately coupled with § 5.04 in the Family Code.

43. *Fanning*, 828 S.W.2d at 143.

44. TEX. FAM. CODE ANN. § 3.63 (Vernon 1993).

45. *Fanning*, 828 S.W.2d at 143.

texts of those sections, especially when considered in light of the constitutional provisions on partition and exchange.

In its comments on the invalidity of the 1986 partition the Waco court failed (as all must in most instances) to make a precise application of section 5.55.⁴⁶ The section provides that a premarital or marital partition, exchange or agreement may be invalidated on one of two grounds: (1) a lack of *volition* of a party or (2) unconscionability of the bargain (as judged at the time of making) coupled with a lack of disclosure of the other party's assets. Because the wife attacked the 1986 partition, she bore the burden of proof of showing grounds for invalidity. Without commenting on the wife's volition, the court seemingly applied the second test and appropriately observed that it should "focus upon the circumstances at the time the agreement was executed rather than the [ultimate] disproportionate *effect* of the agreement."⁴⁷ In evaluating unconscionability of the terms of the transaction the court borrowed its definition from commercial law:⁴⁸ the unconscionable contract produced by high pressure tactics in selling consumer goods to a buyer whose bargaining power is frail in comparison to that of the seller. This definition seems inappropriate, however, because it incorporates a large element of volition which is an independent ground for invalidity under section 5.55(1).⁴⁹ Although the court found that the wife's evidence was factually sufficient to show a lack of disclosure of the husband's financial position,⁵⁰ the court evidently had difficulty in determining that "the agreement was unconscionable."⁵¹ Although the court indicated some disparity of bargaining power in mentioning the husband's overbearing personality, nothing was said of the extreme, or gross unfairness of the agreement itself which must be the principal element of unconscionability. The fact is that the standards the Uniform Premarital Act embodies in section 5.55(2) are incompatible with the operation of the Texas rules of marital property management and succession. In most cases it is therefore virtually impossible to judge at the time of making a premarital or marital partition whether the result will be unconscionable because the facts necessary to judge the fairness of marital property management and succession are unknown.

Citing the *Fanning* decision the Austin court of appeals⁵² sustained the validity of a 1983 premarital partition providing that the earnings of each spouse would be the separate property of the earning spouse.⁵³ It was irrelevant that the premarital agreement statute in effect at the time of the trans-

46. TEX. FAM. CODE ANN. § 5.55 (Vernon 1993).

47. *Fanning*, 828 S.W.2d at 145.

48. *Id.* at 146.

49. TEX. FAM. CODE ANN. § 5.55(1) (Vernon 1993).

50. Although some doubt may be entertained as to the need for the statutory rule requiring a full disclosure of the extent of *separate* as well as community property in the process of negotiating a partition between *wives*, in a situation such as this one (when the extent of community property was in doubt), the broader rule may serve a useful purpose.

51. TEX. FAM. CODE § 5.55(2) (Vernon 1993).

52. *Winger v. Pianka*, 831 S.W.2d 853, 855, 858 (Tex. App.—Austin 1992, writ denied).

53. *Id.* at 855-58.

action⁵⁴ did not mention partitions.⁵⁵ The court also rejected the appellant's equally meritless argument that the statute dealt with "property" but failed to make specific provision for "earnings."⁵⁶

In *Blonstein v. Blonstein*,⁵⁷ the husband's executor sought to set aside a marital partition executed in 1986. In contesting the validity of the transaction, the executor relied on the statute in effect at the time of the partition to define the burden of proof with respect to fraud in the process of execution.⁵⁸ That statute put the burden of disproving fraud on the proponent of the partition. As in *Fanning*,⁵⁹ the court in *Blonstein*⁶⁰ followed established authority⁶¹ in holding that the applicable statute for establishing fraud is section 5.55 enacted in 1987,⁶² the statute in effect when the suit was brought. As a statute governing trial procedure rather than substantive law, the later statute is therefore applicable to determine burden of proof, which puts the burden of proving fraud on the party asserting it.

B. TRACING

The presumption that all property on hand at dissolution of marriage is community property⁶³ can be rebutted by a claimant's showing that a particular asset is separate property, though its form may have been altered during the marriage. But if separate property is inextricably commingled with community property, it loses its identity. In *Lawson v. Lawson*⁶⁴ the Texarkana court of appeals commented on a contradictory jury finding that was not challenged at trial:

The only [jury] question that related to the certificates of deposit was the general question about commingling. The [fifth] question to the jury that specifically involved the certificates of deposit involved *interest* only. While it is not consistent to say that all of the certificates of deposit are community property but that the interest from some of the certificates of deposit is separate property, the jury's unchallenged factual determination finds some of the interest to be separate property. This Court has no authority to set aside the unchallenged jury finding.

54. 1981 TEX. GEN. LAWS 2964, ch. 782, § 2 (§ 5.41) at 2964-65.

55. *Winger*, 831 S.W.2d at 859.

56. *Id.*

57. 831 S.W.2d 468 (Tex. App.—Houston [14th Dist.] 1992), writ denied per curiam, 36 Tex. Sup. Ct. J. 136 (Dec. 31, 1992).

58. 1981 TEX. GEN. LAWS 2964, ch. 782, § 2 (§ 5.46) at 2964-65.

59. 828 S.W.2d at 145.

60. 831 S.W.2d at 472. In *Winger*, 831 S.W.2d at 858-59, the court found it unnecessary to discuss the point because it affirmed the trial court's conclusion by applying the 1981 statute, which the appellant asserted was applicable.

61. See *Sadler v. Sadler*, 769 S.W.2d 886 (Tex. 1989); *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

62. TEX. FAM. CODE ANN. § 5.55 (Vernon 1993). In denying a writ of error the Texas Supreme Court commented briefly on the broad-form submission of the issues of volition and disclosure of assets to the jury but neither approved nor disapproved the intermediate appellate court's analysis of the mode of submission. *Blonstein v. Blonstein*, 36 Tex. Sup. Ct. J. 163 (writ denied per curiam, Dec. 31, 1992).

63. TEX. FAM. CODE ANN. § 5.03 (Vernon 1993).

64. 828 S.W.2d 158 (Tex. App.—Texarkana 1992, writ denied).

The jury's finding in answer to jury questions that some of the *interest* from these certificates of deposit was separate property seems to conflict with its answer to jury question 6 finding that all the property has been so commingled that it would be presumed to be community.⁶⁵

Although the specific answer to question 5 should have prevailed over the general answer to question 6, the court went on to observe that the jury was not asked the amount of the interest and hence the jury's answer to question 5 had to be put aside as meaningless in resolving the characterization of the certificates of deposit. Thus, with the trial court's characterization of the marital property significantly affected by the ruling of the appellate court, the property division was required to be remanded to the trial court.⁶⁶

In the will under consideration in *Pine v. Salzer*⁶⁷ the testatrix described specific property as "separate assets" and bequeathed it to particular legatees, who nevertheless stipulated that the property bequeathed was community property. The will went on to provide that "whatever community estate" the testatrix had was bequeathed to her husband. The probate judge, therefore, granted the husband's motion for summary judgment to take the items specifically bequeathed, and the other beneficiaries appealed. In reversing the order of the probate judge, the appellate court held that the bequests were not necessarily inoperative merely because of some legatees' mischaracterization of the assets bequeathed by the testatrix. Agreement among the beneficiaries as to the proper character of the property bequeathed did not relieve the probate judge of interpreting the will as a whole. The decedent's classification of her property as separate was certainly not controlling as a matter of law, but the appellate court's saying that it "is not material to the issue of the decedent's intent"⁶⁸ is something of an overstatement.

C. RETIREMENT BENEFITS

Insofar as interests in a retirement plan are deferred compensation they constitute community property under Texas law. Federal retirement benefits as defined by Congress may, however, be characterized as separate property under the Supremacy Clause of the federal Constitution except to the extent that federal law allows state law to control in dividing such interests on divorce.⁶⁹ The United States Supreme Court has concluded that federal disability benefits are not covered by this exception,⁷⁰ as Texas courts have consistently held.⁷¹ Though doubting that Congress actually intended to limit its exception in this way, the Austin court of appeals dutifully applied the Supreme Court's precedent in *Wallace v. Fuller*.⁷²

65. *Id.* at 160-61 (footnote omitted).

66. *Id.* at 161.

67. 824 S.W.2d 779 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).

68. *Id.* at 782.

69. 10 U.S.C. § 1408 (1988).

70. *Mansell v. Mansell*, 490 U.S. 581 (1989).

71. See *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990). See also Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 Sw. L.J. 1, 34 n.288 (1990).

72. 832 S.W.2d 714, 719 (Tex. App.—Austin 1992, n.w.h.).

In *Duckett v. Board of Trustees*,⁷³ a fireman's ex-wife had been awarded a fractional interest in the retirement benefits of her husband on divorce. The husband was remarried at the time of his subsequent death. The ex-wife nonetheless claimed benefits due to his surviving widow under his legislatively defined⁷⁴ retirement plan. The trial court granted a motion for summary judgment against her claim and the ex-wife appealed. The ex-wife asserted that the benefits awarded to her on divorce included an interest in the survivor-benefits. The appellate court relied on *Lack v. Lack*⁷⁵ in denying her recovery. In *Lack*, an ex-wife was also denied survivor-benefits under the state's fireman's pension system although community funds of the fireman and the ex-wife were contributed to the benefit-fund. The reason given by the court in *Lack* was the discredited one⁷⁶ that because no interest in the benefits vested during marriage the community could have no interest therein. In *Lack*, the court also relied on the ability of the state to divest such "contingent rights" as a basis for concluding that a fireman's spouse had no right at all until the fireman died.⁷⁷ This argument presupposes that the state is not bound to comply with the Texas Constitution, article XVI, section 15 (definition of marital property) and article I, section 19 (due course of law). It is unfortunate that a decision as flagrantly wrong as *Lack* should have been exhumed and relied on as authority.⁷⁸

D. VALUE OF PERSONAL-SERVICE BUSINESS

Division of community property on divorce often requires the valuation of a business enterprise involving the personal services and reputation of one of the spouses. In *Nail v. Nail*,⁷⁹ the Texas Supreme Court held in 1972 that because of the implicit personal component in computing the goodwill of a spouse's professional practice, goodwill should be excluded in valuing the assets of the practice. In some later decisions dealing with large business entities in which the services and reputation of the spouse are interchangeable with those of other persons serving the entity, the courts have distinguished *Nail*.⁸⁰ In *Guzman v. Guzman*,⁸¹ the community character of the goodwill of a spouse's individual practice as a certified public accountant was in issue. Such a practice is, of course, saleable, but a sale will ordinarily include a covenant not to compete which may therefore entail loss of future earning power. If such an interest is deemed to be sold on divorce for the

73. 832 S.W.2d 438 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

74. TEX. REV. CIV. STAT. art. 6243e.2, § 11 (Vernon Supp. 1993).

75. 584 S.W.2d 896 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

76. See *Cearley v. Cearley*, 544 S.W.2d 661, 663-66 (Tex. 1976).

77. *Lack*, 584 S.W.2d at 899 (citing *Dallas v. Trammell*, 129 Tex. 150, 158, 101 S.W.2d 1009, 1013 (Tex. 1937)).

78. See *supra* note 41, at 119.

79. 486 S.W.2d 761 (Tex. 1972). See also *Rathmell v. Morrison*, 732 S.W.2d 6, 17 (Tex. App.—Houston [14th Dist.] 1987, no writ).

80. *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 434-36 (Tex. Civ. App.—Fort Worth 1978, writ dism'd); *Finn v. Finn*, 658 S.W.2d 735, 740-41 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); *Keith v. Keith*, 763 S.W.2d 950, 952 (Tex. App.—Fort Worth 1989, no writ).

81. 827 S.W.2d 445 (Tex. App.—Corpus Christi 1992, writ denied).

purpose of making a valuation and division, a loss of separate earning power after divorce would almost certainly be included. Although the goodwill built up during the marriage clearly has value and its past value may have been significantly enjoyed through past earnings, a computation of its present value may impinge on the future personal rights of the spouse involved in the business. If the present value of the future separate rights of a spouse can be extracted from the process of valuation, a present community value of the goodwill might be attached to it. In *Guzman*, however, the court found itself controlled by the decision in *Nail*.⁸²

Two cases⁸³ dealt with the admissibility of evidence in the valuation of professional practices. In *Smith v. Smith*⁸⁴ the objection to evidence regarding the valuation of a business was based on its inclusion of the element of goodwill itself, because "the value of the business depended entirely on whether the husband could continue working,"⁸⁵ that is, the value of his earning power after divorce. On the basis of the decision in *Nail*, the appellate court held that the objection should have been sustained.⁸⁶ In *Turner v. Montgomery*,⁸⁷ counsel for the husband-attorney in a divorce suit interposed a plea of attorney-client privilege in an effort to block discovery of documents needed to determine the community interest in the attorney's partnership interest. The appellate court held that the plea was ineffective because the attorney had not shown on the part of his client that the documents were privileged.

*Gilbert v. Gilbert*⁸⁸ also presented a hard question of valuation, though the court's opinion was withdrawn after settlement by the parties. During their forty years of marriage the husband and wife had both devoted their skills to the management of a television cable system owned by the wife's parents, partly inherited by the wife, and sold shortly before the divorce. The husband was a party to the sale and covenanted not to compete with the buyer. The divorce court held that the proceeds of sale were wholly the wife's separate property. The appellate court rejected this conclusion insofar as the proceeds included the value of the husband's covenant not to compete. But the further conclusion of the court that the value of the husband's covenant was community property seems faulty, or oversimplified.⁸⁹ Although the value of the covenant when received was presumptively community property because received during marriage, the preponderance of its value was separate to the husband as representing his earning power after divorce. Putting a value on that separate element would entail some difficulty, however, un-

82. *Id.* at 448.

83. *Turner v. Montgomery*, 836 S.W.2d 848 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Smith v. Smith*, 836 S.W.2d 688 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

84. 836 S.W.2d 688 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

85. *Id.* at 690.

86. *Id.* A dissenting judge seemed to regard the goodwill element of the testimony as irrelevant. *Id.* at 694-95.

87. 836 S.W.2d 848 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

88. 1992 WL 87118 (Tex. App.—Eastland 1992, n.w.h.) (opinion withdrawn).

89. See the discussion of an analogous situation in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 Sw. L.J. 1, 8-10 (1990).

less a value was attached to it in the sales contract,⁹⁰ but that process of proof may be somewhat eased by viewing the husband's claim as a right of reimbursement, that is, his contribution (of a separate commitment not to compete) to his wife's sale of her separate business interest.

E. REIMBURSEMENT

A claim for reimbursement arises when one marital estate renders a benefit for another marital estate. In *Graham v. Graham*,⁹¹ the husband used the proceeds from the sale of separate property to discharge an encumbrance on community property and on divorce claimed reimbursement from the community estate. His wife attempted to repel his claim on the ground that the community property was held in both of their names and that therefore the husband's payment constituted a presumed gift to her of half the payment. In rejecting her argument, the court distinguished a purchase with separate funds in the name of the other spouse and the payment of an existing community obligation with separate funds.⁹² A presumption of gift arises in the first instance, whereas a claim of reimbursement arises in the latter. As the court also pointed out, even if there had been an agreement between the spouses that the husband would use his separate property to retire the debt once the second property was acquired, such a promise on the husband's part would not show his intent to make a gift.⁹³ Even if it is conceded that direct payment of separate property for family support is not reimbursable,⁹⁴ it does not follow that use of separate funds to pay a community obligation bars a claim for reimbursement.⁹⁵

In *Heggen v. Pemelton*,⁹⁶ a divorcing couple maintained their home on rural acreage which was partly the wife's separate property and partly community property. The divorce court awarded the husband a money judgment for \$150,000, his community interest in the property, and put a lien on the part originally constituting the wife's separate property for payment of that amount. In reviewing the validity of the lien, the Supreme Court of Texas held that a court may impose a reimbursement lien on separate property for benefits received but not for other purposes.⁹⁷ Thus, the court disap-

90. The tracing problem is the same as that encountered when a lump sum money judgment is awarded to a spouse for recovery of both a separate and a community loss. The burden is upon the recipient spouse to show the amount of the separate recovery. *Kyles v. Kyles*, 832 S.W.2d 194, 198-99 (Tex. App.—Beaumont 1992, n.w.h.). The court's assertion in *Kyles, id.* at 198, that nothing short of proof that an *entire fund* is separate property will rebut the community presumption seems too severe in light of *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973), and *Estate of Hanau v. Hanau*, 730 S.W.2d 673 (Tex. 1987), unless the 1987 amendment to TEX. FAM. CODE ANN. § 5.02 (Vernon 1993) has that effect. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 42 Sw. L.J. 1, 19-20 (1988).

91. 836 S.W.2d 308 (Tex. App.—Texarkana 1992, n.w.h.).

92. *Id.* at 310.

93. *Id.*

94. *Norris v. Vaughan*, 152 Tex. 491, 503, 260 S.W.2d 676, 683 (1953).

95. *Graham*, 836 S.W.2d at 310 (citing *Hilton v. Hilton*, 678 S.W.2d 645, 648 (Tex. App.—Houston [14th Dist.] 1984, no writ)).

96. 836 S.W.2d 145 (Tex. 1992).

97. *Id.* at 146.

proved the contrary body of case law from the intermediate appellate courts.⁹⁸ In this instance the divorce court apparently awarded the husband's community interest in the realty to the wife in order to achieve sole ownership of the tract and then gave the husband a money judgment to make the division equal. But rather than fixing a purchase money lien for reimbursement on the husband's community property interest transferred to the wife, the court put the lien on the wife's separate property. This non-reimbursement lien on the wife's separate property was rejected by the Texas Supreme Court as an improper interference with the wife's separate estate.⁹⁹

Although Family Code section 5.22¹⁰⁰ gives each spouse the sole management of income he or she would have owned if single,¹⁰¹ the law does not allow unreasonable handling of that property to the detriment of the interest of the other spouse. In *Fanning v. Fanning*,¹⁰² the divorce court dealt with assertions by the wife that her husband was guilty of secreting community funds and giving them to his paramour, her family and charitable donees. In remanding the case on this point, the appellate courts directed the trial court to reconsider the "damages" assessed against the husband for the constructive frauds alleged. Although courts have awarded monetary amounts to compensate an innocent spouse for acts of constructive fraud to achieve an equitable division of community interests when there is little tangible community property to divide,¹⁰³ such awards should be termed *reimbursement* in order to avoid the suggestion of an award for an interspousal tort.¹⁰⁴

98. See *Mullins v. Mullins*, 785 S.W.2d 5, 12 (Tex. App.—Ft. Worth 1990, no writ); *Day v. Day*, 610 S.W.2d 195 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.); *Buchan v. Buchan*, 592 S.W.2d 367 (Tex. Civ. App.—Tyler 1979, writ dismissed). See also Joseph W. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 446-47 (1976).

99. Whether a money judgment lien for the equalization of shares in the division of the community might have been put on *all* the community realty awarded to the wife was not addressed.

100. TEX. FAM. CODE ANN. § 5.22 (Vernon 1993).

101. In *Bell v. Moores*, 832 S.W.2d 749 (Tex. App.—Houston [14th Dist.] 1992, writ denied), a wife and an ex-wife sought to intervene as plaintiffs in their husband's and former husband's actions for breach of contract of employment. In each instance the attempted intervention was put aside on procedural grounds. It is not clear what motivated the intervention. Fraud on the part of the husbands was not alleged in either instance. The court noted that the subject matter of the husbands' causes of action were subject to their sole management. *Id.* at 753.

102. 828 S.W.2d 135, 147-49 (Tex. App.—Waco 1992, writ granted).

103. See *Mazique v. Mazique*, 742 S.W.2d 805, 807-08 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Reaney v. Reaney*, 505 S.W.2d 338, 340 (Tex. Civ. App.—Dallas 1974, no writ). See also, Joseph W. McKnight, *Commentary to the Texas Family Code*, Title 1, 21 TEX. TECH L. REV. 911, 1014-15 (1990).

104. See also *Falor v. Falor*, 840 S.W.2d 683, 687 (Tex. App.—San Antonio 1992, no writ). A divorce court had awarded a monetary property division in favor of the wife, secured by a lien on property the husband claimed as his separate homestead. The lien arose from findings in the trial court that the husband had wasted community assets and that the community had a right of reimbursement for discharge of the mortgage on the separate property. Basing its decision on the holding in *Heggen v. Pemelton*, the court remanded the case to the trial court for a determination of exactly what portion of the husband's property was his homestead, so that the lien might be limited to its proper purpose.

F. INTERSPOUSAL LIABILITY

In *Webster v. State Farm Fire and Casualty Co.*,¹⁰⁵ the Fifth Circuit Court of Appeals reiterated its conclusion of allowing no recovery on a policy of insurance held by both spouses when one of them destroys the property insured against destructive loss.¹⁰⁶ Although the Texas Supreme Court has held that a co-owner spouse of a one-half separate property interest can recover the insured value of that half of the property destroyed by the other separate co-owner spouse and co-insured, the court had left open the question with respect to destruction by a co-owner and co-insurer of community property.¹⁰⁷ In *Webster*, the husband destroyed the insured community home and its community contents while the couple was separated and the husband was living in the home alone. After the husband petitioned for divorce, a joint claim for loss was filed and denied by the insurer. The decree of divorce then awarded each spouse as separate property one-half of the net insurance proceeds, if any should later be recovered. One year later both ex-spouses sued the insurer for breach of contract. Acknowledging that divorce of the parties would preclude the ex-husband from any share in the ex-wife's recovery, the court denied any recovery because at all relevant times the property destroyed was community property and the claim was for a community loss. The court suggested, however, that the result might be otherwise if the wife had asserted a separate claim during marriage.¹⁰⁸ The court appears to suggest that if only the wife's portion of the community right of reimbursement had been asserted and awarded to her on divorce, that claim could be successfully asserted against the insurer, unless excepted by the terms of the policy. If on dissolution of a marriage one spouse can be reimbursed for one-half of the value of a community asset which has been unreasonably given away by the other spouse,¹⁰⁹ an action should lie against an insurer for recovery of half the value of community property destroyed by the other spouse. Insurance policies may nevertheless preclude recovery in such instances.

Meanwhile, the Austin court of appeals has advanced the frontier of automobile insurance recovery. In *National County Mutual Fire Insurance Co. v. Johnson*,¹¹⁰ the wife brought an action against her husband for injuries arising out of an automobile collision. The wife was a passenger in the husband's car. In her action against him the husband demanded unconditional defense by his insurer, and in light of the family-member exclusion in his policy the insurer declined. The husband demanded defense because the

105. 953 F.2d 222 (5th Cir. 1992).

106. *Norman v. State Farm Fire & Casualty Co.*, 804 F.2d 1365 (5th Cir. 1986), discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 41 Sw. L.J. 1, 19-20 (1987).

107. *Kulubis v. Texas Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953, 955 (Tex. 1986).

108. *Webster*, 953 F.2d at 223.

109. *Carnes v. Meador*, 533 S.W.2d 365, 368 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); *Givens v. Girard Life Ins. Co.*, 480, S.W.2d 421, 426-27 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

110. 829 S.W.2d 322 (Tex. App.—Austin 1992, writ granted).

Safety Responsibility Act¹¹¹ requires that an automobile owner's liability policy pay all his obligations arising out of his operation of his automobile and he was potentially liable to his wife for her injury. The appellate court held that the Safety Responsibility Act requires mandatory liability insurance in the use of automobiles and thus an insurance policy which excludes coverage of a family member of the insured "violates the plain mandate of the act."¹¹² The court thus followed the weight of authority from other American jurisdictions concerning the validity of family-member or household exclusions.¹¹³

G. INTERSPOUSAL GIFTS

In *Kyles v. Kyles*,¹¹⁴ the Beaumont court of appeals was badly misled in dealing with a difficult issue of characterization. The wife received three warranty deeds from members of her family. Each deed recited receipt of her separate property and conveyed property to her as her separate property. The recitals, the court says, supersede the community presumption with a separate presumption. This assertion is incorrect. The court says that this proposition is supported by *Hodge v. Ellis*¹¹⁵ and *Little v. Linder*.¹¹⁶ It is not. Those cases involved *interspousal* transactions. In such instances dealing with conveyances by a husband to a wife or by a third person to a wife at the husband's direction, the husband was barred from denying the efficacy of the recital because he was a party to the transaction.¹¹⁷ Other authorities cited by the court are also cases involving conveyances by one spouse to the other.¹¹⁸ In *Kyles*, the controlling authorities are those dealing with conveyances to a spouse by a third person when the other spouse is *not* a party to the transaction. Further, in each of the conveyances at issue in *Kyles* a consideration was recited as having been paid with separate funds. The trial court was correct in applying the community presumption in each instance to put the burden of proof on the wife-grantee to prove that the separate property was indeed the consideration for the deed or that the recitals of consideration were false and that each deed was in fact a gift.¹¹⁹ The appellate court supported its conclusion with an alternative assertion that the transactions were presumed gifts because the grantor was in each instance a close relative. Such an approach to the transfers, nevertheless, requires a showing on the part of the grantee that the recitals of consideration were

111. TEX. REV. CIV. STAT. ANN. art. 6701h (Vernon 1977 & Vernon Supp. 1993).

112. *Johnson*, 829 S.W.2d at 325.

113. *Id.* at 326.

114. 832 S.W.2d 194 (Tex. App.—Beaumont 1992, n.w.h.).

115. 154 Tex. 341, 347, 277 S.W.2d 900, 904 (1955).

116. 651 S.W.2d 895, 898 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

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

118. *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426 (Tex. 1970); *Trawick v. Trawick*, 671 S.W.2d 105 (Tex. App.—El Paso 1984, no writ).

119. *Van v. Webb*, 147 Tex. 299, 215 S.W.2d 151 (1948).

false.¹²⁰ If in structuring the transactions initially the wife and her relatives had sought to perpetrate a fraud on the husband, they should have put the transfer in the form of a gift rather than a sale. Insofar as there is a presumption of gift applicable to a transfer from a parent to a child, that presumption relates to disproof of a resulting trust and has no other bearing on the characterization of the transfer as community or separate property.¹²¹

If one spouse transfers either separate or community property to the other spouse (otherwise than as a sale), there is a presumption of gift.¹²² Similarly, if one spouse uses separate property to buy property and puts title in the other spouse's name, the other spouse is deemed a donee,¹²³ but no presumption of gift arises when property is bought with community property.¹²⁴ In *Powell v. Powell*,¹²⁵ the husband, during marriage, made two transfers of shares of his separately owned corporation to his wife. The husband's arguments at divorce that neither transfer was a gift were unconvincing.¹²⁶ In the second instance, he also seems to have admitted that the transfer was made with an intent to defraud a judgment creditor. That fact alone would have precluded his claim to the property.¹²⁷

*Estate of Kuenstler v. Trevino*¹²⁸ involved a gift to a person who was neither a spouse nor a relative. Shortly before his death the decedent bought a truck substantially on credit with a purchase money security interest in the seller, who assigned its security agreement to a bank. The buyer then made a gift of his interest in the truck to the claimant who took possession of it. After the donor's death, the donee failed to make payments in accordance with the security agreement. Choosing to rely on its security rather than filing a proof of claim in the decedent's estate, the bank foreclosed its security interest. The donee then sought a declaratory judgment of her ownership, and the bank petitioned that the decedent's executor be ordered to pay the balance due on the security agreement. The probate court ordered the executor to pay and ordered the bank to transfer the truck's title to the donee. The executor appealed. The appellate court concluded that the donor gave the donee no more than his equity in the truck rather than his ownership interest subject to the seller's lien assigned to the bank. The donee relied on *Hayes v. White*,¹²⁹ a case involving a gift by a husband to his wife of an encumbered car. In their divorce the husband in *Hayes* had been ordered

120. *Goldberg v. Zellner*, 235 S.W. 870 (Tex. Comm'n App.—1931, judgm't adopted) (separate property); *Story v. Marshall*, 24 Tex. 305 (1859) (community property).

121. *Smith v. Strahan*, 16 Tex. 314, 321 (1856).

122. *Goldberg v. Zellner*, 235 S.W. 870 (Tex. Comm'n App.—1931, judgm't adopted) (separate property); *Story v. Marshall*, 24 Tex. 305 (1859) (community property).

123. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975) (separate property); *Smith v. Strahan*, 16 Tex. 314 (1856) (separate property).

124. *Higgins v. Johnson's Heirs*, 20 Tex. 389 (1857).

125. 822 S.W.2d 181 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

126. *Id.* at 183. The wife's attempt to deny that she had made a gift of a clock to her husband was also unsuccessful. *Id.* at 185.

127. *Markum v. Markum*, 210 S.W.2d 835 (Tex. Civ. App.—Amarillo 1917, writ dism'd); *Messer v. Ziegler*, 282 S.W. 620 (Tex. Civ. App.—Ft. Worth 1926, no writ).

128. 836 S.W.2d 715 (Tex. App.—San Antonio 1992, n.w.h.).

129. 384 S.W.2d 895 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.).

to pay the encumbrance, and the court therefore held that the ex-husband was required to pay the lienholder at the insistence of the ex-wife. In both cases the buyer was independently liable on his contract to pay the indebtedness, and in each case the court had the power to order payment. In finding for the executor in *Kuenstler* the court relied on the bank's failure to offer proof of its claim.¹³⁰ But if the bank had not failed to prove the indebtedness (and had not been precluded from doing so by its apparent prior choice of remedy), the court might have ordered the executor to pay the decedent's debt and might have awarded the truck to the donee. In a like case in which the decedent's wife is the donee, the result would be the same. In *Kuenstler*, the court further observed that the donor's contract with the seller impeded his ability to transfer title and therefore precluded his making a gift of the truck to the donee. This was a slip that failed to take account of the impact of commercial law on the underlying transaction.¹³¹

One who accepts benefits under a will must adopt the whole contents of the instrument and renounce any right inconsistent with it.¹³² In *Coppock & Teltschik v. McLaughlin*,¹³³ the widow made an equitable election to take under her husband's will. The court held that she was therefore precluded from taking either statutory allowances or having exempt property set aside to her.¹³⁴ Consequently her former attorney, to whom she had assigned an interest in exempt property received from her husband's estate, lacked standing to complain that a lien had been improperly put on the property.¹³⁵

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

A. COMMUNITY SURVIVORSHIP AGREEMENTS

Whether community property is solely or jointly managed, it may be made subject to a right of survivorship by the spouses' agreement in writing.¹³⁶ Because the consequences of such agreements arise at death, the statutory counterpart for the 1987 constitutional provision authorizing such spousal agreements are found in the Probate Code¹³⁷ rather than the Family Code. In *Rogers v. Shelton*,¹³⁸ spouses had entered into a written agreement in 1981 to create a bank account of community property with a right of survivorship. The 1989 statute to complement the constitutional provision of 1987, however, by its terms applies to earlier agreements only if both

130. *Kuenstler*, 836 S.W.2d at 718.

131. TEX. BUS. & COM. CODE ANN. §§ 9.311, 1.201(32). The court's authority for its conclusion is *Ford v. Harlow*, 439 S.W.2d 682, 685-86 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.), a case involving the assignment of a negotiable instrument which occurred prior to enactment of the Uniform Commercial Code. There the assignment was not accompanied by delivery and was therefore ineffective.

132. *Miller v. Miller*, 235 S.W.2d 624, 626 (Tex. 1951).

133. 1992 Tex. App. LEXIS 2342 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).

134. *Id.* at *11-12.

135. *Id.* at *12.

136. TEX. CONST. art. XVI, § 15.

137. TEX. PROB. CODE ANN. §§ 451-461 (Vernon Supp. 1993). See also *id.* § 439.

138. 832 S.W.2d 709 (Tex. App.—Eastland 1992, writ denied).

spouses were still living on the effective date of that act.¹³⁹ In 1986, however, the wife had died; so the statute covering spousal agreements to hold community property with a right of survivorship was ineffective.¹⁴⁰ Prior to his mother's death, the couple's son had added his name to the account. On the death of his mother the son nevertheless made no claim to funds in the account. On his father's death in 1989, however, the son asserted a claim which was rejected by the trial court. Because the addition of his name to the account did not comply with the provisions of Probate Code section 439,¹⁴¹ this conclusion was affirmed by the court of appeals. If both spouses had been alive in 1989 when the later act was passed to complement the 1987 constitutional provision and both spouses had joined in writing to designate the son as a further beneficiary of the survivorship account, he would have qualified as a beneficiary under section 439. But if the son's name were added by the written direction of only one spouse, the son's position is not clear. If the designating spouse is the surviving spouse, it might be reasonably asserted that the son would have a right of survivorship to the account on the death of that spouse.

B. HOMESTEAD: DESIGNATION AND EXTENT

The law of homestead and exempt personal property defines most of the boundaries protecting family property from the claims of creditors. One of those rules is that a debtor can claim only one homestead at a time. Before filing for bankruptcy the debtor in *In re England*¹⁴² sold a rural home near Dallas and moved to a central Texas ranch which he already owned. In his bankruptcy proceeding the debtor claimed the ranch as his homestead and also claimed the proceeds of a vendor's lien note secured by the property which he had just sold. The creditors successfully challenged the debtor's attempt to claim the note as exempt. The debtor asserted that Property Code section 41.001(a), stating that a homestead and burial lots are exempt from creditors' claims, is amplified by the provisions of section 41.001(c), providing that the proceeds of sale of a homestead are exempt. Thus, the debtor argued that the proceeds of sale are an independent non-homestead exemption just as burial lots are. In the light of prior decisions, the federal district court concluded that subsection (c) is not an additional but an alternative homestead exemption to that provided in subsection (a).¹⁴³ Hence, a debtor's claiming both the note and the rural homestead amounted to claiming two homesteads at once.

Homestead property loses its protected status on abandonment of homestead use. But a purchaser from the debtor may assert his predecessor's homestead protection against the prior owner's judgment creditor, if the

139. TEX. PROB. CODE ANN. § 451 (Vernon Supp. 1993).

140. *Id.*

141. TEX. PROB. CODE ANN. § 439 (Vernon 1980) (enacted in 1979). See *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990).

142. 141 B.R. 495 (Bankr. N.D. Tex. 1991), *aff'd*, 975 F.2d 1168 (5th Cir. 1992).

143. *Id.* at 499.

purchaser receives title while the seller is still in possession.¹⁴⁴ In *Intertex, Inc. v. Kneisley*,¹⁴⁵ the court restated the familiar rule that when a creditor abstracts his judgment in the deed records, despite the homestead nature of his debtor's property at the date of filing, the creditor's judgment lien attaches when the property loses its homestead character through alienation so that the judgement creditor takes priority over all subsequently filed judgments.¹⁴⁶

Whether a property was a homestead at the time a deed of trust was executed on the property was addressed in *Gregory v. Sunbelt Savings*.¹⁴⁷ In upholding the trial court's finding that the property was not a homestead at the time and the lien was therefore valid, the court reiterated the extraordinarily high standard of proof to show that "homestead character of property can be established prior to actual occupancy when the owner intends to improve and occupy the premises as a homestead": if such preparations "have proceeded to such an extent as to manifest, *beyond a reasonable doubt*, the intention to complete improvements and to reside upon the place as a home."¹⁴⁸ The court went on to hold that if the owner is not in occupancy of the property at the time the deed of trust was executed, and the lender relies on the owner's representations that the property is not his homestead, the owner is estopped from asserting a homestead claim though the property later became his homestead.¹⁴⁹

In defining the extent of a business homestead the Texas Supreme Court in *Ford v. Aetna Insurance Co.*¹⁵⁰ held that property "used in aid of the business" but not "essential to and necessary for such business" is not exempt.¹⁵¹ Applying this test, the Fifth Circuit Court of Appeals held in *In re Webb*¹⁵² that a property used for a separately operated urban retail business of the debtors, who also operated a wholesale and retail business eighteen blocks away, did not constitute an exempt extension of the wholesale and retail business property.¹⁵³

In *Webb*, the court also considered as "a factor worthy of inclusion in the factual calculus"¹⁵⁴ the claimants' declaration that the retail property was not claimed as exempt when they executed a mortgage on that property.

144. See *Posey v. Commercial National Bank*, 55 S.W.2d 515, 517 (Tex. Comm'n. App.) (1952); *Hoffman v. Love*, 494 S.W.2d 591, 594-95 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

145. 837 S.W.2d 136 (Tex. App.—Houston [14th Dist.] 1992, writ denied). See *Gensheimer v. Kneisley*, 778 S.W.2d 138 (Tex. App.—Texarkana 1989, no writ).

146. *Kneisley*, 837 S.W.2d at 138.

147. 835 S.W.2d 155 (Tex. App.—Dallas 1992, writ denied).

148. *Id.* at 158 (citing *Bartels v. Huff*, 67 S.W.2d 411, 412 (Tex. Civ. App.—San Antonio 1933, writ ref'd) (emphasis added)). See *Cheswick v. Freeman*, 155 Tex. 372, 287 S.W.2d 171 (1956); *Gilmore v. Dennison*, 131 Tex. 398, 115 S.W. 2d 902 (1938); *Archibald v. Jacobs*, 69 Tex. 248, 6 S.W. 177 (1887).

149. *Gregory*, 835 S.W.2d at 159-60.

150. 424 S.W.2d 612, 614, 616 (Tex. 1968).

151. *Id.* at 616.

152. 954 F.2d 1102 (5th Cir. 1992).

153. *Id.* at 1108.

154. *Id.*

Another bankrupt debtor's disclaimer of homestead use was more pointedly rejected as a significant factor in dealing with a homestead claim in *In re Bradley*,¹⁵⁵ before a different panel of the same court. In *Bradley*, the debtor-wife and her husband owned 15 acres of rural land where their home and outbuildings were located. This improved area was surrounded by an additional 114 acres used to pasture livestock. After using the 114 acres as security for a note, the debtor and her husband had made a written disclaimer of the homestead character of the property to the lender. In rejecting the creditor's argument that the disclaimer constituted an abandonment of the 114 acres as part of the debtor's rural homestead, the court said that a lender of money secured by this land "should have known or expected that a homestead disclaimer was false" under the circumstances.¹⁵⁶ "As long as the claimant has occupied the property in question and used it for homestead purposes, then an attempted homestead disclaimer will not preclude her from claiming the homestead exemption."¹⁵⁷ The court added: "Unless the claimant has abandoned part of the homestead, Texas law does not favor severance of a single contiguous tract of land into homestead and non-homestead sections . . . Absent abandonment, the severance of a tract of land from a homestead is permissible only if there is *no* evidence that the severed tract is used for homestead purposes."¹⁵⁸ In response to the creditor's further argument that the property could not constitute a rural homestead because it was within the limits of an incorporated town, the court said that the debtor could rely on the provision of Property Code section 41.002(c),¹⁵⁹ enacted in 1989, that the property when designated as a homestead was "not served by municipal utilities and fire and police protection."¹⁶⁰ The debtor and her husband had occupied the 15 acres as a homestead since 1977 as well as the 114 acres since its acquisition in 1982, at which time neither tract was served with the urban amenities specified in the statute.

Under section 41.005 of the Property Code¹⁶¹ a party may make a voluntary designation of his homestead — ordinarily for the purpose of assuring a prospective lender that other property on which the owner is about to give a lien is not claimed as a homestead. Notwithstanding such a written designation under the statute a homestead claimant may subsequently show that different property from the property so designated had become his homestead.¹⁶² In *In re Kennard*,¹⁶³ the Fifth Circuit court allowed a debtor's

155. 960 F.2d 502 (5th Cir. 1992).

156. *Id.* at 510.

157. *Id.* at 509.

158. *Id.* at 508-509 (citations omitted) (emphasis in original).

159. TEX. PROP. CODE ANN. § 41.002(c) (Vernon Supp. 1993): "A homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection." In this context "designation" means "when the property became a homestead."

160. *Id.* at 511-12.

161. TEX. PROP. CODE ANN. § 41.005 (Vernon 1984).

162. See *Lifemark Corp v. Merritt*, 655 S.W.2d 310, 314 (Tex. Civ. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

163. 970 F.2d 1455 (5th Cir. 1992).

claim of a rural homestead consisting of 200 acres used as a residence, farm, and pasture, even though the debtor had claimed a different 200 acres as his homestead in the designation and disclaimer executed in connection with the earlier execution of a deed of trust. The property earlier designated did not include the land where the debtor's present home is located. The debtor's present use is the best evidence of the debtor's intent to exempt the 200 acres containing his present home.¹⁶⁴ Because the bank could not have reasonably relied on the debtor's obviously stale designation, the debtor was not estopped by his declaration from asserting an exemption for the 200 acres where he is actually living.¹⁶⁵

Section 41.002(b) of the Property Code allows up to 200 acres for a rural family homestead and up to 100 acres for a single adult who is not otherwise entitled to a rural homestead.¹⁶⁶ Under this statute an unmarried debtor who is head of a household consisting of her adult married daughter and granddaughter is not limited to 100 acres for single adults. In *In re Hill*,¹⁶⁷ the debtor, in 1984, removed her daughter and granddaughter from a household of domestic violence and provided for their financial and emotional support and physical safety until the time the debtor filed a bankruptcy petition in 1988. In rejecting the creditor's argument that the 1973 statutory amendment defining rural homestead rights of single adults changed the prior meaning of a family homestead, the court stated that the amendment merely gave additional rights to single adults and did not affect prior case law which had consistently held that the family relationship is one of status and that there has never been a requirement that the head of a family be married.¹⁶⁸ The court further held that the daughter's marital status during the time she lived with the debtor did not effect the debtor's claim based on the daughter's reliance on her mother's financial and emotional assistance.¹⁶⁹ The court also rejected the creditor's argument that the daughter's employment disproved her dependency upon the debtor for financial assistance because absolute financial reliance is not necessary to establish dependence. The daughter's income was insufficient to enable her to leave the debtor's household.¹⁷⁰ By way of dicta, the court went on to state that only in situations involving minor children or infirm parents would an obligation to provide moral support, wholly apart from financial support, be sufficient to establish the familial relationship necessary to support the family homestead exemption.¹⁷¹

Article XVI, section 50 of the Texas Constitution states that "[a]ll pretended sales of the homestead involving any condition of defeasance shall be void." In the context of the time when the provision was drafted, it meant

164. *Id.* at 1459.

165. *Id.* at 1460.

166. TEX. PROP. CODE ANN. § 41.002(b) (Vernon 1984).

167. 972 F.2d 116 (5th Cir. 1992).

168. *Id.* at 119-20. See *Roco v. Green*, 50 Tex. 483 (1878); *Henry S. Miller Co. v. Shoaf*, 434 S.W.2d 243, 244 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.).

169. 972 F.2d at 120.

170. *Id.* at 121.

171. *Id.* at 121-22.

that a homestead claimant did not lose his homestead by pretending to sell it when he was actually mortgaging it for a loan. In *Orozco v. Sander*,¹⁷² the Texas Supreme Court found that a homestead claimant had made such a pretended sale structured much more elaborately. The claimant sought to borrow money with his home as security. Acting through an agent, the lender provided the money and established the criteria for the purchase of the home by his agent. The seller then conveyed her homestead to the agent in exchange for a promissory note, a deed of trust to secure the note, and another deed of trust to secure the agent's assumption of the seller's prior indebtedness on the property. The agent then leased the home back to the seller for the amount of the scheduled payments on her loans, and these rental payments were to be made to the lender. It was agreed that when the seller repaid the principal amount of the loan, the agent would reconvey the homestead to the seller. At the closing of the transaction the lender purchased the seller's note at a substantial discount. From the proceeds of the sale the seller gave the agent the money to discharge her prior note, but the agent kept the money and defaulted on both the old and the new note. Both lien holders notified the seller of their intention to foreclose their liens. The Supreme Court held that there was sufficient evidence to support the jury's verdict for the seller:¹⁷³ that there was a pretended sale and that the seller was entitled to damages. This is the sort of transaction that the legislature sought to outlaw in passing Property Code section 41.006.¹⁷⁴

Once a homestead has been established, it is presumed to continue until it is abandoned, and the party asserting abandonment has the burden of proof. In *Firstbank v. Pope*,¹⁷⁵ the homeowners sold their home to a corporation of which they were the sole shareholders in order to receive some ready cash and to increase the company's balance sheet liquidity. They received cash for the sale and immediately leased the home from the company but made no lease payments. Two years later the company reconveyed the home to the sellers. Subsequently, the company filed a Chapter 7 bankruptcy petition and one of its creditors sought a declaration that the lien was valid. In holding the lien invalid, the bankruptcy court stated that the creditor had not met its burden of proof that the homestead was abandoned. The court said that abandonment requires both overt acts of discontinued use and intent to abandon.¹⁷⁶ In reaching its decision the court placed particular reliance on evidence that the creditor knew that the sellers' real purpose was to borrow money against their residence without violating the homestead laws, that they continued to live in the home, paid its homeowner's insurance, and intended to reconvey the home within two years to avoid a capital gains tax. Still, in order to borrow money on the home without violating the homestead law, the borrowers had to abandon their homestead.

The effect of federal forfeiture provisions on Texas homestead rights was

172. 824 S.W.2d 555 (Tex. 1992).

173. *Id.* at 556.

174. TEX. PROP. CODE ANN. § 41.006 (Vernon Supp. 1993).

175. 141 B.R. 115 (Bankr. E.D. Tex. 1992).

176. *Id.* at 120.

considered by the Fifth Circuit Court of Appeals in *United States v. Lot 9, Block 2 of Dannybrook Place*.¹⁷⁷ The federal code provides that

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(7) All real property . . . which is used in . . . the commission of a violation of [Title 21] punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.¹⁷⁸

The husband and wife owned a home in Houston from which the husband was allegedly selling illegal drugs. Based on these allegations, the government filed a complaint asking that the home be forfeited pursuant to the statute. Finding that the husband used the house to sell drugs, the district court awarded summary judgment to the government. In reversing the forfeiture award against the wife's interest in the home, the Fifth Circuit court stated that although the husband may have forfeited his interest in the home, the wife's interest could be sheltered under the "innocent owner" defense on her showing that the illegal acts here were committed without her knowledge or consent.¹⁷⁹ The court further stated that the wife's interest in the home should be established by referring to Texas law and that her interest should be protected to the extent that Texas law does not contravene the federal forfeiture statute.¹⁸⁰ Although it is clear that the wife has a protected possessory homestead interest in the property under Texas law it seems likely that she will be limited to the value of that interest on sale of the home.¹⁸¹

C. LIENS ON HOMESTEADS

In *Laster v. First Huntsville Properties Co.*,¹⁸² the Texas Supreme Court addressed the issue of whether an ex-spouse co-owner of property, subject to the other ex-spouse's exclusive right to occupancy for a limited period pursuant to a divorce decree, can mortgage his interest. The court concluded that the mortgage of an ex-spouse's interest in the residence is valid under the Texas homestead laws and that its foreclosure was valid, and it was subject to foreclosure after default once the mortgagor could exercise his right of reentry. Whether a mortgagee might foreclose before the mortgagor's right

177. 919 F.2d 994 (5th Cir. 1990).

178. 21 U.S.C. § 881(a)(7) (Supp. 1988).

179. *Lot 9*, 919 F.2d at 999. Circuits are divided as to whether *both* a lack of knowledge and a lack of consent are required to establish the "innocent owner" defense. *Id.* at 1000.

180. *Id.*

181. See *United States v. Rodgers*, 401 U.S. 677 (1983) (holding that section 7403 of the Internal Revenue Code of 1954 authorizing the sale of a home to satisfy tax indebtedness overcame the homestead possessory rights of a innocent spouse of the delinquent taxpayer). See also *Amrani-Khaldi v. State*, 575 S.W.2d 667 (Tex. Civ. App.—Corpus Christi 1978, no writ). But see *United States v. D.K.G. Appaloosas, Inc.*, 630 F.Supp. 1540 (E.D. Tex. 1986).

182. 826 S.W.2d 125 (Tex. 1991), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 45 Sw. L.J. 1831, 1848-49 (1992).

of reentry accrues was not addressed. The court, however, remarked that the divorce decree created in the ex-husband "a future interest in the residence similar to that held by a vested remainderman," and consequently "no homestead right arose in favor of the ex-wife in [the ex-husband's] interest in the residence because he held only a future right to possession in the property subject to [the ex-wife's] homestead rights."¹⁸³ In approving the sale and partition in favor of the mortgagee the court nevertheless added that a divorce court's power to make a "just and right" division of community property includes the power to order the sale of a community homestead and division of the proceeds and that a postponement of the division until a future date does not reduce the court's power to do so. In what amounts to an addendum to the court's decision in *Laster*, two concurring justices in *Heggen v. Pemelton*¹⁸⁴ observed that *the former wife's homestead right did not reach the entire property but only her proportional interest*. This is more consistent with prior authority. In *Speer & Goodnight v. Sykes*,¹⁸⁵ the court had held that an ex-husband who had been ordered to surrender occupancy of the family home on divorce could maintain his homestead interest in the property, though he was temporarily excluded from exercising his right of possession.

In *Shoberg v. Shoberg*,¹⁸⁶ a divorce decree incorporated an agreement incident to divorce in which the husband agreed to convey his interest in the couple's residence to his wife in consideration of a promissory note and deed of trust. The agreement was executed and both parties allowed the judgment to stand. Having subsequently defaulted on the note the ex-wife sought to enjoin foreclosure. The trial court entered summary judgment for the ex-husband. In rejecting the wife's contention that the lien was unconstitutional, the appellate court stated that the ex-wife's suit was a collateral attack on the judgment.¹⁸⁷ Further, the lien was constitutionally valid as purchase money security.¹⁸⁸

The federal codification¹⁸⁹ of the *D'Oench, Duhme*¹⁹⁰ doctrine provides that the maker of a promissory note payable to a bank is estopped from asserting against the federal government that the parties had agreed that the instrument would not be enforced.¹⁹¹ In applying the doctrine in *In re Napier*¹⁹² the bankruptcy court held that the rule does not estop a debtor from asserting that, under Texas homestead law, a deed of trust lien held by the Federal Deposit Insurance Corporation is invalid on exempt property to the extent that the lien secures a non-purchase money debt, even though

183. *Id.* at 129-30.

184. 836 S.W.2d 145, 148 (Tex. 1992).

185. 102 Tex. 451, 454-55, 119 S.W. 86, 86-88 (1909).

186. 830 S.W.2d 149 (Tex. App.—Houston [14th Dist.] 1992, no writ).

187. *Id.* at 152 (*citing* Williams v. Williams, 620 S.W.2d 748, 749 (Tex. App.—Dallas 1981, writ ref'd n.r.e.)).

188. TEX. CONST. art. XVI, § 50.

189. 12 U.S.C. § 1823(e) (1988).

190. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942).

191. *Id.* at 461-62.

192. 144 B.R. 719 (Bankr. W.D. Tex. 1992).

executed with a homestead disclaimer affidavit indicating that another property was the debtors' homestead.¹⁹³ In this instance the owners made no representations of an intent to abandon the property as a homestead and the lender likely knew that the owner retained physical possession of the property.¹⁹⁴

Property Code section 53.059 provides that a mechanic's lien contract for improvements on a homestead must be made in writing and recorded before it is performed.¹⁹⁵ In *In re Smith*,¹⁹⁶ the homeowners executed a mechanic's lien note in consideration of improvements, and money was advanced by a bank pursuant to draw requests indicating that work on the residence was being completed. All of the parties involved knew, however, that no work was to be performed and the money was actually advanced to allow the homeowners to pay delinquent income taxes and other debts. After the note matured, the borrowers defaulted and filed for relief in bankruptcy. The bank's federal assignee sought a declaration of validity of the homestead lien, arguing that it took free of any defenses under the *D'Oench, Duhme* doctrine.¹⁹⁷ The homeowners asserted that the lien was invalid under Texas law because it never attached, as no work was ever performed.

The court, however, concluded that it was unnecessary to reach the issue of whether the mechanic's lien attached, because the homeowners were estopped from denying the validity of the lien.¹⁹⁸ The court reasoned that there is an exception to the rule against estoppel "when the owners represent that existing notes are valid mechanic's lien notes for improvements, secured by a mechanic's lien contract properly executed."¹⁹⁹ Although estoppel would not preclude an assertion of invalidity of the lien against the lending bank because of its knowledge of the fraud, its assignee was an innocent third party purchaser who could assert estoppel.²⁰⁰

A purchase-money lien is implied in favor of a vendor to secure payment of the purchase price when no express lien is embodied in a sale and the purchase money is not paid.²⁰¹ In *Trison Investment Co. v. Woodard*,²⁰² the court addressed the issue of implied vendor's liens in a divorce context. The husband and wife had purchased a community farm during marriage. On divorce it was agreed that the husband would take the farm and other real and personal property and that he would make periodic payments to the wife. The ex-husband later used the non-exempt farm as security for a loan. When the ex-husband defaulted on payments to the ex-wife and sought bankruptcy protection, the wife filed a proof of claim alleging an implied vendor's lien on the farm. After the lender foreclosed its lien, the farm was

193. *Id.* at 725.

194. *Id.*

195. TEX. PROP. CODE ANN. § 53.059 (Vernon 1984).

196. 966 F.2d 973 (5th Cir. 1992).

197. 315 U.S. 447 (1942).

198. *In re Smith*, 966 F.2d at 976.

199. *Id.* at 977.

200. *Id.* at 977-78.

201. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 881-82 (Tex. 1984).

202. 838 S.W.2d 790 (Tex. App.—Dallas 1992, writ denied).

sold. In rejecting the ex-wife's assertion of an implied lien on the farm, the court relied on the absence of a specific consideration attributable to the farm.²⁰³ In drafting divorce decrees it is therefore recommended that a value be attributed to each item of property along with a schedule of the periodic payments that will be paid to discharge the liens. It is also suggested that the divorce decree be filed to achieve a perfected security interest on personalty under the Uniform Commercial Code and recorded in the deed records to give constructive notice of the lien on the realty.²⁰⁴

D. LIEN STRIPPING

On its face the meaning of Bankruptcy Code section 506(a) and (d)²⁰⁵ is far from clear, but a number of courts have concluded that a bankrupt debtor is thereby allowed to reduce ("strip down") a lien on the debtor's property to the value of the collateral. In *Dewsnup v. Timm*,²⁰⁶ the United States Supreme Court resolved a conflict between the federal circuits with respect to the proper interpretation of the section in a Chapter 7 (liquidation) bankruptcy.²⁰⁷ The debtors in bankruptcy sought liquidation of their non-exempt property, including a parcel of realty valued at \$39,000, subject to a mortgage for a debt of \$119,000. In effect, the debtors sought to avoid the unsecured portion of the mortgage.²⁰⁸ The Court rejected the debtors' reading of section 506(d) in favor of the creditor's protection under section 502 with the further observation that an unfair result would be produced by the debtors' interpretation of section 506: It would be unfair to allow reduction of the creditor's lien, because the debtors would thereby receive the benefits of any future increase in the value of the collateral.²⁰⁹

The decision in *Dewsnup* leaves open the question of availability of "lien

203. *Id.* at 794.

204. See TEX. BUS. & COM. CODE ANN. § 9-302 (Vernon 1991); TEX. PROP. CODE ANN. § 13.002 (Vernon 1984).

205. 11 U.S.C. § 506(a), (d) (1988).

206. 112 S. Ct. 773 (1992).

207. A majority of courts had held that a Chapter 7 debtor could use § 506 to strip down a lien unsupported by value. See *Gaglia v. First Federal Sav. & Loan Ass'n*, 889 F.2d 1304 (3rd Cir. 1989); *In re Folendore*, 862 F.2d 1537 (11th Cir. 1989); *In re Richardson*, 121 B.R. 546 (Bankr. S.D. Ill. 1990); *In re Kostecky*, 111 B.R. 823 (Bankr. D.Minn. 1990); *In re Donahue*, 110 B.R.41 (Bankr. D.Kan. 1990); *In re Brouse*, 110 B.R. 539 (Bankr. D.Colo. 1990); *In re Moses*, 110 B.R. 962 (Bankr. N.D.Okla. 1990); *In re Garnett*, 88 B.R.123 (Bankr. W.D.Ky. 1988), *aff'd sub nom*; *United States ex rel. Farmers Home Admin. v. Garnett*, 99 B.R. 757 (Bankr. W.D.Ky. 1989); *In re Haugland*, 83 B.R. 648 (Bankr. D.Minn. 1988); *In re Crouch*, 76 B.R. 91 (Bankr. W.D.Va. 1987); *In re O'Leary*, 75 B.R. 881 (Bankr. D.Or. 1987); *In re Cleveringa*, 52 B.R. 56 (Bankr. N.D.Iowa 1985); *In re Lyons*, 46 B.R. 604 (Bankr. N.D.Ill. 1985); *In re Gibbs*, 44 B.R. 475 (Bankr. D.Minn. 1984).

Other courts had taken the view that such a reduction is prohibited. See *Dewsnup v. Timm*, 908 F.2d 588 (10th Cir. 1990), *aff'd*, 112 S. Ct. 773 (1992); *Oregon v. Lange*, 120 B.R. 132 (9th Cir. 1990); *In re Doty*, 104 B.R. 133 (Bankr. S.D.Iowa 1988); *In re McLaughlin*, 92 B.R. 913 (Bankr. S.D.Cal. 1988); *In re Verma*, 91 B.R. 17 (Bankr. W.D.Pa. 1987); *In re Maitland*, 61 B.R. 130 (Bankr. E.D.Va. 1986); *In re Wolf*, 58 B.R. 354 (Bankr. N.D.Ohio 1986); *In re Cordes*, 37 B.R. 582 (Bankr. C.D.Cal. 1984).

208. It was argued that under § 506(d) the creditor had a secured claim for the value of the collateral (\$39,000) and an unsecured claim for the balance (\$80,000).

209. *Dewsnup*, 112 S. Ct. at 778.

stripping" in a Chapter 13 proceeding.²¹⁰ The financial problem presented ordinarily occurs when there is a downturn in the real estate market making a debtor's residence or other realty worth less than the balance of the outstanding mortgage debt. The Ninth Circuit Court of Appeals has twice concluded that the holding in *Dewsnup* is inapplicable to a Chapter 13 proceeding.²¹¹ The Fifth Circuit court, however, has refused to allow Chapter 13 debtors to strip the value of the secured burden on the property, and this decision is under review by the United States Supreme Court.²¹²

E. EXEMPT PERSONALTY

In *Daniels v. Pecan Valley Ranch*,²¹³ the court held that a structured settlement of a personal injury claimant is not exempt from the claims of the injured party's creditors. The settlement was structured as a spendthrift trust from which lump sum and periodic payments were to be paid for the life of the beneficiary from an annuity issued by an insurance company. Five years later the recipient's judgment creditor attempted to garnish funds from the insurance company and the trust. The San Antonio court of appeals relied on a consistent line of bankruptcy cases holding that annuities based on tort settlements (in contrast to certain retirement instruments) are not exempt from attachment under the Internal Revenue Code. The court also rejected the debtor's argument that the use of a spendthrift trust made the funds exempt. Because the debtor had participated in the creation of the annuity contract, he was a settlor under Texas trust law and could not take shelter behind the trust.²¹⁴ Finally, the court held that the annuity was not exempt under Insurance Code article 21.22.²¹⁵

In 1991, article 21.22 of the Insurance Code was amended to provide that all life, health, and accident insurance policies and their proceeds are exempt from creditors' claims.²¹⁶ In *In re Walden*,²¹⁷ a bankruptcy court considered whether a pre-paid annuity to secure payments under a non-competi-

210. Bankruptcy Code § 1322 allows Chapter 13 plans to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." 11 U.S.C. § 1322 (1988).

The concept of lien stripping is inapplicable to chapter 11 bankruptcy. See Margaret Howard, *Stripping Down Liens: § 506 and the Theory of Bankruptcy*, 65 AM. BANKR. L.J. 373, 398-99 (1991).

211. See *Lomas Mortgage USA v. Wiese*, 980 F.2d 1279 (9th Cir. 1992); *Houglund v. Lomas & Nettleton Co.*, 886 F.2d 1182 (9th Cir. 1989).

212. *Nobleman v. American Savings Bank*, 968 F.2d 483, cert. granted, 113 S. Ct 654 (1992).

213. 831 S.W.2d 372 (Tex. App.—San Antonio 1992, writ denied).

214. TEX. PROP. CODE ANN. § 112.035(d) (Vernon 1984).

215. *Daniels*, 831 S.W.2d at 380 (relying on *Norsul Oil & Mining Ltd. v. Commercial Equip. Leasing Co.*, 703 S.W.2d 345 (Tex. App.—San Antonio 1985, no writ) (turnover order can issue against one other than the judgement debtor)). The court rejected the debtor's argument that because the funds were outside his "possession or control," they were held by the insurance company. *Id.* at 384.

216. Act of June 15, 1991, 72nd Leg., R.S. ch. 609, § 1, 1991 Tex. Gen. Laws 2216 (current version at TEX. INS. CODE ANN. art. 21.22 (Vernon Supp. 1993)).

217. 144 B.R. 54 (Bankr. W.D. Tex. 1992).

tion agreement was exempt property under article 21.22. The debtor had sold his business and had committed himself to a non-competition agreement in exchange for certain agreed payments and became an employee of the purchaser. In settlement of an ensuing breach of contract suit between the parties, it was agreed to substitute payments from a pre-paid annuity issued by an insurance company for payments under the contract. In holding that the annuity was not a policy of insurance issued by a life, health or accident insurance company (and thus exempt from seizure) the court stated that an annuity is "essentially a form of investment which pays periodically during the life of an annuitant or during terms fixed by contract rather than on occurrence of future contingency."²¹⁸ Because the annuity did not (1) provide for payments under an insurance policy made on the occurrence of future contingency, (2) make payments when the insured became ill and incurred medical expenses or (3) pay for damages caused by accidents, it was not an exempt policy of insurance under article 21.22.²¹⁹ The court also held that the annuity was not a plan or program of annuities or benefits in use by an employer. The debtor's claims for exemption were, therefore, dismissed, and the trustee in bankruptcy obtained the payments as part of the bankrupt's estate.

A bankruptcy court applied the Texas exemption for tools of trade²²⁰ to computer hardware equipment deemed necessary in the conduct of the debtor's trade or business.²²¹ The court indicated that to meet the requirement that such items "fairly belong" to the trade and are not merely of "general value and use" the computer hardware, although generic in nature, must be used in conjunction with specially designed software and that it is only such use as a unit which gives the hardware its exempt status.²²²

In *In re Nash*,²²³ the court gave retrospective effect to the Supreme Court's decision in *Owen v. Owen*²²⁴ that non-possessory, non-purchase money liens on farm equipment may be avoided under § 522(f)(2)(B) of the Bankruptcy Code when such equipment is exempt under Texas law.²²⁵ The court rejected the lien holder's argument that section 522(f)(2)(B) did not apply to large machinery and equipment. The court explained that because section 522(f)(2)(B) refers to exemptions under both state and federal law, there is no controlling federal definition of the term "reasonably necessary" and that the term "tools of the trade" takes on the character of the statute

218. *Id.* at 56-57.

219. *Id.* at 56.

220. TEX. PROP. CODE ANN. § 42.002(a)(4) (Vernon Supp. 1993).

221. *In re Neal*, 140 B.R. 634, 637-38 (Bankr. W.D. Tex. 1992).

222. *Id.* at 637.

223. 142 B.R. 148 (Bankr. N.D. Tex. 1992).

224. 111 S. Ct. 1833 (1991). In *Owen* the Supreme Court announced that in determining whether a lien may be avoided under § 522(f) one asks "not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he would have been entitled but for the lien itself." *Id.* at 1836-37.

225. TEX. PROP. CODE ANN. § 42.002(a)(4) (Vernon Supp. 1992). Because the case was filed after the enactment of the 1991 amendment to the Texas exemption statute, act of May 24, 1991, ch. 175, § 1, 1991 Tex. Gen. Laws 789, 792 (Vernon), there was no requirement that the debtors show regular use of the equipment. *Nash*, 142 B.R. at 152.

providing the exemption, that is, Property Code section 42.002,²²⁶ which has no "reasonably necessary" requirement.

The retrospective effect of *Owen* was again addressed in *In re Blackstone*.²²⁷ The debtors chose state exemptions under section 522(b)(2)(A) and included among their asserted exempt property was a tractor, claimed under Property Code section 42.002(3)(B).²²⁸ The creditor claiming a non-possessory, non-purchase money lien on the tractor did not object to the asserted exemption within 30 days as required under federal Bankruptcy Rule 4003(b). After the debtors had been discharged, but before the case was closed, the creditor filed a proof of claim asserting a lien. Citing *Owen* and *James B. Beam Distilling Co. v. Georgia*,²²⁹ the court stated that the rights of the parties became fixed at the time the petition was filed and the case was therefore closed.²³⁰ Because that date was prior to the *Owen* decision, however, the court refused to allow the debtors to reopen their case to take advantage of that decision.²³¹

Property Code section 42.002(a)(8) exempts items of "athletic and sporting equipment,"²³² and since its amendment in 1991 section 42.002 no longer requires that such property be "reasonably necessary for the family" to qualify for exemption.²³³ Relying on two prior decisions²³⁴ the bankruptcy court held in *In re Griffin* that "athletic and sporting equipment" is limited to small items for individual use.²³⁵ The court reasoned that allowing a recreational boat as exempt would permit the debtor to take undue advantage of the exemption laws and shield assets which are not necessary to a fresh start from the just claims of creditors.²³⁶

In *American Express v. Harris*,²³⁷ the court refused to exempt from garnishment wages deposited in a bank account under provisions of the Texas Constitution and the Property Code, protecting "current wages" from seizure for general debts. When wages are paid and received by the wage earner, who subsequently deposits them in his bank account, they cease to be "current wages" for the purposes of the exemption law.²³⁸ Nor was the debtor's position improved by recourse to the 1989 amendment to the turn over statute, which provides that a "court may not enter or enforce an order under this section that requires the turn over of the proceeds of, or the dis-

226. *Id.* at 153. See *In re Hurcirile*, 138 B.R. 835, 840 (Bankr. N.D. Tex. 1992), for application of the old rule in a pre-amendment dispute.

227. 142 B.R. 146 (Bankr. N.D. Tex. 1992).

228. TEX. PROP. CODE ANN. § 42.002(3)(B) (Vernon 1984).

229. 111 S. Ct. 2439 (1991).

230. *Blackstone*, 142 B.R. at 148.

231. *Id.*

232. TEX. PROP. CODE ANN. § 42.002(a)(8) (Vernon Supp. 1992).

233. Act of May 24, 1991, Ch. 175, § 3, 1991 Tex. Gen. Laws 789, 792 (Vernon).

234. *In re Gibson*, 69 B.R. 534 (Bankr. N.D. Tex. 1987); *In re Schwarzbach*, Case No. 87-30817 (Bankr. W.D. Tex. May 22, 1989) (unpublished).

235. 139 B.R. 415, 417 (Bankr. W.D. Tex. 1992).

236. *Id.*

237. 831 S.W.2d 531 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).

238. *Id.* at 533.

bursement of, property exempt under any statute."²³⁹ The court held that this statute is inapplicable to garnishment proceedings.²⁴⁰ The court also held that since the turn over order was directed to the judgment debtor and not to a third person, it was not a garnishment within the meaning of the Texas Constitution.²⁴¹

In *Patterson v. Shumate*,²⁴² the United States Supreme Court held that a Chapter 7 debtor's interest in an ERISA-qualified plan was excluded from the bankruptcy estate under section 541(c)(2) of the Bankruptcy Code. That section provides that a debtor's estate does not include the debtor's beneficial interest in a trust if the trust is subject to transfer restrictions that are enforceable under non-bankruptcy law. The court concluded that the term "applicable non-bankruptcy law" encompasses any relevant non-bankruptcy law, including such federal laws as ERISA, and is not limited to state spendthrift trust law. Thus, the decision of the Fifth Circuit Court of Appeals in *United States v. Goff*²⁴³ is put to rest and the later decisions of Texas bankruptcy courts are sustained.²⁴⁴

The United States Supreme Court held in *Taylor v. Freeland & Kronz*²⁴⁵ that when a bankrupt claims an exemption without cause, but the trustee and creditors fail to object within 30 days after the creditor's meeting, the debtor is entitled to treat the property as exempt. Following *Taylor*, the bankruptcy court in *In re Halbert*²⁴⁶ held that if the case is converted from a chapter 11 to a chapter 7 proceeding and there was no objection to the claimed exemptions in the chapter 11 case, the chapter 7 trustee is not entitled to object to the exemptions claimed. The court concluded that this result follows even though a new creditors' meeting was required to be held to permit the unsecured creditors to elect a Chapter 7 trustee.

IV. DIVISION ON DIVORCE

A. JURISDICTION

Texas courts have *in rem* jurisdiction to grant a divorce despite lack of personal jurisdiction over a spouse. In *Hoffman v. Hoffman*,²⁴⁷ the court reiterated the conclusion²⁴⁸ that absence of personal jurisdiction over a spouse substantially limits its division of property. Though adjudication of status is one of the exceptions to the minimum contacts requirement for ju-

239. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(f) (Vernon Supp. 1993).

240. *Harris*, 831 S.W.2d at 533.

241. *Id.*

242. 1992 WL 127069 (U.S. 1992).

243. 706 F.2d 574 (5th Cir. 1983).

244. See D. Bruce Hendrick, *Federal Nonbankruptcy Law Includes ERISA*, 53 TEX. BAR.J. 854 (1990); Scott C. Sanders, Comment, *Protecting ERISA Plans in Bankruptcy: Is There Still Hope for Texas Debtors?*, 42 BAYLOR L.REV. 757 (1990).

245. *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644 (1992).

246. 146 B.R. 185 (Bankr. W.D. Tex. 1992).

247. 821 S.W.2d 3 (Tex. App.—Ft. Worth 1992, n.w.h.).

248. See *Redus v. Redus*, 794 S.W.2d 418 (Tex. App.—Austin 1990, writ denied); Joseph W. McKnight, *Family Law: Husband and Wife: Annual Survey of Texas Law*, 45 SW. L.J. 415, 433 (1991).

risdiction,²⁴⁹ a court lacking personal jurisdiction of both spouses "may not divide the property of the parties located outside the state of Texas and possibly that located within the state of Texas."²⁵⁰

In *Letersky v. Letersky*,²⁵¹ the court held that a foreign wife's letter to a Texas court informing the court that a divorce proceeding was already pending in Scotland did not constitute a general appearance to confer jurisdiction on the Texas court. The court reasoned that the letter did not invoke the judgment of the court when it questioned the court's subject matter and personal jurisdiction.²⁵² Nor did a letter from the wife's Scottish counsel constitute an answer when it informed the court of a pending divorce proceeding in Scotland and questioned the court's jurisdiction.²⁵³

B. SANCTIONS

In *Bloom v. Graham*,²⁵⁴ Rule 215 sanctions²⁵⁵ were imposed against an attorney for filing groundless pleadings which were brought merely for the purpose of harassment. The attorney had represented the wife in a divorce proceeding until she discharged him following receipt of his bill for services. The husband and wife subsequently appeared in court with the husband's attorney and obtained an agreed decree of divorce. Although the wife's original attorney was still the wife's attorney of record, he did not receive notice of the hearing. Upon learning of the agreed divorce decree, he filed a motion for new trial, a motion for sanctions against the husband and his attorney for conducting an "ex parte" hearing, a motion for the appointment of an attorney *ad litem* to represent the children, and a motion to disqualify the wife's new attorney. All this was done without the wife's consultation or consent.

The court held that sanctions were appropriate in this case. Although the attorney was still the wife's attorney of record at the time of the divorce hearing, her dismissal of him coupled with her entering the agreed divorce decree should have put him on notice that she no longer wanted him to participate in the case and that his authority as attorney of record had ended.²⁵⁶ The court stated that the attorney's acts after his dismissal were sanctionable under Rule 13.²⁵⁷

C. PROPERTY SETTLEMENT AGREEMENTS

In *Birdwell v. Birdwell*,²⁵⁸ the husband and wife entered into an agreement incident to divorce which provided for the division of property, child sup-

249. *Hoffman*, 821 S.W.2d at 5 (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

250. *Id.*

251. 820 S.W.2d 12 (Tex. App.—Eastland 1991, no writ).

252. *Id.* at 14.

253. *Id.* (citing TEX. R. CIV. P. 7).

254. 825 S.W.2d 244 (Tex. App.—Ft. Worth 1992, writ denied).

255. TEX. R. CIV. P. 215.

256. *Id.* at 247-48.

257. *Id.* at 248; see TEX. R. CIV. P. 13.

258. 819 S.W.2d 223 (Tex. App.—Ft. Worth 1991, writ denied).

port, and contractual alimony. The ex-wife sued to enforce alimony payments. The ex-husband argued that the provision for alimony approved by the court and incorporated in the divorce decree is only enforceable as a contract²⁵⁹ but was not supported by consideration. The court rejected this argument: even though the court approved the agreement between the husband and wife, its approval did not (and could not) make the agreement as to alimony an order of the court.²⁶⁰

In *Giles v. Giles*,²⁶¹ the husband and wife appeared in court to present a property agreement which was read into the record. At the conclusion of the hearing the court granted the divorce as effective immediately, approved the agreement, and ordered the wife's attorney to prepare the decree which would not require the signature of the parties, but only those of their attorneys. Several months later the husband notified the court that he no longer consented to the division of property as previously agreed. The trial court ignored the husband's attempted repudiation and signed the divorce decree as agreed to at the hearing. In the ex-husband's contest of the matter the court held that his repudiation was ineffective in that the judgment was rendered at the time of the hearing.²⁶²

D. PROPERTY NOT SUBJECT TO DIVISION

A trial court has broad discretion in dividing property at divorce, but the court must confine itself to the community property of the parties.²⁶³ When the trial court commits an error in characterization of property as community or separate that thereby materially affects the "just and right" division, remand for a new division of the entire community estate is appropriate.²⁶⁴ In *Hopf v. Hopf*,²⁶⁵ the trial court mistakenly included in the community division a separate residence having significant value in relation to the rest of the community estate. This mischaracterization of a valuable property materially altered the just division and therefore amounted to reversible error requiring an entire redivision of the community estate.²⁶⁶

In *Powell v. Powell*,²⁶⁷ the husband attacked an order of the trial court that he purchase his wife's 1000 shares of stock in his company which she had acquired by gift during the marriage. The husband complained that the order required him to pay for the wife's separate property and thus divested both spouses of their separate estates. The appellate court agreed and reformed the divorce decree by deleting this unconstitutional provision.²⁶⁸

259. *Francis v. Francis*, 412 S.W.2d 29 (Tex. 1967).

260. *Birdwell*, 819 S.W.2d at 226.

261. 830 S.W.2d 232 (Tex. App.—Ft. Worth 1992) (opinion withdrawn).

262. *Id.* at 237.

263. TEX. CONST. art. 16, § 15; TEX. FAM. CODE ANN. § 5.01(a) (Vernon 1993); *Cameron v. Cameron*, 641 S.W.2d 210, 213 (Tex. 1982).

264. See *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985).

265. 841 S.W.2d 898 (Tex. App.—Houston [14th Dist.] 1992, writ filed).

266. *Id.* at 902.

267. 822 S.W.2d 181 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

268. *Id.* at 184. The court also found that the husband was unable to overcome the presumption that two debts incurred during the marriage were community obligations. *Id.*

The court also stated that when there is community property before the court for division, regardless of the relative values of the community and separate property of the parties, the existence of the community property is sufficient authority for the court to award attorney's fees as part of the division of the property.²⁶⁹

Prior to divorce, the couple in *Matelski v. Matelski*²⁷⁰ entered into a property settlement agreement which they termed a partition. The agreement divided their property and also contained provisions dealing with child support, visitation, and alimony. The ex-husband appealed an order clarifying the decree. He complained that the predivorce agreement was governed by Family Code section 5.52 and was therefore not enforceable under section 3.70 as an agreement incident to divorce. The court held that those portions of the agreement labeled partitions were indeed governed by section 5.52 and therefore relieved the court of jurisdiction to divide the separate property thereby created. The portions of the agreement regarding other matters were, however, governed by section 3.70 and could be enforced as part of the divorce decree.²⁷¹ This judicial response to labels must be contrasted with another court's different approach to a similar problem in *Patino v. Patino*.²⁷²

In *Acosta v. Acosta*,²⁷³ the wife sued to partition community property allegedly not divided on divorce. The property at issue was stock issued to the husband fifteen years after the divorce as part of a lump sum retirement disbursement from his employer. The original divorce decree had awarded the husband "any retirement benefits" which he "may have."²⁷⁴ The trial court found this language too vague to include the stock at issue and awarded a money judgment to the ex-wife for her portion of the benefits. The appellate court reversed. Because the stock was a form of deferred compensation earned during each month of service, it clearly fell into the literal definition of the broad term "retirement benefits" and was therefore properly divided at divorce under the terms of the unambiguous divorce decree.²⁷⁵ The intent of the parties at divorce is immaterial because the judgment agreed.²⁷⁶

E. MAKING THE DIVISION

In *Burgess v. Burgess*,²⁷⁷ a default judgment was entered against the wife because she failed to appear at the trial despite proper notice. In order to set

269. *Id.*

270. 840 S.W.2d 124 (Tex. App.—Fort Worth 1992, n.w.h.).

271. *Id.* at 127.

272. 687 S.W.2d 799, 800-01 (Tex. App.—San Antonio 1985, n.w.h.), discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 40 Sw. L.J. 1, 26 (1986).

273. 836 S.W.2d 652 (Tex. App.—El Paso 1992, writ denied).

274. *Id.* at 653.

275. *Id.*

276. *Id.* (citing *Lohse v. Cheatham*, 705 S.W.2d 721, 726 (Tex. App.—San Antonio 1986, writ dism'd)).

277. 834 S.W.2d 538 (Tex. App.—Houston [1st Dist.] 1992, no writ).

aside a default judgment a party must show (1) that the failure to appear was due to mistake or accident and not intentional or the result of conscious indifference, (2) that the appellant has a meritorious defense, and (3) that granting the motion will occasion no delay or otherwise injure the appellee.²⁷⁸ In her timely motion for new trial the wife stated that she failed to appear because of health and financial problems and listed the "equities on her side which the court should consider before making any division of the community estate."²⁷⁹ In affirming the trial court's rejection of her motion, the appellate court stated that she had not specified any facts that would entitle her to a more favorable property division. In the absence of evidence that a re-trial would cause a different result, she failed to establish a meritorious defense.²⁸⁰

In *Finch v. Finch*,²⁸¹ the husband contended that the trial court had erred when it did not make fact-findings regarding the value of various items of community property including a business and various joint bank accounts. In upholding the trial court's refusal to make such findings, the appellate court stated that because a trial court's principal responsibility with respect to the community estate is to divide it in a just and right manner, the value of the properties involved are merely evidentiary to the ultimate issue of whether the trial court divided the property in a just and right manner.²⁸² The trial court was therefore not required to make the additional findings of fact since the values of the property are not the ultimate, controlling issue.²⁸³ If that is so, review is therefore precluded because there is no basis for judging the equity of the division.

The husband also contended that the trial court had erred in valuing land one year before, rather than at the date of, trial. This argument was rejected as being addressed to the evidence rather than the trial court's conclusion. In analogous cases involving the valuation of land on condemnation, sales occurring within five years of the date of the taking may be considered as comparable values in such cases²⁸⁴ and therefore the nearness of time of the appraisal to the time of the division was within the judgment of the trial court.²⁸⁵

While an inadvertent failure to divide community property on divorce transforms the property into a tenancy in common, a deliberate failure to divide part of the community estate makes the decree of divorce merely interlocutory. In *Demler v. Demler*,²⁸⁶ the trial court refused to divide certain stock options as part of the assets of the community. In rejecting the hus-

278. *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939).

279. *Burgess*, 834 S.W.2d at 539.

280. *Id.* at 540.

281. 825 S.W.2d 218 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).

282. *Id.* at 221 (citing *Wallace v. Wallace*, 623 S.W.2d 723, 725 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.)).

283. *Id.*

284. *Id.* at 223 (citing *Board of Regents of the Univ. of Texas v. Puett*, 519 S.W.2d 667, 672 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)).

285. *Id.*

286. 836 S.W.2d 696 (Tex. App.—Dallas 1992, no writ).

band's argument that the trial court's action was appropriate because it did not have sufficient evidence before it necessary to divide the options, the court relied on Family Code section 3.63(a) which requires that "the court shall order a division of the estate."²⁸⁷ Because this language is mandatory and because the court was aware that the options could have constituted community property subject to division, the failure to grant the wife's motion for new trial was reversible error.²⁸⁸

F. ATTORNEY'S FEE

In *Roever v. Roever*,²⁸⁹ the husband contended that the trial court erred in awarding his wife a personal judgment for attorney's fees. He argued that because the court found that community liabilities exceeded the value of the community estate, the judgment of attorney's fees improperly divested him of his separate property. In his argument on appeal the husband relied on the court's docket sheet which indicated that the community property estate was of no net value or of merely nominal value. In rejecting the husband's argument, the court noted that neither party alleged clerical error and that in the absence of such error no resort could be had to the docket sheet. Nothing in the judgment or the record supported the argument that the community was of no value.²⁹⁰ The husband's argument amounts to a confusion of debt obligation with property rights. Because the evidence indicated that the husband had greater earnings potential than the wife, the court stated that the trial court properly exercised its equitable power by awarding attorney's fees when it divided the community.²⁹¹ The court also awarded damages for delay against the husband for pursuing an appeal without sufficient cause. The court indicated that since the trial court had awarded the wife attorney's fees as part of the equitable division of the community estate and not as damages, it imposed upon the husband damages of five times total taxable costs of the appeal.²⁹² In *Giles v. Giles*,²⁹³ the court made it clear that the divorce court's loss of jurisdiction 30 days after rendition of the judgment²⁹⁴ includes the court's power to grant attorney's fees.

G. BILL OF REVIEW

Voluntary intoxication cannot be effectively plead to avert the consequences of one's own negligence in failing to defend a suit for divorce. In *Bristow v. Bristow*,²⁹⁵ the husband filed a bill of review to set aside a divorce

287. TEX. FAM. CODE ANN. § 3.63(a) (Vernon 1993); *See also* Blancas v. Blancas, 495 S.W.2d 597, 601 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.).

288. *Demler*, 836 S.W.2d at 699.

289. 824 S.W.2d 674 (Tex. App.—Dallas 1992, no writ).

290. *Id.* at 676.

291. *Id.*

292. *Id.* at 677; TEX. R. APP. P. 84 (up to ten times total taxable costs of the appeal may be awarded to the prevailing party for attorney's fees).

293. 830 S.W.2d 232, 239 (Tex. App.—Fort Worth 1992, no writ).

294. TEX. R. CIV. P. 3296(d); *see* Simpson v. Simpson, 727 S.W.2d 662, 664 (Tex. App.—Dallas 1987, no writ).

295. 834 S.W.2d 497 (Tex. App.—Eastland 1992, no writ).

decree incorporating a property settlement agreement, because he did not recall signing the settlement agreement due to intoxication when he signed it. Although the jury finding sustained his explanation, the appellate court reversed and rendered for the wife. There was no evidence that the husband was prevented from asserting a meritorious defense because of extrinsic fraud of the wife. The failure to present a defense was a result of the husband's negligence.²⁹⁶ A somewhat similar result was reached in *Hartsfield v. Wisdom*.²⁹⁷ The court held that as a ground for a bill of review (an allegation of incompetence during the pendency of the divorce) was inadequate to show a meritorious defense to a contractual divorce settlement in the absence of a showing of receipt of an unfair settlement and a likelihood of a more favorable property division on retrial, if the allegations were believed.

Recent instances suggest an all too common inclination to seek a bill of review when some other remedy is appropriate. *Hill v. Steinberger*²⁹⁸ was, however, a relatively easy and straightforward appropriate use of a bill of review, but one can rarely rely on one's opponent to be so generous with admissions. A final divorce decree was signed and a bill of review was filed by the wife seeking to have the judgement set aside, because her husband's fraud and misrepresentation prevented her from asserting a right to a greater share of the marital estate when the wife was not represented by an attorney as a result of her husband's assurances that she did not need one. In reversing a summary judgment for the husband, the court held that because the husband judicially admitted that the wife was not negligent and was so prevented from asserting her rights to a greater share of the marital estate and because he misrepresented the value of the community property, a fact issue was raised as to whether the wife would have been able to present a meritorious defense to the property division made in the decree.²⁹⁹ The court stated that existence of a meritorious defense coupled with the husband's admission of extrinsic fraud which prevented that defense from being asserted and the absence of any negligence on the part of the wife made the bill of review appropriate.³⁰⁰ The court also held that the wife's accepting the division of the community estate in the decree does not preclude her from asserting a bill of review.³⁰¹

A void judgment may be attacked at any time, anywhere. A judgment (or a portion of a judgment) may be void when the court lacks (1) jurisdiction over the parties, (2) jurisdiction over the property, (3) jurisdiction to enter a particular judgment, or (4) capacity to act as a court.³⁰² Non-jurisdictional

296. *Id.* at 502.

297. 843 S.W.2d 221 (Tex. App.—Amarillo 1992, writ denied).

298. 827 S.W.2d 58 (Tex. App.—Houston [1st Dist] 1992, n.w.h.).

299. *Id.* at 62 (citing *Baker v. Goldsmith*, 582 S.W.2d 404, 408-09 (Tex. 1979); *Rose v. Rose*, 598 S.W.2d 889, 895 (Tex. Civ. App.—Dallas 1980, writ dismissed w.o.j.)). See also *Martin v. Martin*, 840 S.W.2d 586, 594 (Tex. App.—Tyler 1992, writ filed) (holding that the husband's failure to reveal the true value of a subchapter S corporation's stock was sufficient evidence to establish prima facie proof of a meritorious claim).

300. *Hill*, 827 S.W.2d at 62.

301. See also *Martin*, 840 S.W.2d at 594.

302. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985).

defects merely make a judgment voidable, and such a judgment is not subject to collateral attack.³⁰³ In *Bakali v. Bakali*,³⁰⁴ after one day of trial a settlement was reached and approved by the court as dictated into the record. The husband's attorney drafted the decree and submitted it to the wife's attorney. The wife's attorney objected to parts of the decree and the trial court struck the provisions to which objection was taken, signed the decree, and sent copies to the attorneys. Not finding the decree in full agreement with the settlement, the wife's attorney filed a timely motion for new trial. On its denial, he sought to have the decree set aside by a bill of review. The appellate court held that the divorce decree was not void because the court had proper jurisdiction to render the judgment.³⁰⁵ The fact that the written judgment did not comport with the judgment rendered by the court does not render it a nullity. The parties are entitled to have an order reformed, but they must do so within the prescribed time limits.³⁰⁶ Although the wife had properly plead the necessary elements of a bill of review, uncontradicted evidence showed that her attorney had received copies of the signed written order prior to its being filed with the court. Thus, as a matter of law one essential element of her bill of review was negated — that she was precluded from asserting her meritorious defense by the fraud, accident or wrongful act of her husband or a court official.³⁰⁷ Her initial remedy was to seek reformation and, failing that, to appeal.

When a divorce judgment is attacked as void or other legal remedies are not exhausted, a bill of review is inappropriate. Maintaining that his ex-wife had fraudulently induced him to marry her by falsely representing that she was divorced from her prior husband, the ex-husband in *Chandler v. Chandler*³⁰⁸ filed a bill of review seeking to set aside a divorce decree on the ground that the parties' marriage was void. A bill of review was unsuitable to this situation because the alleged fraud was not related to the course of the divorce proceeding. The proper procedure in this situation was to file a declaratory judgment action based on the invalidity of the marriage.³⁰⁹

In *Hesser v. Hesser*,³¹⁰ the trial judge signed an agreed judgment granting a divorce. After the ex-wife failed to make mortgage payments (as ordered by the decree) with respect to a residence in which both former spouses maintained an interest, the ex-husband filed a timely motion for new trial seeking that the ex-wife be ordered to deposit \$60,000 with a trustee to secure her mortgage payments. Proceeding *pro se*, the ex-wife refused to attend the hearing on the motion for new trial at which the court ordered her to deposit the \$60,000. She refused to deposit the money or to attend a

303. *Id.*

304. 830 S.W.2d 251 (Tex. App.—Dallas 1992, n.w.h.).

305. *Id.* at 255.

306. *Id.* at 254 (citing *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987)).

307. *Id.* at 256.

308. 842 S.W.2d 829 (Tex. App.—El Paso 1992, writ denied).

309. See *Sutherland v. Sutherland*, 560 S.W.2d 531, 533 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) (holding that a declaratory judgment action is available when a judgment is void).

310. 842 S.W.2d 759 (Tex. App.—Houston [1st Dist] 1992, reh. filed).

subsequent hearing regarding her failure to comply with the court's order, despite receiving privately proffered notices regarding the hearing. The trial court rendered a \$60,000 default judgment against her. The trial judge signed the default judgment and proper notice of the default was sent to the ex-wife. Asserting that the default judgment was void, the ex-wife thirteen months later filed an equitable bill of review. In rejecting the ex-wife's appeal of a summary judgment against her bill of review, the appellate court stated that she was not entitled to a bill of review because she failed to exhaust adequate legal remedies.³¹¹ Her appropriate remedy was either (1) a writ of error pursuant to Rule 45, available here because of lack of service which was error apparent on the face of the record; (2) a motion for new trial; or (3) an appeal.³¹² Because she had voluntarily foregone these remedies, an equitable bill of review was unavailable.

H. POST DIVORCE DISPUTES

In *Stubblefield v. Stubblefield*,³¹³ the ex-wife filed a motion to modify the divorce decree. After the motion was set for a hearing the respondent moved for a continuance based on the illness of his attorney. The trial court granted the continuance conditioned upon his promise to pay the ex-wife's expenses incurred in traveling to the hearing. When the respondent later refused to pay, the court struck his pleading as a sanction and entered a default judgment against him.³¹⁴ Despite the ex-husband's breach of faith with the court, there is nevertheless no authority to sanction a party in this situation under Rule 215, which allows sanction for failure to comply with proper requests for discovery.³¹⁵

Res judicata operates as a bar to relitigation, with regard to the same parties, of all issues and defenses which, with the use of diligence, might have been tried in a prior suit.³¹⁶ In *Bell v. Moores*,³¹⁷ the court held that an ex-wife's claim against her husband's employer was so barred. When the wife sued for divorce, she named her husband's employer as a defendant, seeking one-half of a royalty interest allegedly owed to her husband under a contract with his employer. The employer was later dismissed as a party to that suit. In a subsequent suit the ex-wife again sued the employer concerning the royalty interest. Because the dismissal order was not in evidence before the court, it was unclear whether the employer had been dismissed from the prior cause with or without prejudice. The court nevertheless held that the prior judgment should be treated as a final adjudication on the merits.³¹⁸ Because the ex-wife was seeking the same relief in the second suit as in the

311. *Id.* at 765-66.

312. *Id.*

313. 818 S.W.2d 221 (Tex. App.—Houston [14th Dist.] 1991, no writ).

314. *Id.* at 222.

315. TEX. R. CIV. P. 215.

316. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984).

317. 832 S.W.2d 749 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

318. *Id.* at 755 (citing *Allen v. Port Drum Co.*, 777 S.W.2d 776, 778 (Tex. App.—Beaumont 1989, writ denied)).

first suit from which the employer had been dismissed, the dismissal merged with the final divorce decree and stood as a final adjudication.³¹⁹

The El Paso court of appeals concluded that a turnover order which requires a party to "turn over all non-exempt funds"³²⁰ fails to meet the test for specificity enunciated by the Texas Supreme Court.³²¹ The El Paso court reasoned that the test requires that the trial court have a hearing to determine what specific assets are exempt and what assets are subject to the court's order and then to direct payment as the court determines.³²² The debtor is not to determine what property is exempt and what is not. A factual showing is required to be made by the party seeking the order.³²³

By the decree of divorce in *Arena v. Arena*³²⁴ the wife was awarded an interest in benefit plans of the husband, who was ordered to transfer the funds to her. The wife brought an action for damages based on the husband's delay in distributing the assets. The court rejected all the ex-husband's arguments of ERISA preemption³²⁵ as well as his argument that he was not individually liable for delay in distributing the funds.³²⁶

I. EFFECT OF BANKRUPTCY

In *In re Kelley*,³²⁷ the ex-spouses entered an agreement incident to divorce which provided for alimony payments by the ex-husband and specifically stated that under section 71(a) of the Internal Revenue Code the payments would be included in the ex-wife's gross income and deducted from the ex-husband's gross income. In his bankruptcy proceeding the ex-husband argued that the payments were intended to be a division of the community estate rather than alimony and therefore a dischargeable obligation. In rejecting this argument the court, relying on *In re Davidson*,³²⁸ held that if the husband had realized tax benefits under the agreement incident to divorce, he was estopped from claiming that his payment obligation was not alimony.³²⁹

Whether a lien imposed by a divorce court on a separate property homestead as security for payment of reimbursement can be avoided as a judgment lien under Bankruptcy Code section 522(f) was addressed in *In re Parrish*.³³⁰ The husband had used community income to construct a home on his separate property. On divorce the wife was awarded reimbursement

319. *Id.* at 754-55.

320. *Bergman v. Bergman*, 828 S.W.2d 555 (Tex. App.—El Paso 1992, no writ).

321. *Schultz v. Richter*, 810 S.W.2d 738 (Tex. 1991).

322. *Bergman*, 828 S.W.2d at 557.

323. *Id.*

324. 822 S.W.2d 645 (Tex. App.—Ft. Worth 1991, no writ).

325. *Id.* at 648-50.

326. *Id.* at 650.

327. 7 Tex. Bankr. Ct. Rpt. 27 (1992).

328. 947 F.2d 1294, 1296-97 (5th Cir. 1991).

329. *In re Kelley*, 7 Tex. Bankr. Ct. Rpt. at 27. For a discussion of the effects of bankruptcy on alimony payments, see Dale Ellis, *Protecting Alimony from Bankruptcy Discharge Through Drafting*, FAIRSHARE: THE MATRIMONIAL LAW MONTHLY, Dec. 1992, at 8.

330. 144 B.R. 349 (Bankr. W.D. Tex. 1992).

secured by a lien on the property awarded to the husband. The ex-husband later claimed the property as exempt in a bankruptcy proceeding and sought to remove the lien. The bankruptcy court held that the lien imposed by the divorce decree was a judgment lien on the husband's pre-existing property that impaired the exemption to which he was entitled and was therefore avoidable.³³¹ In so concluding, the court overlooked the equitable lien that had existed on the property prior to the divorce.³³² The judicial lien, therefore, did not impair the ex-husband's exemption as section 522(f) requires for removal of the lien.

331. *Id.* at 353.

332. *Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991).