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Family Law: Husband and Wife

Joseph W. McKnight

FAMILY LAW: HUSBAND AND WIFE

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I. STATUS

A. INFORMAL MARRIAGE

IN 1989 the legislature repealed the part of section 1.91 of the Family Code[1] that allowed a court to infer an agreement to be married if it were established that the couple had cohabitated as husband and wife and held each other out to the public as such.[2] The lower courts have since struggled to discern the significance of this change in dealing with proofs of informal marriages,[3] and the Texas Supreme Court has now resolved the ambiguity of the statute to allow proof of an agreement to marry by circumstantial evidence.[4] Each case will, therefore, turn on its own particular circumstances for determination of the existence of an agreement to marry but with inevitable reliance on many of the same facts used to prove living together as spouses and public acknowledgement of the marital relationship.[5] The consequence of the 1989 legislation is that a higher standard of proof now prevails than was ordinarily applied prior to the amendment for proof of an informal marriage. As the Texas Supreme Court pointed out in *Russell v. Russell*,[6] proof of the agreement to be married is subject to legal and factual sufficiency review before a court of appeals and legal sufficiency review on appeal to the Texas Supreme Court.

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1. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1993). *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 SW. L.J. 1, 4 (1990).

2. A new provision was added that precludes proof of an informal marriage more than a year after the termination of the cohabital relationship. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1993). *See* Riley v. State, 849 S.W.2d 901 (Tex. App.—Austin 1993, n.w.h.). This provision is understood to mean that a suit must be commenced within one year of termination of the cohabital relationship in order to prove an informal marriage. *See* Mossler v. Shields, 818 S.W.2d 752, 754 (Tex. 1991).

3. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 46 SMU L. REV. 1475, 1475-76 (1993); Flores v. Flores, 847 S.W.2d 648, 652 (Tex. App.—Waco 1993, writ denied) (dictum); Russell v. Russell, 838 S.W.2d 909, 913-14 (Tex. App.—Beaumont 1992), *rev'd*, 865 S.W.2d 929 (Tex. 1993).

4. Russell v. Russell, 865 S.W. 929, 931 (Tex. 1993).

5. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 SW. L.J. 1, 2-3 (1990), *cited in Flores*, 847 S.W.2d at 652, and *Russell*, 838 S.W.2d at 913.

6. 865 S.W.2d 929, 933-34 (Tex. 1993).

B. INTERSPOUSAL IMMUNITY

In criminal cases the validity of an informal marriage is ordinarily raised in conjunction with an attempt to exclude from evidence a marital communication to a person whose marriage to a prisoner was informal.[7] In response to an effort to extend the privilege to a person whose informal marriage to the prisoner was invalid because of a subsisting prior marriage, the court denied the right of the party aware of the bar to claim the privilege[8] but left for future determination whether the privilege might be claimed by a prisoner without knowledge of the bar to the validity of the testifying witness's supposed marriage to him.[9] In defining the scope of the marital privilege generally, recourse was had to the newly enacted definition of the term "member of the household."[10]

C. MARITAL FRAUD

Oliver v. Oliver[11] was a suit for fraud by an ex-wife against her ex-husband on the unlikely ground of concealing their marital status. The couple was married ceremonially in New Mexico in 1978. In 1979 the husband brought suit for divorce and the wife signed papers waiving citation without having read them and evidently without knowing their contents. The husband procured the divorce but the parties continued to live together as husband and wife. An informal marriage, however, could not have been contracted because New Mexico does not recognize that institution. The couple moved to Texas in 1987 and established an informal marriage which was nevertheless dissolved by divorce in 1988. In that suit the wife counterclaimed for fraud in concealing the prior divorce, and her suit was severed for an independent trial. Though the jury awarded damages for the fraud, it also found that the fraud should have been discovered in 1979. The appellate court, therefore, held that the wife's suit was barred by the four years' statute of limitation.[12]

D. EMOTIONAL DISTRESS

On the same day the Supreme Court of Texas decided two cases relating to recovery for infliction of emotional distress: *Boyles v. Kerr*,[13] a non-mari-

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7. In Quinonez-Saa v. State, 860 S.W.2d 704, 710 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.), an informal marriage was merely alleged but not proved.

8. Weaver v. State, 855 S.W.2d 116, 120-21 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.) (under TEX. R. CRIM. EVID. 504(2)) (relying on Rougeau v. State, 738 S.W.2d 651, 662-63 (Tex. Crim. App. 1987)).

9. *Weaver*, 855 S.W.2d at 121 (under TEX. R. CRIM. EVID. 504(1)).

10. Riley v. State, 849 S.W.2d 901, 902 (Tex. App.—Austin 1993, n.w.h.); TEX. R. CRIM. EVID. 504(2).

11. 843 S.W.2d 595 (Tex. App.—El Paso 1992, no writ).

12. *Id.* at 599. For a case of ordinary interspousal tort (a case of fraud to which the statute of limitation was also successfully interposed), see Tippit v. Tippit, 865 S.W.2d 624, 626-27 (Tex. App.—Waco 1993, n.w.h.).

13. 855 S.W.2d 593 (Tex. 1993) (overruling some of the court's language in St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987), while saying that the holding was correct). For student notes on *Boyles* see Richard A. Ginsburg, *The Supreme Court Giveth, and the Supreme Court Taketh Away: Negligent Infliction of Emotional Distress Is Not An Independent Cause of Action in Texas: Boyles v. Kerr, 36 Tex. Sup. Ct. J. 874 (May 5, 1993)*, 24 TEX. TECH

tal case, and *Twyman v. Twyman*,[14] a marital case. In *Twyman*, but not in *Boyles*, the court acknowledged that Texas now recognizes a cause of action for intentional infliction of emotional distress.[15] In *Boyles* the court had concluded that Texas does not recognize a general duty of care not to inflict emotional distress negligently and that damages for mental anguish "should be compensated only in connection with [a] defendant's breach of some other duty imposed by law."[16]

Twyman was a suit for divorce in which a cause of action for emotional distress was also alleged. Sitting without a jury, the trial court had awarded damages for infliction of emotional distress without making a finding of outrageous behavior or severe emotional distress but had impliedly made a finding of negligence.[17] The Austin Court of Appeals affirmed the judgment on the ground that the wife might recover for negligent infliction of emotional distress.[18] After formulating a distinction between intentional and negligent infliction of emotional distress that turns on a finding of deliberate or reckless conduct in the former case, the Supreme Court of Texas remanded the case for retrial "in the interest of justice."[19] The court made it very clear that in a divorce case the court should avoid awarding a double recovery: "a spouse should not be allowed to recover tort damages and a disproportionate division of the community estate based on the same conduct."[20] As indicated by the short-lived distinction between intentional and negligent infliction of physical injury in relation to abrogation of interspousal immunity,[21] however, it will be difficult for the courts to limit recovery for emotional distress to intentional acts. It will also be difficult for fact-finders to distinguish between negligent and intentional infliction of emotional distress in some instances and for courts to divide property without regard to the award of intentional infliction of emotional distress, especially when a jury fixes the award for damages or gives an advisory verdict with respect to division of the community estate. Regarding these problems of sufficient practical gravity, three dissenting judges would have denied a spouse's recovery for emotional distress of any kind against the other spouse.[22]

Two of those judges[23] also dissented to the Texas Supreme Court's later summary opinion affirming an award of $320,000 to a spouse for intentional

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L. REV. 1247 (1993); Gary F. Cerasuolo, *Boyles v. Kerr: Sex, Emotional Distress, and Videotape*, 30 HOUS. L. REV. 1433 (1993).

14. 855 S.W.2d 619 (Tex. 1993).

15. *Id.* at 621-22, 626-27.

16. *Boyles*, 855 S.W.2d at 596.

17. Judging from the award of $15,000 in damages, one would guess that the court did not regard the damages as very severe.

18. *Twyman v. Twyman*, 790 S.W.2d 816 (Tex. App.—Austin 1990), *rev'd*, 855 S.W.2d 619 (Tex. 1993).

19. *Twyman*, 855 S.W.2d at 624, 625-26 n.21.

20. *Id.* at 625.

21. Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977) (abrogation of the doctrine of interspousal immunity in intentional harm cases); Price v. Price, 732 S.W.2d 316 (Tex. 1987) (abrogation of the interspousal immunity doctrine in cases of negligent harm as well).

22. *Twyman*, 855 S.W.2d at 626-40 (Phillips, C.J., Hecht and Enoch, JJ. dissenting).

23. Hecht and Enoch, JJ.

infliction of emotional distress against the other spouse. The husband's acts in *Massey v. Massey*[24] were certainly ill-mannered and short-tempered, but one might expect some provocation for some of them. "When he correctly suspected [his wife's] having an affair, he angrily confronted her and her lover. When he feared [that she] was drinking too much, he went through the garbage looking for evidence. When she filed for divorce, he threatened to take custody of their children and [to] tell her friends about her affair."[25] When one considers that less than thirty years ago a husband's killing of his wife's paramour taken in adultery (*i.e.*, in his wife's presence) was justifiable homicide,[26] one realizes how mannerly — some might even say effete — our law has become. One wonders whether the pace of civilized improvement can be maintained.

Unmentioned by the Texas Supreme Court in dealing with the cases on infliction of emotional distress was the practical consideration of insurance coverage. Most, if not all, Texas homeowner's insurance policies protect an insured against infliction of negligent, though not intentional, injury. Hence, under such policies of insurance an insurer has no duty to defend or to pay defense costs with respect to a proceeding culminating in an award for damages intentionally inflicted.[27] As to attorney's fees, the court pointed out in *Twyman* that allowing recovery for intentional infliction of mental anguish in a suit for divorce does not constitute authorization of contingent fees in divorce proceedings.[28] Attorneys must make independent arrangements to cover such tort claims.[29]

E. INTESTATE SUCCESSION

In virtual secrecy, but at the urging of the Real Estate, Probate, and Trust Law Section of the State Bar of Texas, the legislature passed an amendment at its 1993 session that radically changed the Texas law of succession. The rule of intestate succession to community property in effect since Texas began to be colonized by Europeans in the eighteenth century (that is, for roughly two hundred and seventy five years) was changed without any public discussion, though in legal circles the suggested change had been discussed from time to time and had been last proposed to the legislature in 1981.[30] Section 45 of the Probate

24. 867 S.W.2d 766 (Tex. 1993).

25. *Id.* at 766-67. He had also thrown a towel at her, sprayed her with beer, screamed at her because she could not drive a boat, slammed a door against a wall so that the knob made a hole, thrown a cup of coffee against a wall, broken a nutcracker, and pulled food from a refrigerator onto the floor. *Id.* at 766.

26. TEX. PENAL CODE ANN. § 1220 (repealed 1967).

27. Chiles v. Chubb Lloyds Ins. Co., 858 S.W.2d 633, 635-36 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

28. *Twyman*, 855 S.W.2d at 625 n.18.

29. *Id.*

30. S.B. 226 and H.B. 1145, then proposed at the behest of the Real Estate, Probate, and Trust Law Section of the State Bar, would have amended § 45 of the Probate Code so that the surviving spouse took all of the intestate deceased spouse's share of community property if the survivor was the parent of the decedent's children. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 35 SW. L.J. 93, 108-09 (1981).

Code[31] was amended so that all the community interest of a deceased spouse who dies intestate passes to the surviving spouse who is the parent of the decedent's descendants. Since 1844 Louisiana has given the surviving spouse a life estate of the deceased spouse's community share terminable on remarriage if all the descendants of the decedent are also those of the surviving spouse,[32] and Arizona enacted a provision somewhat similar to the new Texas law in 1973.[33] The amendment was effective on September 1, 1993.

If the need for change of the intestacy law had been more carefully and publicly examined, a better solution could have been produced. Even those decedents who had decided to die intestate under the old law and had lost capacity to make a will are presumably (though improperly) victims of the act if they died after the effective date of the act. Those who now desire that their interest in community property pass to their descendants rather than to their spouses who are their descendant's parent must make a will to achieve that result. Although the new law may express the assumed wish of a great many Texans who therefore need not make wills so that their shares of community property pass to their spouses at death, the new state of the law consequently discourages will-making in many cases when a will could greatly ease the problems of administration at death. A more troubling result of the amendment is that it accentuates the already existing advantage of a spouse to influence a prospective decedent in the survivor's own interest. A further and even more regrettable consequence of the act is that the legislation did not also deal with a prospective decedent's separate property on intestacy. Under section 38 of the Probate Code[34] the surviving spouse takes a life estate in one third or one half of the deceased spouse's separate realty and one-half or all of the deceased spouse's separate personalty depending on whether the decedent is survived by descendants. As to realty the life estate presents serious problems of administration and prospective familial interests, as well as tax problems, that could have been readily solved by dealing with the problem as part of the change in the law of succession to community property. Now that the law has been amended in favor of the surviving spouse with respect to a deceased spouse's community share, it is strongly recommended that the deceased spouse's descendants should be favored with respect an additional amendment as to separate property. Such an amendment would dispose of present problems and encourage the prospective decedent to made a will with respect to community as well as separate assets.

F. ADMINISTRATION OF A DECEASED SPOUSE'S ESTATE

At its 1993 regular session the legislature also passed several acts bearing on the administration of decedents' estates. The process of informal administration was clarified in amendments to the Probate Code to add section

31. TEX. PROB. CODE ANN. § 45 (Vernon Supp. 1994).
32. 1844 La. Gen. Laws 99, no. 152, § 2 (codified as 1870 LA. CIV. CODE § 96); LA. CIV. CODE ANN. art. 890 (West Supp. 1993).
33. 1973 Ariz. Gen. Laws 347, ch. 75, § 4 at 363-64; ARIZ. REV. STAT. ANN. § 14-2102 (1975).
34. TEX. PROB. CODE ANN. § 38 (Vernon 1980).

506[35] and to revise section 160.[36] In its thorough revision of the law of guardianship of incompetents the legislature introduced a disquieting provision to the effect that the guardianship of a spouse ceases when the ward dies and the guardian qualifies "as survivor in community."[37] The draftsman's careless use of this terminology therefore suggests that a proceeding should be commenced under Probate Code sections 160 and 162 in order to terminate a spousal guardianship. Such a proceeding, which would entail great expense,[38] cannot have been intended.

Although the legislature repealed Probate Code section 157[39] and replaced it with new section 883,[40] section 157 was also amended.[41] Clarification of these sections will be required at the next legislative session at which time the unnumbered provision attached to the Family Code by a footnote[42] and deäling with the separate property of a spouse missing in action can be incorporated into the Probate Code.[43]

II. CHARACTERIZATION OF MARITAL PROPERTY

A. PREMARITAL AND MARITAL PARTITIONS

The Supreme Court of Texas had not yet decided *Beck v. Beck*[44] when *Fanning v. Fanning*[45] was tried. The divorce court, consequently, held that a premarital partition contracted prior to the constitutional amendment of 1980 was unconstitutional. The law of premarital partitions stood in an entirely different posture, however, when *Fanning* reached the Texas Supreme Court. The case was, therefore, remanded to the trial court so that other claims of the wife in relation to the partition but not ruled upon could be put before the court.[46]

Ex parte Hall[47] dealt with a more unusual issue in connection with a partition. The couple had entered into a premarital agreement by which the husband agreed to support his wife and her two children of a prior marriage.

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35. Act approved June 16, 1993, 73d Leg., R.S., ch. 712, § 7, 1993 Tex. Gen. Laws 2788, 2793 (Probate Code § 506).

36. Act approved June 19, 1993, 73d Leg., R.S., ch. 846, § 17, 1993 Tex. Gen. Laws 3337, 3345 (amendment to Probate Code § 160).

37. Act approved June 19, 1993, 73d Leg., R.S., ch. 957, § 1, 1993 Tex. Gen. Laws 4081, 4105 (Probate Code § 694(b)(1)).

38. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 SW. L.J. 1, 17 n. 144 (1989).

39. Act approved June 19, 1993, 73d Leg., R.S., ch. 957, § 75, 1993 Tex. Gen. Laws 4081, 4182 (applicable only to appointments after September 1, 1993).

40. *Id.* § 1 at 4154 (Probate Code § 883).

41. Act approved June 16, 1993, 73d Leg., R.S., ch. 712, § 3, 1993 Tex. Gen. Laws 2788, 2789 (amendment to Probate Code § 157).

42. *See* TEX. FAM. CODE ANN. § 5.26, note (Vernon Supp. 1994); Act approved June 10, 1971, 62d Leg., R.S., ch. 844, § 3, 1971 Tex. Gen. Laws 2711, 2712.

43. *See* Joseph W. McKnight, *Commentary to the Texas Family Code, Title 1*, 21 TEX. TECH L. REV. 911, 1091-93 (1990).

44. 814 S.W.2d 745 (Tex. 1991).

45. 847 S.W.2d 225 (Tex. 1993).

46. *Id.* at 226; *see* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 46 SMU L. REV. 1475, 1478-81 (1993).

47. 854 S.W.2d 656 (Tex. 1993).

In their divorce proceeding the court entered an order for temporary support for the wife and children based only upon the agreement and an exhibit proffered by the wife as to support required. On his failure to pay the ordered amount, the husband was held in contempt. On his petition for habeas corpus the Texas Supreme Court held that the support order based on the premarital agreement would not support an order for contempt.[48]

A Texas appellate court has not yet had an occasion to comment on the validity of a renunciation, or waiver, of a right to temporary alimony as part of a bargain for a premarital or marital partition.[49] Nor has any Texas appellate court dealt with a more particular penalty provision by which a wife waives all marital property rights if she engages in sexual relations with anyone other than her husband, but a Pennsylvania court has enforced such a provision.[50] The use of a premarital or marital undertaking to protect marital assets from federal Medicaid rules, however, seems to be precluded.[51]

B. SURVIVORSHIP AGREEMENTS

Though spouses need not use the same document to achieve their objective, the contractual will is the traditional device for achieving survivorship of marital property. In *Kilpartrick v. Estate of Harris*[52] childless spouses each executed a will in 1974 with correlative provisions. The husband's will gave the wife a life interest in his entire estate with the remainder to his relatives, and the wife's will gave the husband a life interest in her entire estate with the remainder to her relatives. The jury found that the plan was contractual, though the contract was not expressed in writing as required for contractual wills executed after September 1, 1979. The husband died in 1984, at which time his will was not found. Administration was, therefore, had on his estate as though he had died intestate. In 1985 the widow made a new will altering the disposition of the remainder contrary to the agreement with her husband. The widow died in 1985 and her executrix probated her will. In 1986 the executrix discovered the husband's will, and it was admitted to probate in 1987. The proceedings of both estates were thereafter consolidated, and the wife's executrix (also named as the husband's executrix) qualified as such. The wife's remaindermen under the 1985 will intervened to assert their interests. In 1989 the executrix of both wills asserted that the wills were contractual and that the estates should be distributed accordingly. The trial court imposed a constructive trust on the wife's remaindermen to achieve that result and they appealed. Apart from evidentiary issues resolved in favor of the executrix, the remaindermen made two arguments.

48. *Id.* at 658. TEX. FAM. CODE ANN. §§ 3.58(c)(2) (temporary spousal support) and 11.11(b) (child support) (Vernon 1992) require that the amount be "necessary and equitable" and "for the safety and welfare of the child," respectively.

49. A student note, however, addresses this problem in California. Robert H. Martin, *Waivers of Spousal Support in Premarital Agreements*, 1 SAN DIEGO JUST. J. 475 (1993).

50. Laudig v. Laudig, 724 A.2d 651 (Pa. Super. Ct. 1993).

51. *See* ALEXANDER J. BONE, JR., THE MEDICAID PLANNING HANDBOOK (1992), *summarized in* Alexander J. Bone, Jr., *Can You Use a Premarital Agreement to Protect Assets from Medicaid?*, 13 FAIRSHARE 7 (No. 6, June 1993).

52. 848 S.W.2d 859 (Tex. App.—Corpus Christi 1993, n.w.h.).

They first asserted that the agreement between the spouses (though not affected by the 1979 amendment to the Probate Code) should have been in writing to be enforceable as a matter of general law. To this argument the court responded that the defense of partial performance was satisfied by the death of the husband with the consequential benefit cast on the widow's estate when his will was found and proved.[53] Both parties to the contract, moreover, had achieved part performance of the contract by equal gifts made to their respective families in furtherance of the contract.[54] With respect to the remaindermen's further argument that the executrix had tarried beyond the two years' statute of limitation the court responded that the executrix's assertion of the contractual will related back to her original answer within the limitation period.[55] The point that the case makes tacitly but most effectively is that the requirement of the 1979 amendment makes a great deal of sense.

Although no recent appellate case dealt with an attempt to employ the constitutional means of achieving a right of survivorship to community property, the decision of the El Paso Court of Appeals in *McNeme v. Estate of Hart*[56] seems equally applicable to spousal situations as to the non-spousal facts before the court. There the court held that a depositor's initialing of a signature card providing for survivorship sufficed as a signing in compliance with the statute.[57]

C. COMMUNITY PRESUMPTION

All problems involving the characterization of marital property begin with the community presumption.[58] If the presumption that property is acquired during marriage, or is on hand on dissolution of a marriage, is not rebutted by clear and convincing evidence, the property in issue is characterized as community property.[59] Application of the tracing doctrine is commonly used to rebut the presumption. In *Celso v. Celso*[60] a rival presumption created a tracing problem. Prior to his marriage the husband purchased a dry cleaning business,[61] which was sold during his marriage. Using the proceeds of sale and those from a certificate of deposit purchased prior to marriage, the husband bought a house in the names of both spouses.[62] When the house was sold the proceeds were deposited in a certificate of deposit in both

53. *Kilpartrick*, 848 S.W.2d at 864.
54. *Id.* at 864-65.
55. *Id.* at 865.
56. 860 S.W.2d 536 (Tex. App.—El Paso 1993, n.w.h.).
57. *Id.* at 540; TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1994).
58. TEX. FAM. CODE ANN. § 5.01 (Vernon 1993); *see* Celso v. Celso, 864 S.W.2d 652, 654 (Tex. App.—Tyler 1993, n.w.h.); Hodges v. Hodges, No. 05-92-00239-CV, 1993 WL 25347 (Tex. App.—Dallas, Feb. 4, 1993, n.w.h.) (not designated for publication); Arcia v. Arcia, No. 01-91-0042-CV, 1992 WL 361282 (Tex. App.—Houston [1st Dist.] Dec. 10, 1992, no writ) (not designated for publication).
59. *Id.*
60. 864 S.W.2d 652 (Tex. App.—Tyler 1993, n.w.h.).
61. Apparently, a corporate entity.
62. The house was located in Missouri, where the spouses lived, but because the court applied Texas law throughout the opinion, no importance was attached to that fact.

spouses' names. If these were all the facts, the trial court's conclusion that the second certificate of deposit was community property was clearly wrong, as the appellate court held. But the court further concluded that the second certificate of deposit was wholly the separate property of the husband, because of lack of evidence that the husband intended to make a gift of any portion of the funds to his wife.[63] The rule is, however, that if a spouse makes a transfer to the other spouse, there is a presumption of gift, which the presumed donor has the burden of rebutting.[64] Lack of evidence of intent to make a gift will not suffice to satisfy the transferor-spouse's burden of proof.[65] In the absence of evidence to rebut the two successive gratuitous transfers, the transfers constituted presumed gifts to the wife of half of the husband's separate interest in the amounts paid and deposited.

D. RETIREMENT BENEFITS

In *Parliament v. Parliament*[66] an ex-wife was successful in convincing a divorce court to apply a new formula for determining a community interest in a lump-sum, defined, retirement account earned prior to marriage and during marriage. Responding to the longstanding argument that retirement benefits are not earned equally during each month of employment, the trial court ascertained the community interest in a novel way. The court first determined the value of annual benefits under the retirement plan at the date of marriage and deducted that amount from the value of annual benefits at date of retirement. The court then took the ratio of the difference in those amounts to the value of the annual benefits at date of retirement to calculate the percentage of the community interest in the annual benefits. The San Antonio Court of Appeals rejected the divorce court's analysis[67] on the basis of precedent[68] as well as policy. On the side of policy the court stressed the

63. *Celso*, 864 S.W.2d at 655.

64. *See* Smith v. Strahan, 16 Tex. 314 (1856).

65. In *Celso*, 864 S.W.2d at 655, the court cited Higgins v. Higgins, 458 S.W.2d 498, 500 (Tex. Civ. App.—Eastland 1970, no writ), for the proposition that a spouse who makes a deposit to a bank account held in the names of both spouses "does not make a gift to the other spouse." *Higgins*, however, does not so hold. Rather the court in *Higgins* commented, "In Hartman v. Crain, Tex. Civ. App., 398 S.W.2d 387, 389, the court said that no presumption of a gift to her husband resulted from a wife['s] depositing her inheritance in their joint bank account." *Higgins*, 458 S.W.2d at 500. The court in *Hartman* was perpetrating the double standard for husbands and wives that previously prevailed: though there was a presumption of gift when a husband transferred property to his wife, there was no such presumption when the wife transferred property to her husband. As Justice Reavley said in Cockerham v. Cockerham, 527 S.W.2d 162, 175 (Tex. 1975) (Reavley, J., dissenting, but not on this point), that distinction between a transfer by a husband and a transfer by a wife is now *passe*.

66. 860 S.W.2d 144 (Tex. App.—San Antonio 1993, writ denied).

67. *Id.* at 145.

68. Taggart v. Taggart, 552 S.W.2d 422, 423-24 (Tex. 1977), *as clarified by* Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983); Anderson v. Anderson, 707 S.W.2d 166, 168 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); Neese v. Neese, 669 S.W.2d 388, 390 (Tex. App.—Eastland 1984, writ ref'd n.r.e); May v. May, 716 S.W.2d 705, 710-11 (Tex. App.—Corpus Christi 1986, no writ); Dunn v. Dunn, 703 S.W.2d 317, 321 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *see also* Humble v. Humble, 805 S.W.2d 558 (Tex. App.—Beaumont 1991, writ denied), *discussed in* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 SW. L.J. 1831, 1863-64 (1992).

simplicity and predictability of the current formula, as well as fairness and neutrality, that "increase in value would not have taken place [in later years of employment] but for the foundation years of employment prior to the marriage."[69]

In *Sutherland v. Cobern*[70] the familiar litigant, Chief Warrant Officer Sutherland, reappeared to urge that the 1991 amendment to the Uniformed Services Former Spouses' Protection Act[71] altered his responsibility under a 1971 divorce decree. But by its terms the amendment is inapplicable to the retirement benefits dealt with in his case.[72] "In 1990, section 1408(c)(1) was amended to provide that a court could not divide or partition retired pay as marital property if a final divorce decree was entered before June 25, 1981, . . . *and such . . . decree had not originally treated . . . the retired pay as marital property.*"[73] But the divorce court had originally treated the Warrant Officer's retired pay (then called retainer pay) as marital property.

E. REIMBURSEMENT

The principal elements of a claim for marital reimbursement are now well recognized. That the right is of an equitable nature subject to discretionary award is not in doubt.[74] That a claim for reimbursement must be plead is almost as well established,[75] and even if not required, pleading such a right is always good practice. That a lien can be fixed on real property to secure a reimbursement claim is clear.[76] Like the concept of tortious liability earlier in this century, the reimbursement principle covers a number of particular instances (claims for improvement, satisfaction of debt, constructive fraud, and the like) without a well defined general standard applicable to all such claims.

Harris v. Holland[77] presented an unusual reimbursement claim. The husband was engaged in ranching. In addition to his claim for reimbursement for separate cattle, forage, and equipment that had been contributed to enhance the value of the community estate, he also claimed (and was awarded)

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69. *Parliament*, 860 S.W.2d at 146. For a further discussion of this and other points, see 93-3 State Bar of Texas Section Report: Family Law 29-30 (1993).

70. 843 S.W.2d 127 (Tex. App.—Texarkana 1992, no writ).

71. 10 U.S.C. § 1408 (Supp. IV 1992).

72. *Sutherland*, 843 S.W.2d at 130.

73. *Id.* at 129 (emphasis added).

74. Golias v. Golias, 861 S.W.2d 401, 403 (Tex. App.—Beaumont 1993, n.w.h.).

75. Hodges v. Hodges, No. 05-92-00239-CV, 1993 WL 25347 (Tex. App.—Dallas, Feb. 4, 1993, n.w.h.) (not designated for publication). In McGaffey v. Trevisani, No. B14-92-00727-CV, 1993 WL 271021 (Tex. App.—Houston [14th Dist.], July 12, 1993, n.w.h.) (not designated for publication), the claim was evidently plead but unproved.

76. Holland v. Holland, No. C14-92-00873-CV, 1993 WL 291551 (Tex. App.—Houston [14th Dist.], Aug. 5, 1993, n.w.h.) (not designated for publication) (lien for purchase money); Falor v. Falor, 840 S.W.2d 683, 868-87 (Tex. App.—San Antonio 1992, no writ) (lien for improvement). Fixing a lien for improvement on homestead property is consistent with the constitutional limitations on putting a lien on a homestead. TEX. CONST. art. XVI, § 50 (1876, amended 1983).

77. 867 S.W.2d 86 (Tex. App.—Texarkana 1993, n.w.h.).

an amount to cover speculative[78] capital gains taxes on the future sale of those items.[79] The appellate court reversed the award of this claim and remanded for equitable consideration of the effect of awarding low basis assets to the husband.[80]

A spousal recovery for constructively fraudulent dispositions of community property on dissolution of a marriage is a species of reimbursement.[81] An additional recovery for exemplary damages in such instances[82] now seems precluded by the Texas Supreme Court's decisions in *Boyles* and *Twyman*.[83]

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

A. MANAGEMENT

In the course of composing the Matrimonial Property Act of 1967[84] the drafters concluded that the terms of the proposed act properly defined management of such property as a tax refund.[85] Over the last decade bankruptcy courts have considered this issue several times.[86] Without alluding to the 1967 commentary of the drafting committee, the bankruptcy court in *In re Burke*[87] reached the same conclusion that was suggested nearly thirty years ago: that the management of a tax refund is controlled by the management of the funds used to pay it. In *Burke* the bankrupt's wife who had filed an individual return resisted the request of the bankrupt's trustee to turn over funds she had received as a tax refund. But it was stipulated by the parties that all the income and deductions on the wife's tax return were either solely or jointly managed by the bankrupt husband and such funds were used to make payments to the federal treasury. Hence, if the refund took the same character as the payments, they were properly deemed part of the bankrupt's estate under section 541(a)(2) of the Bankruptcy Code.[88] The court ordered

78. *Id.* at 87-88 (citing Freeman v. Freeman, 497 S.W.2d 97, 99-100 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ)).

79. *Id.*

80. *Id.* at 88.

81. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 46 SMU L. REV. 1475, 1487 (1993).

82. *See* Tyropanis v. Tyropanis, No. 05-92-00381-CV, 1992 WL 352802 (Tex. App.—Dallas, Nov. 20, 1992, no writ) (not designated for publication); Mazique v. Mazique, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st Dist.] 1987, no writ).

83. *See* notes 14-16 *supra* and accompanying text; *see also* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 42 Sw. L.J. 1, 25-6 (1988); *see also* Transportation Ins. Co. v. Moriel, 37 Tex. Sup. Ct. J. 450, 461-62 (Feb. 2, 1994).

84. Act approved May 27, 1967, 60th Leg., R.S., ch. 309, 1967 Tex. Gen. Laws 735.

85. *See* Joseph W. McKnight, *Commentary on the Matrimonial Property Act of 1967*, 17 TEX. TECH L. REV. 1319, 1336 (1986).

86. *See In re* Canon, 130 B.R. 748, 752 (Bankr. N.D. Tex. 1991); *In re* Wilson, 49 B.R. 19, 20 (Bankr. N.D. Tex. 1985); *In re* Barnes, 14 B.R. 788, 790 (Bankr. N.D. Tex. 1981); *In re* Bathrick, 1 B.R. 428, 430 (Bankr. S.D. Tex. 1979).

87. 150 B.R. 660 (Bankr. E.D. Tex. 1993).

88. 11 U.S.C. § 541(a)(2) (1988): "Such estate is comprised of . . . (2) [A]ll interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is (A) under the sole . . . or joint management and control of the debtor."

the wife to pay the trustee the amount of her refund.[89]

In *Pankhurst v. Weitinger & Tucker*[90] the husband had assigned a one-half interest in a particular chose of action to his wife. Thereafter the husband and wife engaged the defendant law firm to represent them in the action. The wife alone later brought suit against the firm for malpractice in representation, and the firm contested her standing to sue. The court assumed that the chose in action was originally a community asset, and it was apparently subject to the husband's sole management.[91] Hence, after the husband's assignment of a one-half interest to his wife, the husband continued to hold the other one-half interest as community property, and the wife held one-half as her separate property. The court, therefore, concluded that the wife, as manager of her fractional separate interest that she had engaged the firm to pursue, had standing to maintain a cause of action for malpractice.[92]

In *Jones v. First National Bank of Anson*[93] the court's reasoning is not so convincing. The husband had borrowed money from a bank to which he had given a note. After the note was due, the wife deposited a check made to both spouses to a joint checking account in the same bank. The bank offset the amount of the deposit against the note and gave the husband notice of that fact. The bank then brought suit against the husband for the balance due on the note. The wife was not a party to the suit. A default judgment was entered against the husband. The husband and the wife then brought suit against the bank, *inter alia* for exercising an offset against the deposit to the checking account. The bank defended on the ground that the prior suit was determinative of the issue against both the husband and the wife, because the complaint with respect to the offset was a matter of compulsory counterclaim to the bank's suit on the note and that the wife was bound by the prior judgement. The appellate court sustained the trial court's finding for the bank.[94] The court reasoned that the wife was in privity with her husband in the first suit because the note was a community liability as a result of an identity of interest between the spouses in that the proceeds of the note were used for a community purpose.[95] In making this argument the court was very wide of the mark. Although the court cited Family Code section 5.61, the court did not seem to appreciate the consequences of the 1985 and 1987 clarification of that section: that one spouse is not liable for the acts of the other unless the other acted as agent of the former.[96] There was no showing of agency in this situation. In *Cooper v. Texas Gulf Indus-*

89. 150 B.R. at 663. The court declined to follow *In re* Bathrick, 1 B.R. 428, 432 (Bankr. S.D. Tex. 1979), where a similarly placed non-debtor spouse was allowed to resist a turnover order under the old Bankruptcy Act when she had spent the funds refunded by the Treasury.

90. 850 S.W.2d 726 (Tex. App.—Corpus Christi 1993, writ denied).

91. *Id.* at 729-30.

92. *Id.* at 731.

93. 846 S.W.2d 107 (Tex. App.—Eastland 1992, no writ).

94. *Id.* at 110.

95. *Id.* at 109-10.

96. TEX. FAM. CODE ANN. § 5.61 (Vernon 1992); *see also* TEX. FAM. CODE ANN. § 4.031 (Vernon 1992).

tries, Inc.[97] the Texas Supreme Court said in a somewhat similar situation that the previous suit (in which the wife was not joined) was not conclusive as to the wife but was conclusive as to the husband *"except to the extent that it might have to be disregarded in giving [the wife] all the relief to which she may show herself entitled."*[98] The trial court's conclusion was nevertheless supportable. The wife had standing to sue the bank with respect to the set-off, but she had no ground to contest it in the light of section 5.61(c). The funds in the account were subject to the joint management of the spouses as indicated on the face of the instrument deposited[99] and were therefore subject to recovery for the husband's sole liability to the bank.

A nice point in the conflict of laws was posed in *Hartman v. Sirgo Operating, Inc.*:[100] whether a Texas court can make an effective declaratory judgment to determine the validity of an obligation to acquire an interest in foreign real property. Acting alone, the husband had contracted to sell to the plaintiff an interest in New Mexican community realty. The suit, however, did not involve title to the foreign realty but merely the validity of the contract.[101] Under New Mexican law both spouses had to join in a sale of community realty.[102] In this suit to determine the validity of the contract the wife was not a party. Relying on *Cooper v. Texas Gulf Industries, Inc.*,[103] the court held that the wife's joinder was not necessary for the purpose of jurisdiction to rule on the dispute concerning the validity of the husband's acts.[104] By analogy to a Texas court's power to adjudicate matters of merely *in personam* impact, the court held that it had jurisdiction to judge that the husband's contract was not enforceable under New Mexican law.[105]

B. HOMESTEAD: DESIGNATION AND EXTENT

In *In re Hughes*[106] the court initially ruled that uncontradicted evidence showed that the combined values of a debtor's residential and business homestead properties (excluding improvements) was under $10,000 when the properties were acquired and designated for homestead use in the mid 1970s. By providing that existing homesteads were to continue as such, it was intended by the draftsman of the 1983 constitutional amendment[107] and

97. 513 S.W.2d 200 (Tex. 1974).

98. *Id.* at 205 (emphasis supplied).

99. *See* Joseph W. McKnight, *Commentary to Title 1 of the Family Code*, 21 TEX. TECH. L. REV. 911, 1074 (1990). If the terms of deposit in the account or the spouses' tacit agreement as evidenced by their use of the account varied the statutory concept of joint management, the bank had full notice of all those matters and seemingly acted in accordance with them.

100. 863 S.W.2d 764 (Tex. App.—El Paso 1993, writ requested).

101. *Id.* at 766.

102. N.M. STAT. ANN. § 40-3-13(A) (Michie 1973).

103. 513 S.W.2d 200 (Tex. 1974).

104. *Hartman*, 863 S.W.2d at 767.

105. *Id.* at 767-68.

106. As initially reported in 153 B.R. 736 (withdrawn by publisher), 7 Tex. Bankr. Ct. Rep. 180, 184 n.2 (Bankr. N.D. Tex. 1993).

107. TEX. CONST. art. XVI, § 51.

the 1985 statute[108] which implemented it that existing homesteads should be proved in just that way. Further evidence in *Hughes* did not alter the court's factual conclusion as to value of the homestead tracts when designated as such, and the court, therefore, found it unnecessary to address the constitutional issue.[109] The draftsman of these constitutional and statutory provisions nonetheless believed, and still believes, that replacing the earlier definition with the later and ordinarily broader one acre definition of urban homestead expands the homestead claim unconstitutionally as to prior creditors under Article I, Section 10 of the United States Constitution.[110]

Once a homestead is acquired, however, it may be lost by abandonment. In *In re Finkel*[111] the point at issue was whether an alleged business homestead had been lost by the claimant's abandonment of the business to her adult son. The court held that claimant's sale of a controlling interest in a corporate business to her son divested her of any right to claim a homestead in the premises occupied by the business even if she had had any such right before the sale.[112] Nor would it have been appropriate for her to claim a family business homestead in the premises because there was no familial support relationship between mother and son,[113] even if that could be a relevant concern when she had leased the premises to the corporation which she did not operate.[114]

In *In re McCain*[115] the court reiterated the point made in *In re Mitchell*[116] that a claimant of a rural homestead, with continuing control of the whole of it, need not show an economic use of all of it.[117] As to the debtor's interest in twenty-three acres,[118] surrounding the area where the debtor actually made her home and for which future residential development was anticipated, surprisingly the court held that this acreage was not part of the rural homestead.[119] As to a debtor's interest in yet farther acreage in the course of

108. Act approved June 15, 1985, 69th Leg., R.S., ch. 840, § 1, 1985 Tex. Gen. Laws 2906 (Tex. Prop. Code § 41.002(c), renumbered in 1989 as Tex. Prop. Code § 41.002(d)): "The definition of a homestead as provided in this section applies to all homesteads in this state whenever created."

109. *In re* Hughes, 159 B.R. 197, 198 (Bankr. N.D. Tex. 1993).

110. Edwards v. Kearzey, 96 U.S. 595, 607 (1877); Gunn v. Barry, 82 U.S. (15 Wall.) 610, 623-24 (1872). *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 40 Sw. L.J. 1, 16-18 (1986).

111. 151 B.R. 779, 784 (Bankr. W.D. Tex. 1993).

112. *Id.* at 784 n.2.

113. *Id.* at 784-86.

114. *Id.* at 786-87.

115. 160 B.R. 933 (Bankr. E.D. Tex. 1993).

116. 132 B.R. 553 (Bankr. W.D. Tex. 1991), *noted in* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 1831, 1847-48 (1992).

117. *Mitchell*, 132 B.R. at 568; *McCain*, 160 B.R. at 938. In *McCain* the area first in question was an undivided one-half interest in about five acres. In *Mitchell* it was 104 acres. *Cf. In re* Spencer, 109 B.R. 715, 717-18 (Bankr. W.D. Tex. 1989) (rather than limiting the rural homestead to the area actually used as a home, the court curiously limited the homestead to one acre when the claimant enjoyed the benefits of city living). At best this conclusion can be termed *bizarre*.

118. An undivided two-thirds interest.

119. *McCain*, 160 B.R. at 940-41.

residential development,[120] the court said that it was "not dealing with a conversion from an admitted homestead to a commercial development [as in *Bradley*][121] but dealing with an attempt to convert an admitted commercial development to a homestead."[122] Though this effort to distinguish *Bradley* is not altogether convincing, the court appears to mean merely that the burden of proof of establishing a homestead is on the claimant. But if the entire area was initially rural and remained so, a homestead character should be applied to all parts of it.[123] Is the court perhaps suggesting that by segregating and beginning to develop a part of a rural tract for residential use the owner had already created a new *urban* area?

In re Davis[124] also concerned a determination of whether a homestead was rural in nature. The claimant's thirty-two acres was evidently located within the outer limits of an expanding municipality. In reversing the conclusion of the Bankruptcy Court of the continuing rural character of the area, the federal District Court held that the failure of the town to provide municipal utilities and fire and police protection is not alone determinative that a homestead is rural.[125] Rather, the court said that the 1989 amendment to the Property Code[126] concerning the absence of such amenities means that an incorporation of a *rural* area within a municipality without such advantages does not cause the area to lose its rural character, but if the area were otherwise actually *urban*, the lack of those services does not cause it to be classified as rural.[127] That reasoning may be further glossed by saying that if those municipal amenities are provided after homestead designation their availability will be no more than elements in determining a shift from a rural to an urban homestead classification of an area.[128]

Perhaps the most disputed point with respect to Texas's otherwise largely settled homestead law is whether realty intended to be occupied as a home-

120. Apparently a separate property interest in two-thirds of the property and a community interest in the rest.

121. 960 F.2d 502, 507 (5th Cir. 1992).

122. *McCain*, 160 B.R. at 939. In *McCain* the fact that the debtor's husband had not joined her in making conveyances of home sites from the development property was treated as evidence that the debtor did not regard the property as part of her homestead. *Id.* For a recent case that turned on the wife's non-joinder in the conveyance of a homestead sometime between 1837 and 1845, when joinder (as the court held) was not required, see Dyson Descendant Corp. v. Sonat Exploration Co., 861 S.W.2d 942 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.).

123. *See* Hollifield v. Hilton, 515 S.W.2d 717 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.). The fact that the claimants' interest in the property was an undivided interest was not controlling. *McCain*, 160 B.R. at 941 (citing Sayers v. Pyland, 161 S.W.2d 769, 773 (Tex. 1942), and other authorities).

124. 152 B.R. 133 (S.D. Tex. 1992).

125. *Id.* at 135.

126. TEX. PROP. CODE ANN. § 41.002(c) (Vernon Supp. 1994). The text added in 1989 provides that "[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."

127. *Davis*, 152 B.R. at 135.

128. For other interpretations of § 41.002(c), see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 SW. L.J. 415, 426 (1991); Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 SW. L.J. 1831, 1845 (1992); United States v. Blakeman, 997 F.2d 1084, 1094 (5th Cir. 1993); *In re* Bradley, 960 F.2d 502, 511-12 (5th Cir. 1992).

stead and eventually occupied as such can be designated as a homestead from a time before actual homestead occupancy is established.[129] The most affirmative argument for that purpose, however, cannot assist a claimant whose only present claim to a property is a mere expectancy as a devisee of a living will-maker. In *Hunter v. NCNB Texas National Bank*[130] the bank was trustee of all of the defendant's mother's property under a trust created by the mother for her own life. Subsequently the mother had been adjudicated incompetent with her son as her guardian. In her will the mother had devised her home to her daughter, the defendant. While her mother was staying in a nursing home, the daughter rented the home from the trustee and at the end of that time her mother was returned home where she stayed for more than a year before again being sent to a nursing home. In the meantime the daughter had stayed in the home but had refused to renew her lease or to pay rent. The trustee succeeded in procuring a declaration that the house was not the daughter's homestead.[131] Her expectancy as a devisee was unavailing in that it constituted no more than a hope without any present property interest.

With the extension of homestead protection to single adults and the adoption of an identical definition of the urban homestead for families and single adults, the importance of proving the existence of a family by a homestead claimant has very much declined. But because the rural homestead for a family and the homestead for a single adult still differ,[132] the existence of a family remains significant in that instance. In *NCNB Texas National Bank v. Carpenter*[133] the appellate court concluded that there were facts in dispute that precluded granting the homestead claimant's motion for summary judgment.[134] In reaching that conclusion, the court noted that the homestead claimants' two adult sons (who apparently lived elsewhere) performed the acts which constituted use of much of the acreage as a rural family homestead, and the court suggested that such work would have had to be performed by a family member in order to prove the existence of a family homestead.[135] But because the couple itself constituted a family, the sons as their parents' agents might have performed acts of homestead use for them.[136]

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129. *See, e.g.*, Gregory v. Sunbelt Saving, 835 S.W.2d 155, 158 (Tex. App.—Dallas 1992, writ denied).

130. 857 S.W.2d 722 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

131. *Id.* at 726.

132. TEX. PROP. CODE ANN. § 41.002(b) (Vernon Supp. 1994).

133. 849 S.W.2d 875 (Tex. App.—Fort Worth 1993, n.w.h.).

134. *Id.* at 881.

135. *Id.* at 880. In *In re* Finkel, 151 B.R. 779, 785-86 (Bankr. W.D. Tex. 1993), the court also expressed dicta with respect to the claimant's alleged extended family. In leasing business property to a corporation controlled by an adult son, it was suggested that the property could be a business homestead if the lessee were part of the family of the debtor who owned stock in the leasing corporation. *Id.* at 786-87. But what was said in *In re* John Taylor Company, 935 F.2d 75, 77 (5th Cir. 1991), was strained enough without attempting to extend it. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 SW. L.J. 1831, 1849-50 (1992).

136. *See* Vaughan v. Vaughan, 279 S.W.2d 427, 434 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.).

Other points of homestead law in relation to the time of assertion of the claim were made in contexts of bankruptcy and federal taxation. A bankruptcy court held that the time for determination of a homestead claim in connection with a shift from a Chapter 13 to a Chapter 7 proceeding is the time of that transfer.[137] Hence, a home that a debtor acquired after his Chapter 13 filing but before the conversion to a proceeding under Chapter 7 could be claimed as exempt property in the converted proceeding.[138] In another bankruptcy case the court held that a post petition inheritance of land might also be claimed as the homestead of a Chapter 7 petitioner.[139] In *In re Blakeman*[140] the federal Fifth Circuit Court of Appeals concluded that the value of a surviving spouse's interest in a homestead should be calculated at the time of foreclosure of a federal tax lien in accordance with the federal tax tables.

Once a homestead claimant discharges his burden of proving the existence of a homestead, the burden of showing abandonment of the homestead is upon the contesting creditor or anyone else who seeks to show the homestead's termination. In *Womack v. Redden*[141] the contestant was a devisee of the property under the claimant's husband's will. The contestant was successful in establishing that the testator and the claimant had abandoned the premises prior to the husband's death and thus the contestant's devisee was not burdened with the surviving wife's right of exclusive occupancy.[142] If the property was community property, as it appears to have been, neither the devisee of the husband's share nor the surviving wife could therefore maintain an exclusive right of occupancy. Either might rent the premises from the other, purchase the others' interest, or have a partition, which would likely require a sale.

C. LIENS ON HOMESTEAD

A homeowner's renunciation or disclaimer of homestead use in putting a non-beneficial encumbrance on the property is in most instances ineffective.[143] When such disclaimers amount to misrepresentations, lenders usually have the means of avoiding deception but sometimes participate in the ruse by making secret agreements with borrowers to forego foreclosure. In such cases the *D'Oench, Duhme* doctrine is invoked by federal assignees of lenders to repel reliance on such agreements when the federal authority seeks to enforce the lender's remedy. Although the Fifth Circuit Court of Appeals held in *Patterson v. FDIC*[144] that the *D'Oench, Duhme* doctrine does not preclude reliance on Texas homestead law in spite of a false dis-

137. *In re* Bartlett, 149 B.R. 446 (Bankr. W.D. Tex 1992).
138. *Id.* at 450.
139. *In re* Magness, 160 B.R. 294, 298-99 (Bankr. N.D. Tex. 1993).
140. 997 F.2d 1084, 1094-95 (5th Cir. 1993).
141. 846 S.W.2d 5 (Tex. App.—Texarkana 1992, writ denied).
142. *Id.* at 8.
143. *See, e.g.*, NCNB Texas National Bank v. Carpenter, 849 S.W.2d 875, 880 (Tex. App.—Fort Worth 1993, n.w.h.); *In re* Stephens, 149 B.R. 414, 415 (Bankr. E.D. Tex. 1992).
144. 918 F.2d 540 (5th Cir. 1990).

claimer of homestead occupancy, in *Buchanan v. Federal Sav. & Loan Ins. Corp.*,[145] the same court went on to allow analogies to the doctrine to defeat a homestead claim when an innocent federal assignee of a lien on a homestead was allowed to foreclose it in spite of transactional flaws, though the lien was not enforceable by the original lender. Bankruptcy courts have been at some pains to distinguish between the two situations. *In re Hughes*[146] involved a disclaimer of homestead use of property in the course of a lien renewal; the property had nevertheless been continuously occupied as a business homestead since the lien was put on the property in 1982 and it had been used as a residential homestead since the owner's divorce in 1986. As concluded in *Patterson*, the *D'Oench, Duhme* doctrine does not preclude reliance on such facts.[147] In *In re Stephens*,[148] a similar case involving a homestead disclaimer given in the course of procuring a lien, the court distinguished the situations in *Patterson* and *Buchanan*. The language of the *Buchanan* case that the claimant had "lent [herself] to a [fraudulent] scheme or arrangement whereby [the lender] was or was likely to be misled"[149] does not constitute a fundamental difference between the judicial approaches in *Buchanan* and *Patterson*. *Patterson* involved a void lien on a homestead. *Buchanan*, on the other hand, dealt with a transactional flaw that did not bar a good faith assignee from relying on the security in spite of its homestead quality. In neither instance is the *D'Oench, Duhme* doctrine operative. In *Patterson* the sort of situation the doctrine *attacks* (the secret agreement with the lender) was not relied on by the claimant. *Buchanan* does not rest on the *D'Oench, Duhme* doctrine at all but on the standing of a good faith assignee to rely on the apparent regularity of the underlying transaction regardless of its involving a homestead claim.[150]

In re Freytag[151] dealt with a facet of a long-disputed question: To what extent, if at all, may an indebtedness secured by a homestead be adjusted and still be enforceable against the security? A couple bought an unimproved lot, made subject to their purchase money mortgage. In 1983, after discharging the lien on the lot, they procured a loan for the construction of a home secured by the lot and its pending improvements, and in 1985 they procured an additional loan to finish construction of the house. These loans were then consolidated and extended by the lender. In 1988 the couple negotiated to refinance the loan to achieve a payment of reduced interest only. Two notes were executed — one extending the existing note and another

145. 935 F.2d 83 (5th Cir. 1991); *see In re* Smith, 966 F.2d 978 (5th Cir. 1992). The result in these instances is like that of a lien given on a homestead for a valid purpose when the lien is unenforceable by the lender (because of lack of joinder of the borrowing spouses) but is enforceable by a bona fide purchaser from the lender. *See* Jones v. Male, 62 S.W. 827 (Tex. Civ. App.—Dallas 1901, no writ).

146. 153 B.R. 736 (withdrawn by publisher), 7 Tex. Bankr. Ct. Rep. 180 (Bankr. N.D. Tex. 1993).

147. *See supra* note 143 and accompanying text.

148. 149 B.R 414 (Bankr. E.D. Tex. 1992).

149. *Buchanan*, 935 F.2d at 85.

150. *Stephens*, 149 B.R. at 418-19.

151. 155 B.R. 150 (Bankr. N.D. Tex. 1993).

concerning the expenses of refinancing (taxes, insurance premiums, attorney's fees, and lender's fees). These notes secured by the lot and its improvements were consolidated and assigned to the new lender. The following year the consolidated note was modified to allow further reductions in payments. Six months later the couple filed for Chapter 7 bankruptcy, in which the validity of the security of the homestead lot was contested. In strained reliance on *Machicek v. Barcak*[152] the court concluded that the entire lien was valid because "[t]here was no new advance of cash or alteration of the basic debt obligation."[153] But there *was* a new advance to cover the cost of the extension of the note and to that extent, at least, the lien should have been invalid.

In *In re Henderson*[154] the debtor in a Chapter 7 bankruptcy proceeding moved under section 522(f)(1) of the Bankruptcy Code[155] to avoid a judicial lien for a nondischargeable debt which ostensibly impaired a homestead. Because the judgment debt was for an obligation which would not impose a lien on a Texas homestead, however, the court held that the lien had not attached and, therefore, there was no lien to remove.[156]

In *In re Aguirre*[157] the debtor had filed for bankruptcy under Chapter 13. Prior to filing his petition he had defaulted on a note properly secured on his homestead. The court held that the default could be cured under the Chapter 13 plan.[158]

D. LIEN STRIPPING

What is referred to in modern bankruptcy parlance as "lien stripping" means reduction of the recoverable amount of a lien to the present value of the security. In *Dewsnup v. Timm*[159] the United States Supreme Court concluded that a Chapter 7 bankrupt may not strip down the value of the lien, and thus the lienholder maintains the security subject to the terms of the loan and may realize as much as the security will bring on default. Through bankruptcy discharge, however, the debtor is relieved of personal liability for default. In *Nobleman v. American Savings Bank*[160] the high court went on to hold that a Chapter 13 plan cannot make a downward adjustment in a Texas debtor's undersecured home mortgage security, though the debtor may be allowed to cure prepetition defaults on a home mortgage by paying

152. 170 S.W.2d 715, 717 (Tex. 1949) (substitute of contractual equivalence in renewal of a mortgage on a homestead).
153. *Freytag*, 155 B.R. at 155.
154. 155 B.R. 157 (Bankr. W.D. Tex. 1992).
155. 11 U.S.C. § 522(f)(1) (1988).
156. *Henderson*, 155 B.R. at 159-60.
157. 150 B.R. 922 (Bankr. N.D. Tex. 1993).
158. *Id.* at 925.
159. 112 S. Ct. 773, 778 (1992) (under 11 U.S.C. § 506(d) (1988)). For a scathing student criticism of the case, see A. W. Bailey III., *Dewsnup v. Timm: Judicial Sleight of Hand in Statutory Construction of the Bankruptcy Code*, 7 B.Y.U. J. OF PUB. L. 319, 326-32 (1993). In *In re* Koppersmith, 156 B.R. 537, 538-39 (Bankr. S.D. Tex. 1993), *Dewsnup* was applied to a federal tax lien on a Texas homestead.
160. 113 S. Ct. 2106 (1993).

off arrearages over the life of the plan.[161]

The United States Supreme Court has not yet dealt with the conclusion reached by lower courts that a bankruptcy court is not precluded under a Chapter 13 plan from modifying a claim secured by more than a security interest in the debtor's principal residence.[162] The result, nevertheless, seems to be foreordained. Both the Fifth Circuit Court of Appeals[163] and a Texas bankruptcy court[164] have approached this problem only in holding that there was no additional security other than the homestead in the instances before them. A further effort to raise the point was made in *In re Evans*.[165] There it was apparently argued that the creditor was not one whose claim was "secured only by a security interest in real property that is the debtor's principal residence,"[166] because the creditor did not hold a security of any real property of the debtor but only on a mobile home, an item of personalty. It is scarcely surprising that the court rejected this argument as without merit.[167]

E. EXEMPT PERSONALTY

At its 1991 session the Texas legislature amended the Property Code[168] so that the encumbered portion as well as the unencumbered part of an item of personalty defined as exempt would be regarded as wholly exempt. The contrary decision of the Fifth Circuit appeals court was thereby undone.[169] Then, the United States Supreme Court concluded in *Owen v. Owen*[170] that a proper application of section 522(f)[171] had the same effect by allowing the avoidance of any "lien impair[ing] an exemption to which [a debtor] would have been entitled but for the lien itself."[172] In response to this decision agricultural lenders procured the assistance of Congressman Sarpaulius and others to propose an amendment to the Bankruptcy Code.[173] In anticipation of and conditional on the unlikely passage of that legislation, the Texas legislature passed an amendment to section 42.002(b) so that only the unencumbered part of personal property is defined as exempt.[174] But in harmony with continuing efforts to liberalize and extend exemptions generally[175] the

161. *Id.* at 2110-11; 11 U.S.C. § 1322(b)(5) (1988).

162. *See* Sapos v. Provident Inst. of Sav., 967 F.2d 918 (3d Cir. 1992); Wilson v. Commonwealth Mortgage Corp., 895 F.2d 123 (3d Cir. 1990) (under 11 U.S.C. § 1322(b)(2) (1988)).

163. *In re* Washington, 967 F.2d 173 (5th Cir. 1992).

164. *In re* Hernandez, 149 B.R. 441 (Bankr. E.D. Tex. 1993).

165. 6 Tex. Bankr. Ct. Rep. 96 (N.D. Tex. 1993).

166. 11 U.S.C. § 1322(b)(2) (1988).

167. *Evans*, 6 Tex. Bankr. Ct. Rep. at 97.

168. TEX. PROP. CODE ANN. § 42.001 (Vernon Supp. 1994).

169. *In re* Allen, 735 F.2d 290 (5th Cir. 1984); *see* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 SW. L.J. 1, 24-25 (1990).

170. 500 U.S. 305 (1991).

171. 11 U.S.C. § 522(f) (1988).

172. *Owen*, 111 S. Ct. at 1836-37.

173. H.R. 330 to amend 11 U.S.C. § 522 (1988). A similar bill had been introduced at the prior session of Congress and had died in committee.

174. Act approved May 17, 1993, 73d Leg., R.S., ch. 216, § 1, 1993 Tex. Gen. Laws 460.

175. TEX. CONST. art. 16, § 50 (amended in 1973 to extend homestead protection to single adults not entitled to a family homestead); TEX. PROP. CODE ANN. §§ 42.001, 42.002 (Vernon

legislature at the same session also amended the Insurance Code to exempt all benefits paid to an insured or other beneficiary of an annuity contract issued by an insurance company.[176]

At the 1991 regular legislative session, at which the amount of personal property exemptions was very substantially increased in the Property Code,[177] the Insurance Code[178] was also amended. Because the amendment to the Property Code was drawn without knowledge of the proposal to amend the Insurance Code, the provision of the Property Code amendment made the exemption of the value of a life insurance policy subject to the caps of $30,000 for an individual or $60,000 for a family claimant.[179] The draftsman of the Property Code amendments was not made aware of the proposed Insurance Code amendment to exempt the value of a life insurance policy to the owner and its proceeds to the beneficiary until after the House committee hearing on the Property Code amendments. Thus, in the state of turmoil that often prevails at the end of a legislative session, it did not seem practicable to the sponsor of the Property Code legislation to conform its provisions to those of the Insurance Code. The two amendments enacted by the same session, however, became law on different dates: the Property Code amendment on May 24, 1991, and the Insurance Code amendment on June 15, 1991. In an attempt to resolve this legislative conflict but unaware of all the legislative history that produced it, the court in *In re Bowes*[180] reached a very peculiar conclusion. The bankrupt family claimants sought to exempt about $57,000 of personal property assets in addition to an interest in life insurance with a value of approximately $77,000. The debtors in bankruptcy relied on the argument that the later act controls. The court, however, said that it did not perceive irreconcilable conflict between the statutes.[181] The court's "reconciliation" was to change both statutes consid-

1984) (1973 reform of personal property exemptions); TEX. REV. CIV. STAT. ANN. art. 3836 (*see* 1979 Tex. Gen. Laws 688) (1979 amendment exempting additional non-business vehicles) (repealed in 1983 and replaced by Tex. Prop. Code § 42.002); TEX. PROP. CODE ANN. § 41.001(a)(2) (Vernon 1984) (1984 amendment increasing urban homesteads to one acre in lieu of a value limitation); TEX. PROP. CODE ANN. § 42.0021 (Vernon Supp. 1994) (1987 extension of personal property exemptions to include retirement benefits without regard to the cap) (see M. Bruce Peele and Tracey Spillman, *Retirement Plans*, 56 TEX. B.J. 548 (June 1993)); TEX. PROP. CODE ANN. § 41.002 (Vernon Supp. 1994) (1989 amendment limiting urban homesteads to property "served by municipal utilities and fire and police protection"); TEX. PROP. CODE ANN. § 42.001(a) (Vernon Supp. 1994) (1991 amendment increasing personal property exemptions to $60,000 for families and $30,000 for single adults and generally broadening personal property exemptions with some exceptions); TEX. INS. CODE ANN. art. 21.22 (Vernon Supp. 1994) (1991 amendment exempting insurance proceeds to the owner or beneficiary of any policy, thus removing insurance policies from the cap).

176. Act effective Sept. 1, 1993, 73d Leg., R.S., ch. 685, § 20.20, 1993 Tex. Gen. Laws 2559, 2706 (amendment to Insurance Code art. 21.22).

177. Act approved May 24, 1991, 72d Leg., R.S., ch. 175, § 1, 1991 Tex. Gen. Laws 789, 789-90 (amendment to Property Code § 42.001).

178. Act approved June 15, 1991, 72d Leg., R.S., ch. 609, § 1, 1991 Tex. Gen. Laws 2217, 2217-18 (amendment to Insurance Code art. 21.22); *see* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 SW. L.J. 1831, 1858 (1992).

179. TEX. PROP. CODE ANN. § 42.002(a)(12) (Vernon Supp. 1994).

180. 160 B.R. 290 (Bankr. N.D. Tex. 1993).

181. *Id.* at 294.

erably by allowing the debtor a choice: either to claim $60,000 of exempt personalty under section 42.002 or $77,000 of exempt life insurance under article 21.22.[182] Put a little differently, the bankrupt can claim the value of the insurance policy in full but will lose all other personal property exemptions. The proper result is that the later and more specific enactment repealed the reference to life insurance policies in section 42.002(a)(12) of the Property Code, because the value of life insurance policies is no longer subject to any restriction.[183] An opinion of the Texas Attorney General confirms this result.[184]

Following the weight of national authority, a bankruptcy court has concluded[185] that a nonposessory, non purchase-money lien fixed on exempt personalty prior to the enactment of section 522(f)(2)(B)[186] is not avoidable even though the note and security agreement were renewed after the effective date of the section.[187] In another case[188] the same court, also following authority elsewhere, held that a similar lien given on exempt personalty after the adoption of the Bankruptcy Code but before its effective date is subject to avoidance.[189] Security interests created after the effective date of the Code are clearly subject to avoidance.[190]

In *Brink v. Ayre*[191] a creditor had intervened in a divorce proceeding and recovered a money judgment against the husband. The creditor subsequently brought suit for a turnover order, which was denied. On appeal of the creditor the court held that a turnover order is discretionary, and the creditor had failed to show an abuse of discretion.[192] Having met the requirements of the statute to show that the debtor has non-exempt property which cannot be readily attached or levied on,[193] the creditor must show, for example, that the debtor's non-exempt funds are in excess of the debtor's reasonable living expenses.[194]

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182. *Id.*

183. TEX. INS. CODE ANN. art. 21.22 (Vernon Supp. 1994).

184. Op. Tex. Att'y Gen. No. DM-125 (June 9, 1992):

> In accordance with the Legislature's express intent, we conclude the total exemption provided for the cash value of a life insurance policy in Article 21.22, Section 1 of the Insurance Code to prevail over the limited exemption provided in section 42.001 and 42.002 of the Property Code.

185. *In re* Davis, 148 B.R. 473 (Bankr. N.D. Tex. 1992).

186. 11 U.S.C. § 522(f)(2)(B) (1988), a part of the Bankruptcy Code signed by the President on November 6, 1978, effective October 1, 1979.

187. *Davis*, 148 B.R. at 476-77. The court refers to each renewal as "a novation because different terms attended each note." *Davis*, 148 B.R. at 476. The court has apparently extended the definition of "novation" to include circumstances where an old debt is completely rescinded and a new obligation substituted. *See In re* Butler, 160 B.R. 155, 158 (Bankr. D. Idaho 1993).

188. *In re* Neal, 148 B.R. 468 (Bankr. N.D. Tex. 1993).

189. *Id.* at 471-72.

190. *Davis*, 148 B.R. at 476.

191. 855 S.W.2d 44 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.).

192. *Id.* at 46.

193. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon 1986).

194. *Brink*, 855 S.W.2d at 46.

IV. DIVISION ON DIVORCE

A. JURISDICTION

In *Redus v. Redus*[195] the couple had been divorced in 1979 by a court in California, the husband's domicile. The wife, who had never lived in California, did not appear in the California proceeding. In 1988 the ex-wife brought suit in Texas for partition of the ex-husband's military retirement benefits, which were unvested at the time of the divorce and were not then recognized as divisible under California law. The Texas trial court's denial of a partition was reversed and remanded by the Austin Court of Appeals.[196] The appellate court held that the California decree did not have the effect of tacitly disposing of the military retirement benefits in favor of the husband because the court lacked jurisdiction to dispose of personal property without personal jurisdiction over the wife.[197] About six months after that first *Redus* decision, Congress enacted an amendment to the Uniformed Services Former Spouses Protection Act (USFSPA)[198] to preclude suit for partition of military retirement benefits not dealt with in decrees of divorce which were final before June 26, 1981. On remand, the trial court accepted the ex-husband's argument that this statute preempted the jurisdiction of state courts to partition the benefits. On appeal, the Austin court reversed a second time, holding that the federal statute bars subsequent partition suits only when the court rendering the decree of divorce had jurisdiction to deal with the petitioning ex-spouse's interest.[199] The California divorce court lacked that jurisdiction.

Two recent cases dealt with the enforcement of foreign alimony decrees. *Garrett v. Garrett*[200] was a straight forward case brought by the ex-wife to recover arrears in payments of alimony ordered by an Ohio court in 1972. The ex-husband had made payments until 1975 and did not resume remittances until 1986. The trial court apparently applied the ten years' statute of limitation on the enforcement of judgments[201] and gave judgment in favor of the ex-wife. The Tyler Court of Appeals affirmed the judgment.[202] The foreign decree was final and worthy of full faith and credit, though permanent alimony is not a type of relief given by Texas divorce courts.[203]

Knighton v. I.B.M.[204] was a more complicated case. After the husband's divorce in Florida in 1983, his employer transferred him to Texas where he became domiciled. The Florida decree required the ex-husband to make

195. 852 S.W.2d 94 (Tex. App.—Austin 1993, writ denied).

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

197. *Redus*, 794 S.W.2d at 419-20.

198. 10 U.S.C. § 1408(c)(1) (Supp. III 1991).

199. *Redus*, 852 S.W.2d at 96.

200. 858 S.W.2d 639 (Tex. App.—Tyler 1993, n.w.h.).

201. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986).

202. *Garrett*, 858 S.W.2d at 641.

203. *See* Missouri Pac. Ry. Co. v. Whipsker, 77 Tex. 14, 13 S.W. 639 (1890); Baumgardner v. Southern Pac. Co., 177 S.W.2d 317 (Tex. Civ. App.—El Paso 1943, no writ).

204. 856 S.W.2d 206 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

payments for the support of his ex-wife. As a consequence of his failure to pay, the Florida court entered an income deduction order requiring the employer to make weekly payments to the ex-wife from the ex-husband's salary and on the ex-husband's retirement to make monthly payments from his retirement plan. The ex-husband did not appeal the Florida court's order. Rather, in Texas the ex-husband filed suit against his ex-wife, his employer, and the trustees of his retirement plan to contest enforcement of the Florida decree under Texas law. The trial court granted summary judgment in favor of the defendants, and the ex-husband appealed, asserting that the Florida judgment can be enforced only by employing Texas collection procedures. The finality of the Florida order was not contested. Pointing out that in a different context it had previously given effect to a foreign order (supported by the order of a federal court sitting in Texas) that, in effect, required garnishment of a Texas employee's wages,[205] the appellate court held that a Texas court needed to do nothing to give the Florida decree full faith and credit.[206] One judge dissented on the ground that judgment against the ex-husband deprived him of his freedom from garnishment of wages under the Texas Constitution.[207]

B. DIVORCE PROCEDURE

If a party[208] wishes to object to a visiting judge sitting for the judge to whose court a case is assigned, the objection must be filed at the first hearing of the case,[209] though that hearing may be devoted to preliminary motions of a more routine nature.[210]

In *Young v. Young*[211] a suit for divorce was filed in November, 1987 and the wife paid her jury fee in May, 1988.[212] Sometime later the parties agreed to the appointment of a master to hear their suit that involved the validity of a 1983 marital partition leaving no community property for division. In his finding the master found that the wife had voluntarily entered into the partition. The wife filed exceptions to the master's recommendations. After the hearing at which the wife asserted that she was entitled to a trial de novo, the trial court denied the wife's request and adopted the master's recommen-

205. Texaco, Inc. v. Le Fevre, 610 S.W.2d 173, 176 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

206. *Knighton*, 856 S.W.2d at 209-10.

207. *Id.* at 211-12 (citing TEX. CONST. art XVI, § 28).

208. In Avila v. Avila , 843 S.W.2d 280, 281-82 (Tex. App.—El Paso 1992, no writ), the court reaffirmed a policy of strict compliance with the rules of citation when the process is under direct attack upon a default judgment.

Several jurisdictions, including Arizona, California, Colorado, and Illinois, have enacted provisions imposing an automatic stay against certain acts of the parties with respect to each other, their children, and their property. *See* Jeff Atkinson, *Automatic Stays Bring New Balance to Divorce Actions*, 79 A.B.A. J. 98 (Apr. 1993).

209. TEX. GOV'T CODE ANN. § 74.053 (Vernon Supp. 1994).

210. Heller v. Heller, No. 05-91-91598-CV, 1992 WL 389789 (Tex. App.—Dallas, Dec. 29, 1992, no writ) (not designated for publication).

211. 854 S.W.2d 698 (Tex. App.—Dallas 1993, writ denied).

212. A written request for a jury made more than 30 days before trial is presumed to be made "a reasonable time before trial." TEX. R. CIV. P. 216(a); Grossnickle v. Grossnickle, 865 S.W.2d 211 (Tex. App.—Texarkana 1993, n.w.h.).

dation. On her appeal the court held that the wife was entitled to a jury trial on the issue of voluntary execution of the partition.[213]

The appellate court concluded that the parties' agreement came within Rule 171,[214] the language of which the agreement generally followed;[215] hence, the reference was binding as to all matters except those to which an objection was taken.[216] The wife was, therefore entitled to a jury trial on her objections.[217] The court's opinion indicates that if parties agree to a trial before a master, a clear agreement should be expressed as to which matters the parties agree to be bound without a trial de novo.

In *Celso v. Celso*[218] the husband objected to the wife's being allowed to testify with respect to the character of particular property after she had failed to answer interrogatories.[219] The appellate court, nevertheless, concluded that a party may come within the "good cause" exception to the rule precluding testimony in that circumstance even though the party was not listed in response to the interrogatory as a person with knowledge of relevant facts.[220]

A wife's letter to the court by way of explanation of the parties' separation and suggesting that professional counseling could achieve a reconciliation may constitute a sufficient answer to the husband's petition to entitle the wife to notice of any subsequent proceeding. The court said in *Harris v. Harris*[221] that the wife's letter, which (along with its envelope) showed her name and address and was otherwise referable to the petition and had been put in the court's file of the case, should have been treated as a sufficient pro se answer to preclude a default judgment.[222] In *Vannerson v. Vannerson*[223] another panel of the same court divided sharply on whether the husband had shown a conscious indifference toward attending the scheduled hearing so that he should be denied a new trial.[224] In her dissent from the trial court's finding of sufficient probative evidence of indifference on the husband's part, Justice O'Connor[225] regarded the husband's failure to appear as the result of accident or mistake.

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213. *Young*, 854 S.W.2d at 702.
214. TEX. R. CIV. P. 171.
215. *Young*, 854 S.W.2d at 701.
216. *Id.*
217. *Id.*
218. 864 S.W.2d 652 (Tex. App.—Tyler 1993, n.w.h.).
219. TEX. R. CIV. P. 215(5).
220. *Id.*; *Celso*, 864 S.W.2d at 654. In Saxon v. Daggett, 864 S.W.2d 729 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.) (modification of conservatorship case) the appellate court granted relief from the trial court's denial of a husband's right to conduct discovery after he had failed to comply with the court's order to pay interim attorney's fees, because the attorney's fees did not relate to discovery.
221. 850 S.W.2d 241 (Tex. App.—Houston [1st Dist.] 1993, no writ).
222. *Id.* at 243; *cf.* Letersky v. Letersky, 820 S.W.2d 12 (Tex. App.—Eastland 1991, no writ), *noted in* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 46 SMU L. REV. 1475, 1505 (1993) (letter informing court of prior proceeding in Scotland did not constitute general appearance in Texas proceeding).
223. 857 S.W.2d 659 (Tex. App.—Houston [1st Dist.] 1993, writ denied).
224. *Id.* at 677-78.
225. *Id.* (O'Connor, J., dissenting).

> Trial settings are rescheduled daily in Texas with this same scenario: A lawyer calls the court, the court informs the lawyer [that] if the other party will agree to a reset[ing], the case will be passed, the lawyer calls the other lawyer, and then calls the court again to tell the court the other lawyer agreed. The only difference in this case is that the party, not his lawyer, called the court and the other lawyer.
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> . . . As [the husband] said in his brief, his divorce case had been pending for over 30 months, and he had to leave town occasionally for business. [He] had never missed another hearing. [He] swore that he had return airline tickets with him and would have flown back to Houston in time for the hearing if he had thought [that] his presence was required. After talking to [his lawyer], he believed they agreed to reset.
>
> . . . [The husband had given opposing counsel] his telephone number in Washington, D.C., and asked her to call him if he needed to appear. [The judge, however,] testified [that] he instructed [opposing counsel] to tell [the husband that] the trial was scheduled to go forward unless it was passed by all the parties.[226]

Justice O'Connor nonetheless acknowledged that there was some evidence that the ex-wife-plaintiff would suffer injury by the granting of a new trial.[227]

In *Holland v. Holland*[228] sworn inventories of property were filed in the court records and "were referred to extensively throughout trial" but were not introduced in evidence.[229] The trial court, nevertheless, stated that it was taking judicial notice of the entire file in the case. In the absence of any provision in the Rules of Evidence[230] to the contrary, the appellate court concluded that the trial court may take judicial notice of its own file.[231] The court also noted that in order to preserve a point of error with respect to the trial court's failure to make a specific finding of fact or law, counsel for the objecting party must file a bill of exception for failure to make the requested findings.[232] It was further noted in *Brooks v. Brooks*[233] that even if such a point of error is properly preserved, it cannot be relied on for reversal by a party who has not shown injury as a result of the alleged error.[234] In *Brooks* the appeal also addressed the trial court's power to make an effective *nunc pro tunc* judgment. In this instance the *nunc pro tunc* judgment reflected conclusions reached on the court's docket sheet and therefore corrected a clerical error rather than a judicial one.[235]

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226. *Id.*

227. *Id.* at 678; *see* Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 391-92, 133 S.W.2d 124, 126 (1939). The majority of the court had concluded that the ex-husband had failed to show that the respondent-ex-wife *would not* suffer injury as they interpreted *Craddock* to require. *Vannerson*, 857 S.W.2d at 665-66.

228. No. C14-92-00873-CV, 1993 WL 291551 (Tex. App.—Houston [14th Dist.], Aug. 5, 1993, n.w.h.) (not designated for publication).

229. *Id.* at *3.

230. TEX. R. CIV. EVID. 201.

231. *Holland*, 1993 WL 291551, at *3 (citing Smith v. Smith, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied); National County Mut. Fire Ins. Co. v. Hood, 693 S.W.2d 638, 639 (Tex. App.—Houston [14th Dist.] 1985, no writ)).

232. *Holland*, 1993 WL 291551, at *1.

233. 864 S.W.2d 645 (Tex. App.—Tyler 1993, n.w.h.).

234. *Id.* at 646.

235. *Id.* at 647. *See* McLendon v. McLendon, 847 S.W.2d 601 (Tex. App.—Dallas 1992,

A similar point was made in *Reynolds v. Reynolds*,[236] where a husband appealed from a second post judgment enforcement order. On the wife's first motion, the trial court ordered enforcement of the couple's divorce decree, requiring the husband to turn over certain items to his ex-wife. The husband did not appeal this order. Later the next year, the wife filed a second motion for enforcement, which the trial court denied. The husband appealed this order but argued that he was actually appealing the first order which he claimed did not become final until the trial court signed the second order. The Dallas Court of Appeals held that the first enforcement order was final and that the time for appealing it had expired.[237] Because the second order was denied and, therefore, did not prejudice the husband, the husband had no standing to appeal.[238]

C. AGREEMENTS INCIDENT TO DIVORCE

Agreements between spouses for the settlement of their disputes on divorce can be reached in various ways. Ordinarily an agreement incident to divorce is the product of negotiations between the parties involving disclosure of assets and acceptance of contractual terms. Counsel for the parties have the responsibility to prepare the agreement for execution. *McCubbin v. Tate*[239] was a post-divorce dispute with respect to a property settlement in which a particular tract of community land was inadvertently omitted from the agreement by the husband's counsel. During marriage the tract of community property was held in the husband's name, and it had been substantially improved during the marriage by the husband's wholly owned separate corporation. Although the husband had failed to apprise the wife of the community character of the tract, the parties had agreed that the property would belong to the husband as part of the settlement. The ex-wife petitioned for partition of the tract as omitted from the settlement, and the ex-husband sought reformation of the agreement to award the tract to him as agreed. The court held that the husband's non-fraudulent failure to divulge the community character of the property was not a bar to his right to reformation.[240] It may be inferred that, in the court's view, if the wife on the eve of divorce was concerned about the character of the property in question, she had the responsibility under these circumstances to ascertain it.

A similar dispute to set aside a division of property was presented by bill of review in *Lee v. Johnson*.[241] The ex-wife complained that her former husband had mischaracterized and undervalued 9,000 shares of stock and a

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writ denied), *discussed in* Ames v. Ames, 860 S.W.2d 590, 594 (Tex. App.—Amarillo 1993, n.w.h.).

236. 860 S.W.2d 568 (Tex. App.—Dallas 1993, writ denied).

237. *Id.* at 570.

238. *Id.* at 570-71 (citing Buchele v. Woods, 528 S.W.2d 95, 98 (Tex. Civ. App.—Tyler 1975, no writ)).

239. 844 S.W.2d 913 (Tex. App.—Tyler 1992, no writ). Marcuz v. Marcuz, 857 S.W.2d 623 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.), was a somewhat similar dispute which turned on the admissibility of parole evidence to show the actual intent of the parties.

240. *Id.* at 916.

241. 858 S.W.2d 58 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.).

tract of land in their prior divorce proceeding. The ex-wife and her counsel had nevertheless accepted the characterization of the property as the husband's as well as his appraisal, and the ex-husband had not interfered in their handling of the records supporting his assertions which were accepted by the trial court. The appellate court affirmed the trial court's denial of relief for lack of extrinsic fraud.[242]

In *McLendon v. McLendon*[243] the parties' agreement was reached in the course of trial of their divorce, was dictated on the record in open court, and the court entered judgment on the basis of the agreement under Rule 11.[244] In his appeal from the judgment the husband relied principally on his assertion that the agreement was incomplete in that some details were left unresolved. The appellate court concluded that the divorce court's supplying such details to complete the judgment did not detract from the agreement of the parties.[245] Further, the court held that the mode of entry into an agreed judgment as to property did not conflict with the provisions of Family Code section 3.631[246] for entering into an agreement incident to divorce.[247] Thus, because the agreement was enforceable under Rule 11, no objection could be made that it failed because it was not in writing as required by Section 3.631 and Business and Commerce Code section 26.01.[248] (It may be remarked, however, that in such cases some attorneys require their clients to initial the reporter's tape of the proceedings.) The appellate court ultimately concluded that such clerical discrepancies as there were between the court's oral judgment embracing the parties' agreement and the judgment signed by the judge could be corrected by the appellate court under Appellate Rule 80(b)(2).[249] The court found that all the errors (though extensive) were merely clerical.[250]

In *Ames v. Ames*[251] the divorce court ordered the disputing parties to mediation under chapter 154 of the Civil Practice and Remedies Code. The parties proceeded to mediation and reached a settlement in writing, which under the Code is a binding contract.[252] Although the husband purported to repudiate the agreement as one made under section 3.631, the court nevertheless embodied the agreement in its judgment. On the husband's appeal, the court held that the agreement could not be repudiated because made

242. *Id.* at 60.
243. 847 S.W.2d 601 (Tex. App.—Dallas 1992, writ denied).
244. TEX. R. CIV. P. 11.
245. *McLendon*, 847 S.W.2d at 606-07.
246. TEX. FAM. CODE ANN. § 3.631 (Vernon 1992).
247. *McLendon*, 847 S.W.2d at 608; *see* Milwee v. Milwee, 757 S.W.2d 429, 431 (Tex. App.—Dallas 1988, no writ); Dehnert v. Dehnert, 705 S.W.2d 849, 850 (Tex. App.—Beaumont 1986, no writ); Cluck v. Cluck, 699 S.W.2d 246, 248-49 (Tex. App.—San Antonio 1988, writ ref'd n.r.e.).
248. *McLendon*, 847 S.W.2d at 608; TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1987).
249. *McLendon*, 847 S.W.2d at 610; TEX. R. APP. P. 80(b)(2); Catlett v. Catlett, 630 S.W.2d 478, 483 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).
250. *McLendon*, 847 S.W.2d at 610-14.
251. 860 S.W.2d 590 (Tex. App.—Amarillo 1993, n.w.h.).
252. TEX. CIV. PRAC. & REM. CODE § 154.071(a) (Vernon Supp. 1994).

"binding by some other rule of law" as provided in section 3.631, but because the trial court made significant additions to the terms of the agreement in the decree, the decree could not stand.[253] In response to the wife's argument that the holding in *McLendon* allowed the appellate court to maintain the agreement without the trial court's additions, the court said that *Ames* and *McLendon* involved essentially dissimilar situations in that *McLendon* dealt principally with correction of clerical errors while maintaining the agreement in *Ames* would have required excision of substantive elements of the decree.[254]

An agreement as to property and responsibilities of parties made in anticipation of divorce is construed in accordance with the law of contracts whether or not the terms of the agreement are incorporated in the divorce decree.[255] Thus the entire contract must be examined in order to give effect to the full intent of the parties.[256] In ascertaining intent the court will not look further than to the terms of the contract itself, however, if those terms are unambiguous.[257] A dispute in *Kurtz v. Jackson*[258] turned on the interpretation of a reference to cohabitation of a former spouse in relation to use of the former family home. This dispute serves as a reminder that draftsmen should make it clear whether the term is to apply in the case of the ex-spouse's remarriage.[259]

In *Rousseau v. Sprecher*[260] the divorce decree provided for monthly payment for the wife's support without any limitation as to duration of payments. The decree was signed by the court and by both spouses as "approved." The appellate court did not mention any agreement reached prior to trial or during the trial, but one may surmise that an oral agreement was reached, at least during trial, that was mirrored by the decree. The husband may have thought that he had agreed to make support payments until the ex-wife remarried, for he stopped paying when she remarried. But the writing did not include this limitation. Relying on *Mackey v. Mackey*[261] in which an oral agreement had been reached by the parties and was reflected in the decree by consent of the parties, the court held that the requirements of section 3.631 were met by the decree in *Rousseau*.[262]

253. *Ames*, 860 S.W.2d at 592-93 (citing Vineyard v. Wilson, 597 S.W.2d 21, 23 (Tex. Civ. App.—Dallas 1980, no writ)).

254. *Id.* at 594.

255. Allen v. Allen, 717 S.W.2d 311, 313 (Tex. 1986); Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

256. Kurtz v. Jackson, 859 S.W.2d 609, 611 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.).

257. *Id.*

258. 859 S.W.2d 609 (Tex. App. - Houston [1st Dist.] 1993, n.w.h.).

259. *Id.* at 612. The dispute in Griffith v. Griffith, 860 S.W.2d 252, 254 (Tex. App.—Tyler 1993, n.w.h.), also suggests that further disagreement can be avoided by agreement as to the value of particular items of property to be supplied by one spouse to the other.

260. 843 S.W.2d 300 (Tex. App.—Houston [14th Dist.] 1992, no writ).

261. 721 S.W.2d 575, 578-79 (Tex. App.—Corpus Christi 1986, no writ).

262. *Rousseau*, 843 S.W.2d at 301.

D. MAKING THE DIVISION

As usual, during the past year challenges of abuse of discretion in the divisions of community property were generally rejected,[263] in most instances in unpublished opinions.[264] In only one instance was such a complaint successful and in that case the opinion was unpublished.[265] Although such a decision may encourage baseless appeals,[266] the dissemination of such information provides guidance to the bench and bar.

Attorney's fees are ordinarily fixed as an element of a division of property,[267] but there is still some room for granting an attorney's fee as a contract for necessaries. No appellate court in recent years, however, has undertaken to make this point. In *Golias v. Golias*,[268] in which the appellate court sustained the grant of large attorney's fees on the ground that they were largely attributable to issues concerning the custody of children, the court seemed to be searching for a better rationale. In an instance in which attorney's fees were denied, the appellate court pointed out that the attorney was entitled to findings of fact and law for purposes of appeal.[269]

E. ENFORCEMENT OF DIVORCE DECREES

The power of a Texas divorce court to order one spouse to execute an instrument creating a debt has never been thoroughly analyzed or defined, though from time to time intermediate appellate courts have confirmed the authority of trial courts to order one spouse to execute a promissory note or

263. Golias v. Golias, 861 S.W.2d 401 (Tex. App.—Beaumont 1993, n.w.h.); Vannerson v. Vannerson, 857 S.W.2d 659 (Tex. App.—Houston [1st Dist.] 1993, writ denied); Falor v. Falor, 840 S.W.2d 683 (Tex. App.—San Antonio 1992, no writ).

264. Mathisen v. Mathisen, No. 01-92-0970-CV, 1993 WL 330998 (Tex. App.—Houston [1st Dist.] Aug. 31, 1993, n.w.h.); Vann v. Vann, No. 01-91-01138-CV, 1993 WL 177616 (Tex. App.—Houston [1st Dist.] May 27, 1993, n.w.h.); Goodwin v. Goodwin, No. B14-92-00047-CV, 1993 WL 347749 (Tex. App.—Houston [14th Dist.] Nov. 25, 1993, n.w.h.); McGaffey v. Trevisani, No. B14-92-00722-CV, 1993 WL 271021 (Tex. App.—Houston [14th Dist.] July 22, 1993, n.w.h.); Holland v. Holland, No. C14-92-00873-CV, 1993 WL 291551 (Tex. App.—Houston [14th Dist.] Aug. 5, 1993, n.w.h.); Heller v. Heller, No. 05-91-01598-CV, 1993 WL 389789 (Tex. App.—Dallas, Dec. 29, 1992, n.w.h.).

265. Knoeppel v. Knoeppel, No. 05-92-00089-CV, 1993 WL 96128 (Tex. App.—Dallas, Apr. 5, 1993, n.w.h.).

266. In a frivolous motion to modify child custody the Beaumont Court of Appeals held that attorney's fees are taxed as costs under TEX. FAM. CODE ANN. § 11.18 (Vernon 1986), and on review the abuse of discretion standard is applicable to such fees. Warchol v. Warchol, 853 S.W.2d 165, 169 (Tex. App.—Beaumont 1993, n.w.h.); *see also* Kurtz v. Jackson, 859 S.W.2d 609, 612-13 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.). It has been proposed that a correlative provision be added to chapter 3 of the Family Code to cover interspousal suits. *See also* Mathisen v. Mathisen, No. 01-92-0970-CV, 1993 WL 330998, slip op. at 11 (Tex. App.—Houston [1st Dist.] Aug. 31, 1993, n.w.h.) (not designated for publication).

267. Carle v. Carle, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950).

268. 861 S.W.2d 401, 402 (Tex. App.—Beaumont 1993, n.w.h.).

269. Heafner & Assoc. v. Koecher, 851 S.W.2d 309, 313 (Tex. App.—Houston [1st Dist.] 1992, no writ). In Parliament v. Parliament, 860 S.W.2d 144, 147 (Tex. App.—San Antonio 1993, writ denied), the court interpreted claims for attorney's fees and expert witness's fees in light of the terms of the property settlement agreement.

to create a mortgage on real property[270] in favor of the other spouse.[271] In the first instance the court can achieve the same result by awarding a money judgment. In the latter case the court can fix a lien on specific realty, and the favored spouse may give notice to all prospective purchasers and creditors by recording the judgment.[272] In *Whittington v. Whittington*[273] the trial court sought to equalize the division of interests of the spouses by awarding the wife a money judgment of $49,500 for a half interest in the community equity in a business property secured by a purchase money note to be signed by the husband, who was awarded the realty. As ordered, the husband executed a mortgage by deed of trust on the property. The divorce court apparently assumed that the husband would execute the note, though he was not ordered to do so. After the divorce a prior mortgage holder foreclosed a lien on the property, and the ex-wife brought suit to clarify the judgment. The trial court exonerated the ex-husband from paying the amount owed because the superior lien had been foreclosed. The Beaumont Court of Appeals reversed the judgment and noted that the divorce court's power was limited to enforcing the unambiguous divorce decree by ordering the ex-husband to execute the note.[274] The court went on to say that ordering the husband to execute the note is only "documentation of the note evidenced in the decree."[275] A divorce court's power to order a spouse to execute a note (unless agreed to by the spouse) is, however, questionable.[276] Because a court cannot enforce a debt by imprisonment,[277] can it order the creation of a debt and enforce noncompliance by imprisonment? In his dissent in *Whittington*[278] Chief Justice Walker pointed out that a note and lien (though related to the same indebtedness) constitute distinct and separable obligations. The existence of a lien need not be supported by a note and, in the absence of realty on which to fix a lien, a divorce court may merely award a monetary judgment to equalize division of property.[279]

In *Jenkins v. Jenkins*[280] the same court dealt with another trial court's oversight. In 1984 the wife's attorney proposed a property settlement agreement by which the husband (unrepresented by counsel) thought that he received his retirement benefits.[281] The decree, however, awarded him only "wearing apparel, jewelry and other personal effects" in his possession or

270. *See* Joseph W. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 438 (1976).

271. *See* Smith v. Smith, 715 S.W.2d 154, 161 (Tex. App.—Texarkana 1986, no writ) (order to execute a deed of trust).

272. *See* Prewitt v. United States, 792 F.2d 1353, 1355 (5th Cir. 1986).

273. 853 S.W.2d 193 (Tex. App.—Beaumont 1993, n.w.h.).

274. *Id.* at 195.

275. *Id.*

276. *See* Smith v. Smith, 715 S.W.2d 154, 161 (Tex. App.—Texarkana 1986, no writ) (order to execute a deed of trust).

277. TEX. CONST. art. XVI, § 28; *Ex parte* Yates, 281 S.W.2d 377 (Tex. 1965).

278. *Whittington*, 853 S.W.2d at 195-200 (Walker, C.J., dissenting).

279. *Id.* at 199-200.

280. 856 S.W.2d 820 (Tex. App.—Beaumont 1993, n.w.h.).

281. *Id.* at 821 n.1.

control.[282] In the ex-wife's suit for partition of the unspecified retirement benefits, the trial court held that the language of the divorce decree was meant to include the ex-husband's retirement benefits and the appellate court sustained that conclusion over a strenuous dissent by Justice Burgess.[283] Because the decision was evidently reached by an appraisal of testimony of the parties, with proper pleading the trial court could have concluded that the property settlement agreement should be reformed to rectify a mutual mistake. In an effort to do substantial justice under the facts, however, the appellate court seems to have used the law of contracts rather than the law of judgments to interpret the judgment.

The Fort Worth Court of Appeals followed what may be termed the historical approach in its interpretation of a judgment in *Barnard v. Barnard*.[284] In a 1978 divorce decree the wife was awarded 168/320[285] of the husband's retirement benefits. The ex-husband did not retire until 1982. In 1991 the ex-wife filed a motion to enforce the 1978 decree. Reversing the trial court's decision, the appellate court held that the judgment should be interpreted in accordance with the law in effect at the time the decree was entered,[286] disregarding the 1983 decision of the Texas Supreme Court in *Berry v. Berry*,[287] holding that for the purpose of division the community property interest in retirement benefits must be valued at the date of divorce. Applying 1978 law to the decree, the Fort Worth court concluded that the ex-wife was entitled to 168/320 of *all* of the ex-husband's retirement benefits.[288] Thus, the principle of res judicata was actually applied.

Sutherland v. Cobern[289] concerned an even more venerable decree of 1971, which had already provoked disputes producing four reported decisions.[290] In the divorce decree the ex-wife had been awarded an undivided interest in the "owned property right" of the husband in his naval retirement benefits. Because there had been a prior division of the ex-husband's benefits, he asserted res judicata as a defence to the ex-wife's suit for partition. The appellate court rejected this argument on the ground that the ex-husband had argued (and had therefore judicially conceded) that partition was the proper remedy in response to the ex-wife's motion for contempt.[291] Thus, the ex-husband was said to be estopped from asserting res judicata.[292] The court also held that the ex-wife was entitled to have cost of living in-

282. *Id.* at 822.
283. *Id.*
284. 863 S.W.2d 770 (Tex. App.—Fort Worth 1993, n.w.h.).
285. The ratio of months of employment during marriage to the total number of months of employment prior to retirement.
286. *Bernard*, 863 S.W.2d at 774.
287. 647 S.W.2d 945, 947-48 (Tex. 1983).
288. *Barnard*, 863 S.W.2d at 774.
289. 843 S.W.2d 127 (Tex. App.—Texarkana 1992, no writ).
290. *Ex parte* Sutherland, 515 S.W.2d 137 (Tex. Civ. App.—Texarkana 1974, writ dism'd w.o.j.); *Ex parte* Sutherland, 526 S.W.2d 536 (Tex. 1975); Sutherland v. Sutherland, 560 S.W.2d 531 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); Sutherland v. Sutherland, 563 F. Supp. 442 (E.D. Tex. 1983).
291. *Sutherland*, 843 S.W.2d at 131.
292. *Id.*

creases received by the ex-husband after the original decree.[293]

In *Tippit v. Tippit*[294] res judicata was successfully asserted to a reimbursement claim. During the marriage the husband borrowed money from the wife's parents and gave them a note for that amount. It was agreed between the borrower and the lenders that if the husband did not repay the note, it would be repaid from a trust fund created by the parents for the benefit of the wife. The note was unpaid at the time of divorce but in her petition for divorce the wife claimed a right of reimbursement for the payment of the note. The agreed judgment of divorce provided that "all matters in controversy . . . were submitted to the Court . . . [and that the] Court finds the [division of assets] is just and right, having due regard for the rights of each party."[295] After the divorce the note was paid from the trust and the ex-wife brought suit for that payment. The court held that the claim for reimbursement was res judicata.[296]

In *Carter v. Charles*,[297] however, there was no basis for a defense of res judicata or a counter argument of estoppel. The divorce court had divided community properties as tenancies in common in varying fractions between the former spouses. The ex-wife later filed suit for partition of the properties. Evidently misunderstanding the nature of the suit because of her alternative plea for clarification of the divorce decree under section 3.70, the trial court dismissed the ex-wife's proceeding as inappropriate under section 3.90, though her suit was not based on that section. In reversing and remanding the suit, the appellate court pointed out that section 3.90 of the Family Code was inapplicable.[298] The court went on to say that even if section 3.90 is applicable to particular facts, a right of partition under Property Code section 23.001[299] is not barred.[300] That dictum is somewhat misleading. If section 3.90 is properly invoked by the other ex-spouse in response to a petition for partition, partition under the Property Code is barred.

In *Sharman v. Schuble*[301] an ex-wife sought a writ of mandamus to compel a court to disburse the proceeds of sale of her former husband's homestead. Though the trial judge's order to sell the home had been carried out by a receiver and the proceeds had been deposited in the registry of the court, the judge refused to distribute all of the proceeds because of a pending motion by the ex-husband that his former wife had not delivered certain personalty as also required by the decree. Though the trial court's division of the proceeds of sale could have been made conditional on compliance with the court's order to deliver the personalty, the order was not conditional.[302]

293. *Id.*
294. 865 S.W.2d 624 (Tex. App.—Waco 1993, n.w.h.).
295. *Id.* at 626.
296. *Id.*
297. 853 S.W.2d 667 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.).
298. *Id.* at 671.
299. TEX. PROP. CODE ANN. § 23.001 (Vernon 1984).
300. *Carter*, 853 S.W.2d at 671.
301. 846 S.W.2d 574 (Tex. App.—Houston [14th Dist.] 1993, no writ).
302. *Cf.* Grimm v. Grimm, 864 S.W.2d 160 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.) (property settlement agreement with conditions precedent to enforcement).

The appellate court, therefore, concluded that the decree could not be altered.[303] In effect, the court refused to widen the exception to authorized alteration of a judgment as applied in cases of specific monetary awards in exchange for relinquishment of claims to community realty.[304] In those exceptional circumstances trial courts have been allowed to put a lien on the property by way of clarification of the original decree.

The divorce decree in *Pierce v. Pierce*[305] provided for an equal division of the husband's recovery in an action for breach of contract commenced during the marriage. After the divorce the ex-husband amended his petition to assert additional causes of action for breach of the duty of good faith and fair dealing and for intentional infliction of emotional distress. The ex-husband's suit was not adjudicated but was settled for a lump sum. The ex-wife then filed a motion for enforcement and clarification of the divorce decree with respect to her share of the recovery and for an alleged fraud of the ex-husband, evidently based on his broadening of the scope of the action and his manner of settling it. The ex-husband had been paid a lump sum amount for his other causes of action with no mention of the action for breach of contract. In an apparent attempt to rectify what it perceived as a fraud on the part of the ex-husband, the trial court directed that sixty percent of the ex-husband's settlement be allocated to the breach of contract suit and thus made subject to the decree. On the ex-husband's appeal the El Paso Court of Appeals held that the divorce decree was not ambiguous and the ex-husband's settlement could not make it so; the ex-wife's claim could not be resolved by a motion to clarify the divorce decree but should be determined by an independent action.[306]

In *Kurtz v. Jackson*[307] the trial court granted attorney's fees[308] to the respondent-ex-wife who had counterclaimed in the ex-husband's suit to enforce a property settlement agreement. The ex-husband appealed this award, *inter alia* because the fees were not segregated as between costs of responding to the claim and asserting the counterclaim. The appellate court

303. *Sharman*, 846 S.W.2d at 576.

304. *See* Reiter v. Reiter, 788 S.W.2d 201 (Tex. App.—Fort Worth 1990, writ denied); Bowden v. Knowlton, 734 S.W.2d 206 (Tex. App.—Houston [1st Dist.] 1987, no writ); *see also* Spradley v. Hutchison, 787 S.W.2d 214 (Tex. App.—Fort Worth 1990, writ denied) (trial court ordered the ex-wife to pay the amount owed the ex-husband after she declined the option of having a receiver sell the property awarded to her).

305. 850 S.W.2d 675 (Tex. App.—El Paso 1993, writ denied).

306. *Id.* at 679-80. In Heller v. Heller, No. 05-91-91598-CV, 1993 WL 389789 (Tex. App.—Dallas, Dec. 29, 1992, n.w.h.) (not designated for publication), on the other hand, the court seemed to suggest that if an ex-spouse is apprehensive of manipulation of the sales price of co-owned realty by the other ex-spouse through her choice of a realtor to sell the property as directed by the court, he could move under §§ 3.70-3.71 for appointment of a different realtor. The suggestion seems erroneous.

The suggestion that the limitation provisions of § 3.70 are applicable to real property as well as personalty was rejected in Carter v. Charles, 853 S.W.2d 667, 671 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.) (dictum).

307. 859 S.W.2d 609 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.).

308. In Parliament v. Parliament, 860 S.W.2d 144, 147 (Tex. App.—San Antonio 1993, writ denied), the court noted that the provisions of TEX. FAM. CODE ANN. § 3.77 (Vernon 1993), for taxing attorney's fees as costs, is applicable to enforcement proceedings but not to suits for divorce.

held that the ex-husband had waived his objection for failure to interrogate the ex-wife's counsel as to the attribution of fees.[309]

F. EFFECTS OF BANKRUPTCY

To avoid the risk of an ex-spouse's subsequent bankruptcy no one has yet discovered an all purpose device to protect executory property rights of the other ex-spouse.[310] The Texas concept of property division[311] and the protection of alimony in section 523(a)(5)[312] of the Bankruptcy Code are limited by their subject matter. Proof that a property settlement was nothing more than that and not an alimony provision, though so labeled, will achieve its undoing before a bankruptcy court.[313] But in the case of contractual alimony, there is some anticipation of general protection by estoppel because it is likely that within the first year after divorce the payor will claim a tax deduction for the payment. The Fifth Circuit Court of Appeals has held that claiming a tax deduction for an alimony payment constitutes "a quasi-estoppel" against the payor's asserting in a later bankruptcy proceeding that the obligation to pay alimony is merely a debt arising from a property settlement agreement.[314]

By customary application of bankruptcy analysis, if a note is discharged in bankruptcy, a lien securing the debt nevertheless survives for the benefit of the lienor. If an ex-spouse subsequently relies on this result, in order to foreclose a reimbursement lien fixed on realty by a divorce court, the ex-spouse asserting the lien must show that it was properly fixed on the property and that the lien survived bankruptcy if the encumbered property is the owner's homestead.[315] The fact that section 522(f)[316] may be used to remove such a judgment lien unless fixed on a homestead when the debtor received it[317] discourages putting a lien on separate homestead property in

309. *Kurtz*, 859 S.W.2d at 613. In Griffith v. Griffith, 860 S.W.2d 252, 254-55 (Tex. App.—Tyler 1993, n.w.h.), the evidence in the record was insufficient for the appellate court to reform the judgment with respect to a contingent fee.

310. The resort of some Louisiana bankruptcy courts to the argument that intentional nonperformance of a property settlement agreement constitutes "wilful and malicious" injury and therefore bars the obligation from discharges, cannot survive objective analysis. The act may be demonstrably wilful, if not malicious, but the subsequent motive has no bearing on the obligation sought to be discharged. *See In re* Rose, 155 B.R. 394 (Bankr. W.D. La. 1993), and *In re* Russell, 141 B.R. 107 (Bankr. W.D. La. 1992) (relying on 11 U.S.C. § 523(a)(6) (1988)).

311. An award of reimbursement was interpreted as an "alimony substitute" in *In re* Nunnally, 506 F.2d 1024 (5th Cir. 1975). *See In re* Brody, 3 F.3d 35, 38-39 (2d Cir. 1993). An award of a community interest of one spouse in the pension benefits of another does not involve a debt relationship and is thereby protected from the pensioner's bankruptcy. *In re* Chandler, 805 F.2d 555 (5th Cir. 1986).

312. 11 U.S.C. § 523(a)(5) (1988).

313. *See* 11 U.S.C. § 523(a)(5)(B) (1988); *In re* Benich, 811 F.2d 493 (5th Cir. 1987); *In re* Billingsley, 93 B.R. 476, 477 (Bankr. N.D. Tex. 1987); Roberts v. Poole, 80 B.R. 81, 85 (N.D. Tex. 1987).

314. *In re* Davidson, 947 F.2d 1294, 1296-97 (5th Cir. 1991); *In re* Kelley, 151 B.R. 790, 791 (Bankr. S.D. Tex. 1992).

315. Faires v. Billman, 849 S.W.2d 455, 457-58 (Tex. App.—Austin 1993, n.w.h.).

316. 11 U.S.C. § 522(f) (1988).

317. Farrey v. Sanderfoot, 500 U.S. 291 (1991); *see* notes 153-55 *supra* and accompanying text.

favor of the non-owning ex-spouse. But the property was the owner's separate property both before and after divorce, as it was in *In re Parrish*,[318] section 522(f) applies. Some suggestions have been made for circumventing the dangers posed by section 522(f),[319] but no factor or device seems to give greater assurance against the risk than the reluctance of the recipient of the property to file for bankruptcy.

318. 7 F.3d 76, 78 (5th Cir. 1993). Prior to rendition of the divorce decree an equitable lien had been fixed on the entire property interest and that lien was rendered enforceable by the divorce court.

319. Herndon Inge III, *Avoiding Post-Divorce Bankruptcy Problems*, 13 FAIRSHARE 7 (No. 11, Nov. 1993).