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## Family Law: Husband and Wife

Joseph W. McKnight

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# FAMILY LAW: HUSBAND AND WIFE

*Joseph W. McKnight\**

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## I. STATUS

### A. CEREMONIAL MARRIAGE

IN 1969 the Family Law Section of the State Bar of Texas recommended that a ceremonial marriage not be conducted until three days had passed after the marriage license had been granted in order to allow a couple to reflect on their desire to marry.<sup>1</sup> The legislature declined to accept the recommendation largely, it seemed, because of a pervasive tradition of a natural right to marry without delay. That was a time when couples contemplating marriage rarely cohabitated prior to their wedding except in secret. Now, of course, premarital mores have changed considerably.

At the behest of some justices of the peace, whose courts are not located near the marriage licensing office, the legislature provided in 1987 for a three-day waiting period for a ceremonial marriage after a marriage license is issued.<sup>2</sup> That provision allowed for written waivers by a district court and in 1989 the power of waiver was extended to statutory county courts with family law jurisdiction.<sup>3</sup> The provision for waivers was presumably meant to make waivers somewhat difficult to get. In practice, however, waivers have been routinely easy to acquire, often without any personal appearance before the court. At the 1995 legislative session the legislature extended the power of granting waivers to a supreme court justice, a judge of the court of criminal appeals, or a judge of a court of appeals.<sup>4</sup> Undelayed marriage has thus come almost full circle, and the waiting period and its counterpart in section 2.48<sup>5</sup> should be repealed as serving no useful purpose.

### B. INFORMAL MARRIAGE

To deter the introduction of damaging evidence the defense in *State v. Mireles*<sup>6</sup> invoked the privilege of confidential spousal communication and was therefore required to prove that the woman who heard the state-

1. See Joseph W. McKnight, *Commentary on Texas Family Code, Title 1*, 21 TEX. TECH L. REV. 911, 933 (1990).

2. TEX. FAM. CODE ANN. § 1.82(c)(2) (Vernon 1993).

3. TEX. FAM. CODE ANN. § 1.82(d)(2) (Vernon 1993).

4. *Id.*

5. TEX. FAM. CODE ANN. § 2.48 (Vernon 1993).

6. 904 S.W.2d 885 (Tex. App.—Corpus Christi 1995, pet. ref'd).

ments of the accused was his wife. For almost a year before the commission of the acts of which the prisoner was accused, he and the woman had cohabited as a married couple but had not entered into a ceremonial marriage. Although the woman had testified that she did not consider herself "married" to the man, she had subsequently brought a suit for divorce against him in which the marriage was alleged, and she had used his surname on letters written to him.<sup>7</sup> In light of these public acknowledgments the trial court evidently interpreted the woman's testimony (not clarified on cross-examination) to mean merely that she had not been *ceremonially* married to the accused.<sup>8</sup> The accused nevertheless regarded himself as married to her, and the trial judge so found. On appeal the court concluded that the trial judge might have inferred an agreement to marry, and the appellate court was loath to upset the trial judge's conclusion that the elements of an informal marriage had been proved.<sup>9</sup> The appellate court, moreover, was as imprecise in its review of the matter as the trial court had been in its prior consideration.

In *Mireles* the prosecution went on to argue that the reliance of the accused on the informal marriage failed because it was not asserted within one year after the time the parties had separated as required by the 1989 amendment to section 1.91(b) of the Family Code.<sup>10</sup> The court rejected this argument on the ground that such a statute of limitations was not applicable to a defensive plea which operated to negate the state's proffered evidence.<sup>11</sup> Not long after the decision in *Mireles*, a federal court held that the Texas statute imposing a one-year limitation period in which to prove a common law marriage was invalid because it violated the equal protection clause of the Federal Constitution because the one-year period is too short a time.<sup>12</sup>

In *Musick v. Rex*<sup>13</sup> a woman was ceremonially married to X in 1979, and while engaged in a suit for divorce from X was ceremonially married to Y in late 1986. The divorce from X was granted one month after the marriage to Y, and the cohabital relationship with Y continued thereaf-

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7. *Id.* at 888.

8. In this respect the appellate court's handling of the issue of informal marriage was much like that of the Texas Supreme Court in *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 167 (Tex. 1981), and it was similarly lacking in explanation. Compare the resolution of the issues in *Mireles* with the courts' handling of *Welch v. State*, 908 S.W.2d 258, 265 (Tex. App.—El Paso 1995, no pet. h.), and *Quinonez-Saa v. State*, 860 S.W.2d 704, 709-710 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd.).

9. *Mireles*, 904 S.W.2d at 888.

10. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1993 & Supp. 1996).

11. *Mireles*, 904 S.W.2d at 889. On the other hand the court said that if the evidence of the informal marriage had been offered to show an independent claim of the accused, the statute of limitation would have barred the proof of the accused. *Id.* (citing *Morris-Buick Co. v. Davis*, 127 Tex. 41, 91 S.W.2d 313 (1936)).

12. *White v. State Farm Auto Ins. Co.*, 907 F. Supp. 1012, 1018 (E.D. Tex. 1995). Cf. *Donnelley v. Almond*, 827 S.W.2d 582, 585 (Tex. App.—Houston [14th Dist.] 1992, no writ) (holding the one-year limitation period did not violate the equal protection clause of the Texas Constitution).

13. No. 08-95-00055-CV, 1995 WL 289651 (Tex. App.—El Paso, May 11, 1995, no writ) (ordered not to be published) (on file with author).

ter. The woman had apparently separated from Y sometime before she began cohabitating with Z in late 1992. The affair with Z ended in early 1994, a little more than a year before she asserted her informal marriage to Z. The El Paso Court of Appeals concluded that her assertion was barred by the one-year's statute of limitation then in effect.<sup>14</sup>

The appellate court also commented on the validity of the woman's prior marriage to Y as an impediment to her proof of the marriage to Z.<sup>15</sup> Because the marriage to X was subsisting when the purported marriage to Y was celebrated, there was no argument that the marriage to Y was not initially invalid. The woman's counsel argued, however, that the marriage to Y was at most an informal marriage and therefore irrelevant in that she had not sought to establish its validity. The court concluded that as a result of meeting the requirements of continued cohabitation and public acknowledgment of the parties, the marriage of the woman to Y became effective under section 2.22 of the Family Code.<sup>16</sup> The marriage to Y was therefore still subsisting and barred proof of the alleged marriage to Z apart from the effect of the statute of limitation.<sup>17</sup>

In 1995 the Legislature again amended Family Code section 1.91(b) to provide that if an informal marriage is not asserted for a period of two years after termination of the cohabital relationship, there is a presumption of no agreement to marry between the parties.<sup>18</sup> The amendment therefore not only extends the limitation period from one year to two years but also allows the proponent of the informal marriage to overcome a presumption that there was no agreement to marry. The presumption can be rebutted in the usual manner of proving the agreement: the same evidence as that used to prove cohabitation and public acknowledgment of the marriage may be used by the finder of fact to show an agreement to marry.<sup>19</sup>

### C. PRIVILEGED COMMUNICATIONS

Having concluded in *Mireles* that an informal marriage existed, the court suppressed the statements made by the prisoner to his wife that tended to prove the acts of which he was accused.<sup>20</sup> But the court affirmed the trial court's admission of the wife's testimony of acts of the accused that she had observed in his company.<sup>21</sup>

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14. *Id.* at \*7.

15. *Id.* at \*6.

16. *Id.* at \*6. See TEX. FAM. CODE ANN. § 2.22 (Vernon 1993).

17. *Musick*, 1995 WL 289651, at \*6. But cf. Peter N. Swisher & Melanie D. Jones, *The Last-in-Time Marriage Presumption*, 29 A.B.A. FAM. L.Q. 409 (1995) (subsequent marriage raises very strong presumption that any former marriage was terminated by death, annulment, or divorce).

18. TEX. FAM. CODE ANN. § 1.91(b) (Vernon Supp. 1996).

19. *Russell v. Russell*, 865 S.W.2d 929, 933-34 (Tex. 1993).

20. *Mireles*, 904 S.W.2d at 890.

21. *Id.*

## D. STATE EMPLOYMENT

The state has long maintained standards to avoid nepotism in hiring state employees and to guard against the use of state employment for personal profit for employees. The rules dealing with the former are embodied in the Government Code<sup>22</sup> and those as to the latter, in the Texas Constitution.<sup>23</sup> Analysis of the law in both of these regards is more commonly found in opinions of the Texas Attorney General than in judicial decisions.

A recent opinion illustrates the operation of the current safeguards against nepotism in hiring state employees.<sup>24</sup> At the time the mayor of a small incorporated city was elected in 1989, his wife had been employed since 1987 as an independent contractor to render daily services at an hourly rate of employment on an oral contract. In 1991 the city employed the mayor's wife in a part-time position but at no increase in pay. In 1995 the city sought advice as to whether the wife might be employed in a full-time position. As the couple were related in the first degree of affinity (that is, within the prohibited second degree of affinity under the anti-nepotism act),<sup>25</sup> the Texas Attorney General's first concern was the wife's employment in a part-time position in 1991. Because she had been employed by the city for over six months when her husband was elected mayor, the wife's hiring as a part-time employee in 1991 was proper.<sup>26</sup> As to her being hired for a full-time position in 1995, the city commission may make such a decision provided that her husband does not participate in any deliberations concerning it.<sup>27</sup>

The negative application of these rules is nicely illustrated by another opinion of the Texas Attorney General.<sup>28</sup> In that instance a county attorney had served in an elective position since 1985. In 1995 he married a member of his staff who had served in that capacity since 1993. The county attorney sought an opinion as to his wife's continued employment over which the county attorney had sole authority.<sup>29</sup> It is presumed that an employer (the county attorney in this instance) "makes a new decision each month to retain . . . employees" paid on a monthly basis.<sup>30</sup> Because the employee was not the county attorney's wife while employed prior to

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22. TEX. GOV'T CODE ANN. § 573 (Vernon 1994 & Supp. 1996). In 1995 general exceptions as to offices affected by the anti-nepotism rule were modestly expanded. See TEX. GOV'T CODE ANN. § 573.061 (Vernon Supp. 1996).

23. TEX. CONST. art. III, § 18 (1876, amended 1968).

24. TEX. ATT'Y GEN. LO-015 (1995).

25. TEX. GOV'T CODE ANN. §§ 573.002, 573.041 (Vernon 1994).

26. TEX. GOV'T CODE ANN. § 573.062(a) (Vernon 1994); Op. TEX. ATT'Y GEN. NO. DM-76 (1992); Op. TEX. ATT'Y GEN. NO. JM-861 (1988) at 2.

27. TEX. ATT'Y GEN. LO-015 (1995) at 3; TEX. GOV'T CODE ANN. § 573.062(b) (Vernon 1994).

28. TEX. ATT'Y GEN. LO-070 (1995).

29. TEX. LOC. GOV'T CODE ANN. § 151.001 (Vernon 1988); *Commissioner Court v. Ross*, 809 S.W.2d 754, 756 (Tex. App.—Tyler 1991, no writ) (hiring of deputies by a sheriff are solely within the sheriff's power).

30. TEX. ATT'Y GEN. LO-070 (1995) at 2 (citing Op. TEX. ATT'Y GEN. NO. MW-286 (1980) and TEX. ATT'Y GEN. LO-114 (1993)).

her husband's election and until her marriage, her employment was not excepted from the nepotism-exclusion rule,<sup>31</sup> and her further employment after her marriage is forbidden.<sup>32</sup>

Another opinion illustrates the application of the rule concerning degrees of affinity.<sup>33</sup> An elected district attorney sought an opinion as to the propriety of hiring his ex-wife's nephew as an assistant. Under section 573.024(b) of the Government Code<sup>34</sup> the prohibited degrees of affinity apply to relatives of a divorced spouse provided that the ex-spouses have a living child, as was the case in this instance. But because the relationship between the employer and the prospective employee was in the third degree and thus beyond the prohibited second degree of affinity, the employment was allowed.<sup>35</sup>

In another inquiry a state senator sought an opinion with respect to a business transaction in which her husband was an interested party.<sup>36</sup> The husband held community stock in a corporation that sought to sell certain real property to a prospective buyer interested in entering into a transaction with the state concerning the land after its purchase. The Texas Attorney General expressed the opinion that there would be no violation of the Texas Constitution<sup>37</sup> in this regard because neither the state senator nor her husband would have any interest in the land once the sale was completed.<sup>38</sup>

#### E. LOSS OF CONSORTIUM

In *Carr v. Mobile Video Tapes, Inc.*<sup>39</sup> a husband sued for defamation and his wife sued for loss of consortium as a result of the consequential emotional distress that he had suffered. The trial court granted the defendant's motion for summary judgment on the wife's suit.<sup>40</sup> Because her asserted claim had not resulted from her husband's physical injury, the appellate court affirmed the judgment against the wife: In the absence of physical injury to a tort-victim, the victim's spouse cannot assert a cause of action for loss of consortium.<sup>41</sup>

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31. TEX. GOV'T CODE ANN. § 573.062 (1994).

32. Tex. Att'y Gen. LO-070 (1995) at 3.

33. Tex. Att'y Gen. LO-020 (1995). See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 Sw. L.J. 1831, 1831-32 (1992), on the manner of counting degrees of relationships generally.

34. TEX. GOV'T CODE ANN. § 573.024(b) (Vernon 1994 & Supp. 1996). In 1995 this rule was limited to living children under 21 in the case of a member of a board of trustees or an officer of a school district, TEX. GOV'T CODE ANN. § 573.024(c) (Vernon Supp. 1996), passed in apparent response to Tex. Att'y Gen. LO-039 (1994).

35. Tex. Att'y Gen. LO-020 (1995) at 2.

36. Tex. Att'y Gen. LO-033 (1995).

37. TEX. CONST. art. III, § 18 (1876, amended 1968).

38. Tex. Att'y Gen. LO-033 (1995) at 3-4 (citing Op. Tex. Att'y Gen. No. JM-782 (1987) at 3).

39. 893 S.W.2d 613 (Tex. App.—Corpus Christi 1994, n.w.h.).

40. *Id.*

41. *Id.* at 619 (citing *Browning-Ferris Indus. v. Lieck*, 881 S.W.2d 288, 294-95 (Tex. 1994)).

## F. INTERFERENCE WITH A SPOUSE'S PERSONAL RIGHTS

There is no reason that one spouse can not bring an action against the other for intentionally causing the complainant emotional distress without also suing for divorce, though it may be anticipated that a counter suit for divorce may be thereby provoked. Nor is it now questioned that a cause of action for intentional infliction of emotional distress may be joined with a suit for divorce. That point was amply demonstrated in *Twyman v. Twyman*<sup>42</sup> and *Massey v. Massey*.<sup>43</sup> Whether failure to join such a cause of action for emotional distress in a suit for divorce precludes a later independent assertion of that cause was broached but apparently not pursued in *Newton v. Newton*.<sup>44</sup>

Complaints for emotional distress in violation of the state and federal wire-tap statutes<sup>45</sup> were before the court of appeals in two divorce cases, *Parker v. Parker*<sup>46</sup> and *Collins v. Collins*.<sup>47</sup> A proper objection to evidence gained by wiretaps in contravention of either statute will bar its admissibility.<sup>48</sup> In *Parker* the trial court awarded the wife \$2,000 for electronic eavesdropping under state law<sup>49</sup> and \$1,000,000 in punitive damages.<sup>50</sup> The husband was guilty of particularly flagrant conduct in bugging the office of his wife's attorney to break through her attorney-client privilege in order to achieve an improper advantage in the trial. In rejecting the husband's assertion that the damage award was excessive, the court stressed that a major purpose of awarding punitive damages in Texas is "to punish and deter wrongful conduct."<sup>51</sup> If that is so, one would think that the state should make some effort toward publicizing such awards. Though this journal strives to assist as it can in this regard, one wonders whether some readers were unaware of the award before being appraised of it here.

In *Moreno v. Moore*<sup>52</sup> the court of appeals held the trial court's granting of a protective order against the wife when the husband did not file an

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42. 855 S.W.2d 619 (Tex. 1993).

43. 867 S.W.2d 766 (Tex. 1993).

44. 895 S.W.2d 503, 504 (Tex. App.—Fort Worth 1995, n.w.h.). In *Parker v. Parker*, 897 S.W.2d 918, 925, 931 (Tex. App.—Fort Worth 1995, writ denied), another panel of the same court disposed of a plea of res judicata made to a cause of action asserted in a divorce case but properly preserved in a later phase of the same case.

45. TEX. CIV. PRAC. & REM. CODE ANN. §§ 123.001-.004 (Vernon 1986 & Supp. 1996); 18 U.S.C. §§ 2510-2521 (1994).

46. *Parker*, 897 S.W.2d at 926-27.

47. 904 S.W.2d 792 (Tex. App.—Houston [1st Dist.] 1995, writ denied per curiam).

48. *Id.* at 798. In both *Collins*, 904 S.W.2d at 804, and *Parker*, 897 S.W.2d at 928-29, the courts commented on the applicability of the statute of limitation to the state wiretap statute. In *Collins* the court concluded that the two-year tort statute is controlling. *Collins*, 904 S.W.2d at 804. In *Parker* the court pointed out that the running of the statute of limitation is tolled by the process of discovery to investigate a rumor of eavesdropping. To achieve applicability of this discovery-rule the party asserting it must plead it affirmatively or show that its application at trial was by consent. *Parker*, 897 S.W.2d at 929.

49. TEX. CIV. PRAC. & REM. CODE ANN. § 123.004 (Vernon 1986 & Supp. 1996).

50. *Parker*, 897 S.W.2d at 929-30.

51. *Id.* at 930.

52. 897 S.W.2d 439 (Tex. App.—Corpus Christi 1995, n.w.h.).



application for a protective order was improper.<sup>53</sup> The wife had requested a protective order against the husband but the trial court, over the wife's objection, entered a mutual protective order in which both the husband and wife were subject to protective orders against each other.<sup>54</sup> The court found that the trial court did not comply with section 71.121 of the Texas Family Code,<sup>55</sup> which requires an agreement between the parties before a joint protective order is issued. In the absence of such an agreement, the court cannot issue a protective order against a party unless there is an application for that relief.

### G. INTRAFAMILIAL INSURANCE

In 1993 the Texas Supreme Court held in *National County Mutual Fire Insurance Co. v. Johnson*<sup>56</sup> that a family-member-exclusion clause in an automobile liability policy is invalid as against the public policy enunciated by the Texas Motor Vehicle Safety-Responsibility Act.<sup>57</sup> Thus, a driver of a motor vehicle is not allowed to be left uninsured by an automobile liability policy with respect to claims asserted against him by members of his own family.<sup>58</sup> In *Liberty Mutual Fire Insurance Company v. Sanford*<sup>59</sup> the Texas Supreme Court made it clear that the invalidity of the family-member-exclusion clause determined in *Johnson* operates only in so far as a clause conflicts with the minimum of automobile liability insurance imposed by the act.<sup>60</sup>

## II. CHARACTERIZATION OF MARITAL PROPERTY

### A. COMMUNITY PRESUMPTION

The presumption that all property possessed by spouses during a marriage is community property<sup>61</sup> is ordinarily the starting point in characterization disputes. In *Panozzo v. Panozzo*<sup>62</sup> the court of appeals found that the divorce court erred in failing to observe the limits of the presumption. The couple's residence, their car, their household furnishings, appliances, clothing and other personal effects, bank accounts, pension and profit sharing plans, and life insurance policies were all presumed to be community property and no evidence was offered to refute that characterization.<sup>63</sup> The wife went on to allege that a large quantity of commercial equipment was also community property but failed to show that the

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53. *Id.* at 442.

54. *Id.* at 441.

55. TEX. FAM. CODE ANN. § 71.121 (Vernon Supp. 1996).

56. 879 S.W.2d 1, 5 (Tex. 1993).

57. TEX. REV. CIV. STAT. ANN. art. 6701h, § 1(10), 1A(a) (Vernon Supp. 1996) (codified at TEX. TRANSP. CODE § 601 (Vernon 1996)).

58. *Johnson*, 879 S.W.2d at 5.

59. 879 S.W.2d 9 (Tex. 1994) (per curiam).

60. *Id.* at 10.

61. TEX. FAM. CODE ANN. § 5.02 (Vernon 1993).

62. 904 S.W.2d 780 (Tex. App.—Corpus Christi 1995, n.w.h.).

63. *Id.* at 786.

equipment was possessed or owned by either spouse during the marriage. The trial court's application of the community presumption to that equipment was therefore erroneous.<sup>64</sup>

### B. TRACING SEPARATE PROPERTY

In two instances wives sought to rebut the community presumption by tracing property on hand at the time of divorce to their separate property. In one instance<sup>65</sup> the wife convinced the trial court that certain assets were her separate property because they were traceable to sales of timber from her separate land, but the appellate court pointed out that as proceeds of products of separate land such property constituted community assets.<sup>66</sup> The trial court had also erred in characterizing funds emanating from earned employment benefits<sup>67</sup> as separate property. In the other instance<sup>68</sup> the wife was successful in tracing assets to property owned by her prior to marriage and thus it was her separate property. In reaching its conclusion the Fort Worth Court of Appeals discussed the appropriate standard of review for appellate courts when the burden of proof at trial demands clear and convincing evidence.<sup>69</sup>

### C. RETIREMENT BENEFITS FROM THE NATIONAL SOVEREIGN

On June 25, 1981 the Supreme Court of the United States ruled in *McCarty v. McCarty*<sup>70</sup> that military retirement benefits were meant by Congress to be enjoyed by the pensioner alone and not by his or her spouse, and it thus seemed that until Congress otherwise provided, military retirement benefits already received belonged to the pensioner. In 1982 Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA)<sup>71</sup> to allow division on divorce under state law received after June 25, 1981 of military retirement benefits. Because it was unclear whether Congress intended the rule change to affect divorces that were rendered before June 26, 1981, Congress amended the USFSPA on November 5, 1990 to provide that for divorces rendered prior to June 25,

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64. *Id.*

65. *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.).

66. *Id.* at 188-89 (citing *White v. Hugh Lynch & Co.*, 26 Tex. 195, 196 (1862)).

67. *Id.* (retirement, annuity, disability, and pension benefits).

68. *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 843-44 (Tex. App.—Fort Worth 1995, n.w.h.).

69. *Id.* at 843. Construing the evidence in the light most favorable to the conclusion reached by the trial court, the court in *Bloomer v. Bloomer*, No. 01-91-01428-CV, 1995 WL 631457 (Tex. App.—Houston [1st Dist.] Oct. 26, 1995, n.w.h.) (not designated for publication), on motion for rehearing unanimously reached a conclusion very different from that it had previously reached in *Bloomer v. Bloomer*, No. 01-91-01428-CV, 1993 WL 459911 (Tex. App.—Houston [1st Dist.] Nov. 10, 1993) (not designated for publication).

70. 453 U.S. 210 (1981).

71. 10 U.S.C. § 1408(c) (1983) (effective Feb. 1, 1983).

1981<sup>72</sup> partitions of benefits should not be allowed.<sup>73</sup> The amendment, however, provided with respect to judgments entered between June 25, 1981 (post *McCarty*) and November 5, 1990 (date of the amendment) that payments not end until November 5, 1992.<sup>74</sup>

As a consequence familiar litigants were again before an appellate court in *Trahan v. Trahan*.<sup>75</sup> The Trahans were divorced in 1971 but the court made no division of the husband's military retirement benefits. After the ex-husband retired, the ex-wife sought and received an order for partition of his retirement benefits in 1977, which order was modified by the intermediate appellate court.<sup>76</sup> While the ex-husband's writ of error was pending before the Texas Supreme Court, the United States Supreme Court decided the *McCarty* case, and the *Trahan* partition was reversed.<sup>77</sup> After the congressional act of 1982 became effective, the ex-wife again filed suit for partition of the retirement benefits paid after June 25, 1981, and her suit was successful.<sup>78</sup> In 1993, under the authority of the congressional act of 1990, the ex-husband sought and was awarded suspension of payments of his benefits to his ex-wife as of November 5, 1992.<sup>79</sup> In reviewing the trial court's decision, the Austin Court of Appeals held that the doctrine of res judicata barred reopening of the issue of whether the ex-wife had a right of partition.<sup>80</sup> The court concluded that the 1982 congressional act was not meant to allow subsequent partitions of retirement benefits in cases decided before the decision in *McCarty* in which a partition had not been made.<sup>81</sup> But the court did not regard the 1982 act as dispositive of cases under the 1990 act which expressly provided for retrospective application.<sup>82</sup> The court concluded that the 1983 judgment in favor of the ex-wife, affirmed on appeal in 1984, gave her a vested right to the ex-husband's military retirement benefits from September 30, 1983, when the judgment of the trial court was rendered, and res judicata barred reopening of the issue of whether she possessed that right. In the court's view, the subsequent amendment to the USFSPA did not affect that judgment however retrospective the amendment may have been intended to be.<sup>83</sup>

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72. Congress should have said "prior to June 26, 1981."

73. Pub. L. No. 102-190, § 1062(a)(1), 105 Stat. 1475 (1991), codified as 10 U.S.C.A. § 1408(c)(1) (West Supp. 1996).

74. 10 U.S.C.A. § 1408(c)(1).

75. 894 S.W.2d 113 (Tex. App.—Austin 1995, writ denied).

76. *Trahan v. Trahan*, 609 S.W.2d 820 (Tex. Civ. App.—Texarkana 1980), *rev'd*, 626 S.W.2d 485 (Tex. 1981).

77. *Trahan v. Trahan*, 626 S.W.2d 485 (Tex. 1981).

78. *Trahan v. Trahan*, 682 S.W.2d 332 (Tex. App.—Austin 1984, writ *ref'd n.r.e.*), *appeal dismissed*, 475 U.S. 1002 (1986) (appeal dismissed for want of a substantial federal question).

79. *Trahan v. Trahan*, 894 S.W.2d 113, 115 (Tex. App.—Austin 1995, writ denied).

80. *Id.* at 119.

81. *Id.* at 116 (citing John B. McKnight, Comment, *Closing the McCarty-USFSPA Window: A Proposal for Relief from McCarty-Era Final Judgments*, 63 TEX. L. REV. 497, 512 (1984)).

82. *Trahan*, 894 S.W.2d at 116.

83. *Id.* at 119.

The Amarillo Court of Appeals reached the same conclusion in *Ex parte Kruse*.<sup>84</sup> The couple's divorce was granted in 1979 without any division of the husband's military retirement benefits. To settle the ex-wife's claim for benefits under the 1982 Congressional act, the court in 1988 entered an agreed order to partition the benefits, and the ex-husband was ordered to pay his ex-wife a specific amount of monthly benefits received unless she received those payments directly from the military service. Payments were made to her by the Air Force until May 1, 1991 when she was notified that she was not authorized to receive direct payments. The ex-husband nevertheless continued to pay her until July, 1994 when he ceased paying. The ex-wife filed a motion for contempt for violating the order and the ex-husband was confined to jail until he paid the arrears due.<sup>85</sup> The ex-husband brought a writ of habeas corpus to the Amarillo Court of Appeals for his release. The relator asserted that under the 1990 amendment of the USFSPA the 1988 order was void.<sup>86</sup> The court concluded that the doctrine of res judicata bars a collateral attack on the unappealed order of 1988.<sup>87</sup> Thus, the ex-husband's position in *Kruse* was substantially the same as the ex-husband's stance in *Trahan*: Even though the 1990 amendment to the USFSPA clarified Congress's intent not to allow partitions of retirement benefits in divorces granted prior to *McCarty* (June 25, 1981), partition judgments related to such pre-*McCarty* divorces rendered prior to the 1990 amendment (e.g. *Trahan* 1984 and *Kruse* 1988) would not be distributed on the grounds of res judicata. The court in *Kruse* was careful to distinguish *Buys v. Buys*<sup>88</sup> in which the San Antonio Court of Appeals held that the 1990 amendment barred the ex-wife's attempt to partition military retirement benefits undivided in a 1980 divorce decree.<sup>89</sup>

#### D. BUSINESS TRANSACTION INVOLVING SEPARATE PROPERTY

*In re Louis*<sup>90</sup> involved a transaction presenting considerable conceptual difficulty seemingly resulting from an insufficiency of fact concerning the initial understanding of the parties. Along with his wife, the husband and his sister contracted with the United States Postal Service in 1988 to construct a building on land inherited by the husband and sister. The Postal Service agreed to lend the money necessary to construct the building, and all three signed a note for the loan. After the building was completed in 1989, the Postal Service occupied the building and began making payments on a ten-year lease. The wife had expended considerable time and

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84. 911 S.W.2d 839 (Tex. App.—Amarillo 1995, n.w.h.). The Amarillo court cited but did not specifically rely on the *Trahan* decision of the Austin court. *Id.* at 841.

85. *Id.* at 840.

86. *Id.*

87. *Id.* at 841.

88. 898 S.W.2d 903 (Tex. App.—San Antonio 1994, writ granted). *See also* Jones v. Jones, 900 S.W.2d 786 (Tex. App.—San Antonio 1995, no writ) (res judicata barred attack on division of husband's disability benefits).

89. *Kruse*, 911 S.W.2d at 841.

90. 911 S.W.2d 495 (Tex. App.—Texarkana 1995, n.w.h.).

effort in preparing and managing the lease prior to filing for divorce in 1994. Despite a contrary conclusion on the part of the trial court, the Texarkana Court of Appeals found inadequate evidence to show a joint venture in which the wife would share the profits of the transaction<sup>91</sup> and remanded the case for redivision of the property.

#### E. PREMARITAL GIFT

In *Louis* the trial court also found that the parties' home was the wife's separate property which she had received in a divorce-settlement with her prior husband, whom she had promised to pay for his community interest in the property.<sup>92</sup> Shortly before her second marriage the wife's husband-to-be supplied her with the money to discharge the debt to her former husband. In the wife's divorce from her second husband, the trial court held that the house from her first marriage was the wife's separate property. The appellate court held that the trial court might have reasonably concluded that the money supplied by the second husband prior to marriage was a gift and thus the trial court's characterization of the property could be sustained.<sup>93</sup> But if the money supplied prior to their marriage to discharge the debt did not constitute a gift, it must have been a loan. If so, the property would still have been the wife's separate estate. In either case, the money supplied to pay the debt could not be construed as a marital advancement because the couple was not then married. Thus, the doctrine of marital reimbursement could not have been applicable to this situation.

In *Leighton v. Leighton*,<sup>94</sup> the wife asserted that her husband had given her a half interest in a ranch which was the husband's separate property acquired before marriage. Shortly after the couple's marriage in 1978 they jointly executed an installment note and deed of trust to build a home on the ranch. After the parties separated in 1991, the wife, who was apparently living in the home, continued to make loan payments to the bank and to pay property taxes and insurance. The husband denied giving the wife an interest in the ranch. The trial court found that by executing the deed of trust the parties had effectively sold the property to the trustee and thereby created a "resulting trust."<sup>95</sup> Thus, the trial court concluded that the ranch was community property and awarded the wife a half interest in it.<sup>96</sup>

The Houston First District Court of Appeals reversed and remanded; the ranch was not acquired with borrowed funds but was only improved with borrowed funds.<sup>97</sup> "Once separate property character attaches, that character does not change because community funds are spent to im-

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91. *Id.* at 497.

92. *Id.*

93. *Id.*

94. 921 S.W.2d 365 (Tex. App.—Houston [1st Dist.] 1996, n.w.h.).

95. *Id.* at 367.

96. *Id.*

97. *Id.* at 368.

prove the property. In addition, the character of property does not change because both parties sign a note, or because the names of both parties are on the deed of trust."<sup>98</sup> The court recognized community reimbursement as the appropriate remedy when separate property is improved with community funds and noted further that a right of reimbursement does not create an interest in the land.<sup>99</sup>

#### F. FORGIVENESS OF DEBT

If a debt owed by a spouse is gratuitously cancelled by the creditor, the debtor-spouse thereby receives a personal benefit in the nature of a gift. But the consequences of the transaction may tend to be exaggerated. In *Abernathy v. Fehlis*<sup>100</sup> the husband and wife received a loan from the husband's father to assist them in buying a house, in the purchase of which they executed a note to the father for \$45,000 and gave him a deed of trust lien on the house. At the time of the father's death, \$2,000 had been repaid on the note. In his will the father forgave the indebtedness to the husband, and the father's executor thereupon assigned the deed of trust lien to the husband. In their divorce the trial court awarded the home to the wife free of all liens but went on to state that the mortgage was the husband's separate property<sup>101</sup> and that he was required to discharge the mortgage and relieve the wife of liability on it.<sup>102</sup>

Putting aside the husband's arguments with respect to the trial court's abuse of discretion in dividing the property, it is clear that the house was a community improvement on community land, and the father's cancellation of the husband's indebtedness had no bearing on that conclusion. The record, however, did not reveal whether the note was a negotiable instrument or a mere contract to pay. Nor was it explained by the court why the father's executor assigned the deed of trust lien to the husband in furtherance of the father's testamentary cancellation of the debt owed by his son and his wife. The effect of the cancellation was that no debt was owed by either spouse. If the note were negotiable, the court said, the Texas Uniform Commercial Code disposed of the debt issue: The "assignment of the lien, which necessarily carried with it a right in [the husband] to have possession of the promissory note, effected a release of [the wife] as well as [the husband] irrespective of the father's intention in the matter."<sup>103</sup> Thus, if the father meant to excuse the indebtedness, the husband and wife were both released from personal liability. From the husband's point of view he got a separate benefit from his father's estate which he was unable to turn to his advantage in the divorce. The court

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98. *Id.* (citation omitted).

99. *Id.*

100. 911 S.W.2d 845 (Tex. App.—Austin 1995, n.w.h.).

101. *Id.* at 847.

102. *Id.* at 846.

103. *Id.* at 847 n.1 (citing TEX. BUS. & COM. CODE ANN. § 3.601(2)(1) (Vernon Supp. 1996) (liability of all parties discharged when party who has himself no right of action or recourse on instrument reacquires it)).

went on to say that if the note had not been a negotiable instrument, the wife would not have been released as an obligor unless she showed that the father meant to assign the lien to the husband with an intention to discharge both the husband and the wife.<sup>104</sup>

If the loan from the father had been structured somewhat differently, a different result could have been achieved. If the husband had given his father a note to buy the house and his father had contracted to look only to the son's separate property for payment, the reimbursement right related to the house would have been the husband's separate right and the forgiveness of the debt would have benefited the husband solely. That may have been what the father had in mind, but if it was, the transaction was not so structured to achieve the father's objective.

#### G. GIFT IN TRUST

Having brought suit for divorce, the husband in *Cleaver v. George Staton Company, Inc.*<sup>105</sup> brought an independent suit against the trustees of a trust from which the wife was entitled to mandatory payments of income. In reaching the conclusion that the husband lacked standing to sue the trustees, the appellate court explained that the wife's right to receive the trust income was her only present interest in the property and therefore was her separate property entitlement.<sup>106</sup> The point has been put somewhat differently: that the income is the subject matter of the gift of which the beneficiary has present enjoyment, though the beneficiary may ultimately benefit in other ways.<sup>107</sup>

The court in *Cleaver* went on to say that if it were asserted that the wife's failure to pursue her claim against the trustee for non-payment of income thereby constructively defrauded the community estate of interest on the trust income, the husband might be entitled to a share of that community reimbursement claim under *Belz v. Belz*.<sup>108</sup>

#### H. DRAWING THE LINE BETWEEN A RIGHT OF REIMBURSEMENT AND RECOVERY FOR TORTIOUS INJURY

The catchword describing many claims for reimbursement involving a unilateral gratuitous disposition of community property is *constructive fraud*. In *In re Moore*<sup>109</sup> the court made it plain that such an allegation of fraud in a suit for divorce does not constitute an independent cause of

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104. *Abernathy*, 911 S.W.2d 845, 847 n.1.

105. 908 S.W.2d 468 (Tex. App.—Tyler 1995, writ denied).

106. *Id.* at 470 (citing *In re Long*, 542 S.W.2d 712, 717-18 (Tex. Civ. App.—Texarkana 1976, no writ)).

107. See *Wilmington Trust Co. v. United States*, 4 Cl. Ct. 6 (1983).

108. *Cleaver*, 908 S.W.2d at 471 (citing *Belz v. Belz*, 667 S.W.2d 240, 247 (Tex. App.—Dallas 1984, writ ref'd n.r.e.)). In some instances, such as negotiation of a property settlement agreement after a suit for divorce has been commenced, the ordinary rules of fiduciary duty cease to operate. *Parker v. Parker*, 897 S.W.2d 918, 924 (Tex. App.—Fort Worth 1995, writ denied).

109. 890 S.W.2d 821 (Tex. App.—Amarillo 1994, no writ).

action which will support damage-recovery for fraud or related mental anguish.<sup>110</sup> A gratuitous disposition with intent to harm (actual fraud) must be distinguished from an unreasonable disposition (albeit gratuitous) of solely managed community assets (constructive fraud). “[A]n allegation of breach of fiduciary duty in a divorce context and a claim of fraud on the community are the same creature . . . .”<sup>111</sup> and as such will not support an independent cause of action in a suit for divorce.<sup>112</sup> Although a divorce court may award a money judgment as a means of rectifying the loss, such an award does not constitute *damages* for an independent wrong. The court particularly relied on *Belz v. Belz*.<sup>113</sup> The court pointed out that in the absence of an independent cause of action (such as one for actual fraud), there can be no recovery for mental anguish.<sup>114</sup>

### I. INTERSPOUSAL GIFT

If one spouse desires to give the other the entire title to an item of community property, the appropriate way to achieve the desired result is for the manager of the property to transfer the entire interest.<sup>115</sup> If the wife or husband is the sole manager of the property, that spouse should transfer the whole of it to the other. If both spouses are joint managers of the property, both should join in making the transfer of the entire interest to the donee-spouse. It should be noted that the donee-spouse's tax basis in the part of the property already owned would not be affected by either mode of transfer.<sup>116</sup> This is not to say that some other mode of transfer may produce the same result, but avoiding the cost of litigation in order to be assured of good title should outweigh experiments with other devices.

In *In re Morrison*<sup>117</sup> the Texarkana Court of Appeals approved an alternative device, but the facts required to show that it is appropriate to the circumstances discourage its usefulness. The husband and wife had purchased a rent house in 1991 and in 1992 the husband executed a deed to the wife of all of his interest in the property. In their divorce in 1994 the trial court concluded that the attempted transfer was ineffective because the couple had not partitioned the property prior to the transfer. Hence, the property was treated as part of the community estate and the

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110. *Id.* at 829-30.

111. *Id.* at 827.

112. *Id.* at 827-30.

113. 667 S.W.2d 240, 243 (Tex. App.—Dallas 1984, writ ref. n.r.e.). The court in *In re Moore* found no contrary authority in *Swisher v. Swisher*, 190 S.W.2d 382 (Tex. Civ. App.—Galveston 1945, no writ), and *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.—Waco 1992), *aff'd, as modified*, 847 S.W.2d 225, 226 (Tex. 1993). *Id.* at 828-29. The description of the award as “damages” in *Mazique v. Mazique*, 742 S.W.2d 805 (Tex. App.—Houston [1st Dist.] 1987, no writ), may be regarded as merely colloquial usage.

114. *In re Moore*, 890 S.W.2d at 830.

115. *In re Morrison*, 913 S.W.2d 689, 693 (Tex. App.—Texarkana 1995, n.w.h.).

116. *See Jones v. State*, 5 S.W.2d 973 (Tex. Com'n App. 1928, holding approved).

117. 913 S.W.2d at 689.



court divided it equally between the spouses. Under the facts of the case the property was clearly subject to joint management of the spouses. Although it is generally agreed that neither spouse acting alone and without the concurrence of the other spouse may make an effective disposition of all or part of jointly managed community property,<sup>118</sup> the Texarkana Court of Appeals nonetheless concluded that if one spouse conveys his or her community interest to the other with the mutual understanding that the grantee will hold the entire property as separate estate, a gift has been effectively made of the grantor's interest to the grantee and the entire property is therefore the grantee's separate property.<sup>119</sup> The court was careful to point out that reimbursement might nonetheless be sought by the husband in such a case for community improvements made on the property subsequent to the transfer.<sup>120</sup>

### III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

#### A. ASSIGNMENT OF MALPRACTICE CLAIM BETWEEN SPOUSES

*Miller v. Miller*,<sup>121</sup> a divorce case decided by the Dallas Court of Appeals in 1984, has acquired some familiarity for exploring, if not fully defining, the fiduciary duty between spouses in the sole management of community property. Simultaneously with the divorce case and after its conclusion, four further suits have been litigated between the parties. In the settlement of the penultimate of these, the ex-husband assigned his ex-wife any malpractice claim that he might have had against his counsel, and that claim *inter alia* was finally resolved in the fifth and last suit, *White v. InteCom, Inc.*<sup>122</sup> There the Austin Court of Appeals held on the authority of *Zuniga v. Groce, Locke & Hebdon*<sup>123</sup> that a malpractice claim is unassignable in Texas.<sup>124</sup>

#### B. SPOUSAL LIABILITY

The appellate courts continue to be called upon to correct spouses' confusion concerning the nature and extent of spousal liability. Such confusion usually arises in relation to a contract made by only one spouse. A community liability ordinarily attaches to such a contract, and it is fre-

118. *Id.* at 692 (citing *Dalton v. Don J. Jackson, Inc.*, 691 S.W.2d 765, 768 (Tex. App.—Austin 1985, no writ)). But the court noted the contrary conclusion in *Vallone v. Miller*, 663 S.W.2d 97, 98 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.), and *Williams v. Portland State Bank*, 514 S.W.2d 124, 127 (Tex. Civ. App.—Beaumont 1974, writ dism'd). *Id.*

119. *Id.* at 693.

120. *Id.* at 693 n.3.

121. 700 S.W.2d 941 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

122. No. 93-94-00394-CV (Tex. App.—Austin, Sept. 13, 1995, writ denied) (not designated for publication).

123. 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd). For a discussion of this decision, see Amy E. Douthitt, Comment, *Selling Your Attorney's Negligence: Should Legal Malpractice Claims Be Assigned in Texas?*, 47 BAYLOR L. REV. 177 (1994).

124. *White*, No. 03-94-00394-CV at \*7.

quently, but inaccurately, thought that both spouses are always personally liable on the contract.<sup>125</sup> The dispute that provoked the decision in *Blake v. Amoco Federal Credit Union*,<sup>126</sup> on the other hand, stemmed from a divorce decree that ordered the wife to pay a note made by both spouses during marriage. In this situation both spouses are indeed initially liable on the contract and both are subject to continuing personal liability, though the wife was ordered to pay the debt. If she follows the order of the court, the liability of both former spouses is discharged. In this instance the creditor assigned the note, and the holder attempted to collect the note from the ex-husband. The ex-husband thereupon brought suit against the assigning creditor for failure to give its assignee notice of the court-order that the ex-wife had been ordered to pay the debt. The creditor was actually aware of this fact as a party to the divorce proceeding. The divorce court, however, did not have power to release the ex-husband from his obligation to pay the creditor (as persons in the ex-husband's position frequently fail to understand), and having a right to recover, the creditor had no duty to inform the assignee of the court's order.<sup>127</sup>

In explaining the ex-husband's liability, the court misleadingly used the term "community debt" to refer to both a joint obligation and a sole obligation and cited inapposite authority.<sup>128</sup> Although the court's ultimate conclusion is correct, some of the underpinning for the court's reasoning is faulty.<sup>129</sup>

### C. TESTAMENTARY DISPOSITIONS

*In re Estate of Gibson*<sup>130</sup> dealt with the construction of a contractual will made by spouses. The will expressly gave the surviving spouse a life estate in certain property but not the absolute power to dispose of the property after the death of the first to die. The dispute, however, concerned the widow's gifts of property acquired after her husband's death. The court pointed out that although the contractual will could have covered such further acquisitions,<sup>131</sup> it failed to do so, and the property was therefore subject to disposition by the survivor.<sup>132</sup>

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125. See *Inwood Nat'l Bank v. Hoppe*, 596 S.W.2d 183 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

126. 900 S.W.2d 108 (Tex. App.—Houston [14th Dist.] 1995, n.w.h.).

127. *Id.* at 112.

128. *Inwood Nat'l Bank v. Hoppe*, 596 S.W.2d 183, 185 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (wrongly decided because the court mistook sole liability for joint liability). The Legislature therefore enacted TEX. FAM. CODE ANN. § 4.031 (Vernon 1993) to preclude repetition of the error.

129. For further confusion about "community debt," see *Siefkas v. Siefkas*, 902 S.W.2d 72, 76 (Tex. App.—El Paso 1995, n.w.h.); *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 Sw. L.J. 1, 18 (1989)).

130. 893 S.W.2d 749 (Tex. App.—Texarkana 1995, no writ).

131. *Id.* at 752 (citing *Knolle v. Hunt*, 551 S.W.2d 755 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.)).

132. *Id.* at 752-53.

*Miller v. Wilson*<sup>133</sup> needs mention here merely because it contains a dictum relating to management powers of spouses and others that is apt to mislead the unwary. The misleading statement of the El Paso Court of Appeals was that a "[t]estator could not grant authority to sell something he does not own."<sup>134</sup> The statement is clearly inaccurate with respect to property that the testator does not own when he makes his will but which he acquires before his death. The view is sometimes expressed that one cannot sell or otherwise deal with property that one does not own. But this statement is also incorrect as is illustrated by *Gibson* and in situations involving a sale of a future acquisition<sup>135</sup> and a disposition that puts a legatee to an equitable election.<sup>136</sup> The statement is also too broad with respect to the doctrine of agency of necessity.<sup>137</sup>

In *Bryant v. Flint*<sup>138</sup> the dispute arose out of a contract to settle a husband's estate. Rather than disposing of something that she did not own, the widow agreed to discharge a debt which she did owe. During their marriage the husband and wife had filed joint income tax returns, which at the time of the husband's death were in the course of audit by the Internal Revenue Service (IRS). After the husband's death a dispute between the widow and the husband's executor culminated in an agreed judgment between them that the widow would discharge one half of any income tax liability. Two years later a determination was made by the IRS that the widow was entitled to treatment as an innocent spouse with respect to certain undeclared income and therefore had no tax liability. When the widow then refused to pay the agreed portion of the taxes, the estate filed suit to enforce the contract. The court held that the widow was liable.<sup>139</sup> The lesson to be learned from this conclusion is self-evident: The surviving spouse should be cautious in agreeing to pay debts for which she is not clearly liable.

#### D. NATURE AND EXTENT OF THE HOMESTEAD EXEMPTION

A homestead tenant has the duty to pay all ad valorem taxes, interest on loans, insurance, and cost of maintenance in relation to a homestead.<sup>140</sup> In *Copeland v. Tarrant Appraisal District*<sup>141</sup> the local taxing authority had denied a widower's request for a homestead tax-exemption and he appealed. On her death the appellant's wife had devised her sepa-

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133. 888 S.W.2d 158 (Tex. App.—El Paso 1994, n.w.h.).

134. *Id.* at 161.

135. *Hale v. Hollan*, 90 Tex. 427, 39 S.W. 287 (1897).

136. See *Miller v. Miller*, 149 Tex. 543, 235 S.W.2d 624 (1951); *Wright v. Wright*, 154 Tex. 138, 274 S.W.2d 670 (1955).

137. See *Smith v. Anna-Manna, Inc.*, 384 S.W.2d 908, 910 (Tex. Civ. App.—San Antonio 1964, no writ). It is notable in this regard that the court did not reject the wife's right to pledge the freezer subject to the husband's sole management except on the authority of the statute repealed in 1968.

138. 894 S.W.2d 397 (Tex. App.—Houston [1st Dist.] 1994, no writ).

139. *Id.* at 401.

140. *Sargeant v. Sargeant*, 118 Tex. 343, 15 S.W.2d 589, 594 (1929).

141. 906 S.W.2d 148 (Tex. App.—Fort Worth 1995, n.w.h.).

rate property home to her son, but her surviving husband maintained his constitutional right to occupy the property for life.<sup>142</sup> Because the surviving spouse's right to occupy the homestead is in the nature of a tenancy for life and the Tax Code provides that "[r]eal property owned by a life tenant and remainderman shall be listed in the name of a life tenant,"<sup>143</sup> the appellate court held that the homestead tenant without legal title is nonetheless entitled to a homestead tax exemption under the Tax Code.<sup>144</sup>

A debtor filing for bankruptcy cannot assert a homestead claim effectively if he has parted with it or has been finally deprived of his homestead claim before filing. In *In re Robinson*<sup>145</sup> the irrevocable transfer of the homestead property in trust constituted an abandonment of the homestead even though the claimant had maintained occupancy of it. He had disposed of his entire interest in the property on which the homestead claim depended. Conditional<sup>146</sup> and sham transfer cases<sup>147</sup> are not convincing authorities to the contrary. Nor will retention of proceeds of sale of a homestead sustain its exempt status indefinitely. The proceeds must be reinvested in a home within six months of the sale in order to maintain the exemption.<sup>148</sup>

The assertion of a homestead claim by an incompetent was discussed by the Austin Court of Appeals in *State v. Ellison*.<sup>149</sup> In 1987 the state had obtained a judgment against a guardian for the care of his mentally deficient ward, who had been in a state institution for almost thirty years. To discharge the debt the court had ordered the sale of the ward's rural realty which the guardian had leased for the ward's benefit. In 1991 a further judgment was obtained by the state for the ward's care.<sup>150</sup> Concerned that the state facility might be closed, the guardian, at some time, had installed a trailer home on the ward's property (on which he had apparently never lived) so that the ward might live there with a caretaker if need demanded.<sup>151</sup> The guardian testified that in late 1993 he thought

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142. TEX. CONST. art. XVI, § 52.

143. TEX. TAX CODE ANN. § 25.05 (Vernon 1992).

144. *Copeland*, 906 S.W.2d at 151-52. See TEX. TAX CODE ANN. § 11.13(j) (Vernon Supp. 1996).

145. 180 B.R. 174 (Bankr. E.D. Tex. 1995).

146. *Sullivan v. Barnett*, 471 S.W.2d 39 (Tex. 1971); *Moorhouse v. Crew*, 273 S.W.2d 654 (Tex. Civ. App.—San Antonio 1954, writ ref'd).

147. *In re Moody*, 862 F.2d 1194 (5th Cir. 1989); *Brown v. Shamburger*, 104 S.W.2d 112 (Tex. Civ. App.—Amarillo 1937, no writ).

148. *In re Reed*, 178 B.R. 707 (Bankr. W.D. Tex. 1994). A new opinion was substituted for the former one with the same citation noted in Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1246 (1995).

149. 914 S.W.2d 679 (Tex. App.—Austin 1996, n.w.h.).

150. It does not appear, however, that the state abstracted either judgment. The Texas Attorney General expressed the opinion that a valid abstract of judgment does not constitute a cloud on the title of a debtor's homestead so that the judgment creditor is liable for clouding the title, but a public authority with an abstract of judgment against a debtor may execute a voluntary disclaimer of any present claim against the homestead. Op. Tex. Att'y Gen. No. DM-366 (1995).

151. *Ellison*, 914 S.W.2d at 684.

that he had reached an agreement with the state whereby all of the ward's realty except a homestead of one hundred acres would be sold to discharge the judgments,<sup>152</sup> and in May, 1994 the guardian moved for judicial recognition of the ward's homestead claim. The trial court recognized the claim, and the state appealed. Although the state put much emphasis on the 1987 order of sale and the guardian's failure to assert his ward's homestead claim at that time, the appellate court found no bar of estoppel or res judicata to deter the guardian's later assertion of the homestead claim. Although the court concluded that the guardian could and did establish a homestead on behalf of his ward, there is no mention of the ward's occupancy of the premises, even vicariously. The court therefore assumed the prevalence of a very liberal doctrine of homestead designation.<sup>153</sup>

The facts underlying the dispute in *In re Camp*<sup>154</sup> are intricate and unlikely to recur, and the court's conclusion is curious. Claiming title by way of a bequest from her paternal grandmother, A had made her residence for six years in Blackacre. A's step mother-in-law B claimed Blackacre under the will of A's father and had A evicted from Blackacre, which B promptly sold to X by warranty deed. A then brought suit against X for title to Blackacre and recovered the property and a money judgment for X's occupancy of the premises.

X in turn sued B for breach of warranty of title to Blackacre. B failed to answer, and the state court rendered a money judgment in favor of X against B. X then began a post-judgment discovery proceeding against B to find property against which he might levy execution. By way of interrogatories X asked B to admit that she had abandoned her homestead claim to Whiteacre, where she had lived for twenty-three years. When B failed to answer the discovery request, the state court ordered her to answer. When B failed to comply, X moved the court to penalize B's misconduct. As sanctions the court thereupon entered an order that B had admitted that she had abandoned any claim to Whiteacre as her homestead, that Whiteacre was not her homestead, and that she could not assert any claim to Whiteacre as her homestead. The result it was said, constituted abandonment of B's homestead by imposition of sanctions. The court then issued a writ of execution against Whiteacre, which X bought at the sheriff's sale and transferred the property to A in satisfaction of her judgment.

B then filed a petition in bankruptcy asserting that Whiteacre (now claimed by A under the conveyance from X) as her homestead. "The bankruptcy court refused to give res judicata effect to the [state court's] sanctions order . . . ."<sup>155</sup> The federal district judge affirmed the ruling of

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152. The sequence of events is not very precisely set out in the opinion.

153. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, Sw. L.J. 65, 83-84 (1983).

154. 59 F.3d 548 (5th Cir. 1995).

155. *Id.* at 550. Anticipating that X might assert that the state court's sanctions order should be given res judicata effect, B's counsel could have appealed the sanctions order.

the bankruptcy court that the "post-judgment discovery proceeding is simply not capable of overriding the protection afforded to homestead claimants under the Texas Constitution."<sup>156</sup>

On A's appeal to the Fifth Circuit Court of Appeals, the court was at pains to show that all the elements for a holding of *res judicata* were met.<sup>157</sup> The court first explained that the state court had jurisdiction in the matter before it so that its ruling was not void but was at most voidable if an appeal had been taken from it. The federal appellate court therefore examined the jurisdiction of the state court to declare that Whiteacre was not B's homestead. The federal court concluded that if the sanctions order and "order of sale"<sup>158</sup> by the state court had caused a forced sale of the homestead, the order would have been void. But the order was saved from voidness by B's prior admission (by failure to respond) of the fact that X had sought to prove: that Whiteacre was not B's homestead. Having dealt with the jurisdiction of the Texas court at length, the court went on to say that the court's order was final and that the issue was the same as that before the bankruptcy court where the same parties were before the court. Though A was not a party to X's action against B in the strict sense, the fact that A was the assignee of X's interest acquired in the action against B made A privy to that action.<sup>159</sup> Because the parties were thus deemed identical and the issues in dispute were also identical, the post-judgment order of the state court had disposed of all issues before it,<sup>160</sup> and B's failure to appeal left that order in effect.<sup>161</sup>

Despite the court's careful reasoning and extreme care on B's behalf on the jurisdictional issue, one nagging point was not discussed: a troubling analogy that may be drawn between the consequences of B's failure to respond to X's interrogatories and a homestead claimant's forbidden waiver of her homestead by tendering it for execution.<sup>162</sup> This point is surely as fundamental as the *res-judicata*-jurisdictional issue, even if the parties to the two proceedings were the same on the basis of the constructive privy argument.<sup>163</sup>

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156. *Id.*

157. *Id.* (citing *Sutherland v. Cobern*, 843 S.W.2d 127, 130 (Tex. App.—Texarkana 1992, writ denied).

158. The court appears to mean "order for levy of execution". *Id.* at 552 (citing *Cline v. Niblo*, 117 Tex. 474, 8 S.W.2d 633, 638 (1928)). In either case, however, this conclusion seems to go further than applicable law requires.

159. *Camp*, 59 F.3d at 555 n.17.

160. *Id.* at 555.

161. *Id.* at 555 n.18.

162. See *Ross v. Lister*, 14 Tex. 469, 473-74 (1855); see also *Houston & Great Northern Ry. Co. v. Winter*, 44 Tex. 597, 611 (1876).

163. *Camp*, 59 F.3d at 552, 555. One is also uncomfortable when a federal court relies on procedural aspects of a Texas case for authority on a procedural point when that same decision is of very questionable authority for a point of substantive law. The particular procedural point for which *Curtis Sharp Custom Homes, Inc. v. Glover*, 701 S.W.2d 24, 25 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) was cited, however, could have been supported by other authorities.

As the case was handled, however, B's failure to respond to X's interrogatories apparently deserved sanction, but B's error was in not taking an appeal from the state court's judgment. If B had taken a successful appeal from that decision, B resort to the bankruptcy court could have been avoided, at least insofar as the homestead claim was concerned.<sup>164</sup>

#### E. LIENS ON HOMESTEADS

Revised homestead lien provisions of the Texas Constitution<sup>165</sup> were adopted on November 7, 1995. The Legislature had enacted amendments to section 41.001(b) of the Property Code, effective from May 17, 1995,<sup>166</sup> and other statutory provisions became effective with the constitutional amendment.<sup>167</sup>

The effective date of a constitutional amendment is not precisely defined. Article XVII of the Texas Constitution is silent on the point beyond stating that "[i]f it appears from the returns that a majority of the votes cast have been cast in favor of an amendment, it shall become a part of this Constitution . . ."<sup>168</sup> The Election Code provides for canvassing of the vote for statewide measures by the Governor from the fifteenth through the thirtieth days after an election<sup>169</sup> and his certification of the tabulations are made to the Secretary of State.<sup>170</sup> On November 7, 1995, the amendment to article XVI, section 50 was voted on and the canvass of December 1, 1995 showed that 51.4 percent of the voters favored the amendment. The amendment therefore seems to have become effective on December 1, 1995.<sup>171</sup>

The most significant change in the constitutional amendment provides that a lien to refinance a lien against a homestead (including a federal tax lien of both spouses or any tax debt of the owner) is valid. But it is not anticipated that lending practices will be much changed as a result. Lending had been conducted in such flagrant disregard of existing law that much, if not most, of the profession had come to think that such practice was constitutionally allowed. Of further significance is the amendment providing that "[a] purchaser or lender for value without actual knowledge may conclusively rely on an affidavit that [dishonestly] designates other property as the homestead of the affiant and that states that the

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164. Or if the bankruptcy had ensued after B's successful appeal, the Fifth Circuit court would have rejected A's appeal. *Camp*, 59 F.3d at 555 (citing *Arndt v. Farris*, 633 S.W.2d 497, 500 n.6 (Tex. 1982)).

165. TEX. CONST. art. XVI, § 50 (amended 1995).

166. TEX. PROP. CODE ANN. § 41.001(b) (Vernon Supp. 1996). Literally interpreted, some of these provisions could be unconstitutionally applied with respect to events that occurred during the brief period of their effectiveness, but they need not be so interpreted.

167. *Id.*

168. TEX. CONST. art., XVII, § 1 (amended 1972).

169. TEX. ELEC. CODE ANN. §§ 67.010(a), 67.012 (Vernon Supp. 1996).

170. *Id.* §§ 67.013(a), (d).

171. For an analysis of this point under prior constitutional and statutory provisions, see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 47 SMU L. REV. 1161, 1177-79 (1994).

property to be conveyed or encumbered is not the homestead of the affiant."<sup>172</sup> This is a considerable change in the law, and it puts aside contrary authorities such as *Texas Land & Loan Co. v. Blalock*<sup>173</sup> and *Maryland Casualty Co. v. Davenport*<sup>174</sup> when the homestead mortgagor's misrepresentation is supported by an affidavit. The third objective of the amendment was to dispose of banks' discomfort caused by the decision in *In re Buffington*<sup>175</sup> in order to allow a lender to make a loan on an entire homestead after its division between spouses on divorce. Another, but minor, change substitutes a general statement for the repetition of the types of debts allowed to burden a homestead with a lien rather than to increase the catalogue with those types added by the amendment.<sup>176</sup> Although the generality of the language is sufficient to do so, there is no evidence that the amendment was meant to dispose of homeowners' associations' liens for future improvements and maintenance charges allowed in *Inwood North Homeowners' Association v. Harris*.<sup>177</sup> That decision has been explained as approving such liens for future maintenance and improvements agreed to as covenants to run with the land prior to the land's becoming a homestead.<sup>178</sup>

Although cast in terms of an ex-wife appeal of the trial court's failure to grant a temporary injunction against an ex-husband's efforts to foreclose a lien against her homestead, her complaint in *Magallanez v. Magallanez*<sup>179</sup> actually amounted to an attack on the divorce court's division of property, to which she had failed to object five years earlier. It is not indicated in the appellate opinion whether the divorce decree was an agreed order, but the court awarded the wife the community family home, except for \$14,000 of its value awarded to the husband as his share of the community equity in the home. The husband's share was to be paid to him when their son reached the age of eighteen. Although apparently not directed by the court to do so, the wife had executed a note to the husband for \$14,000 and had given him a deed of trust lien on the property that might be enforced when the son reached age eighteen. When the son attained adulthood and the ex-wife was unable to pay the

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172. TEX. CONST. art. XVI, § 50 (amended 1995).

173. 76 Tex. 85, 13 S.W.2d 12 (1890) (When the spouses mortgaged their homestead, the property described as their homestead was property they owned but on which they had never lived.).

174. 323 S.W.2d 617-18 (Tex. Civ. App.—Amarillo 1959, no writ) (When they mortgaged their homestead, the spouses asserted that property belonging to someone else was their homestead.) There is no appellate case dealing with a lender's reliance on the borrowing spouses' imaginary property as their homestead when they gave a mortgage on their actual homestead, but that situation is also covered by the amendment.

175. 167 B.R. 833 (Bankr. E.D. Tex. 1994) (commented on in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1251-52 (1995)).

176. However one may feel about the substance of the amendment, it is a superb example of constitutional draftsmanship.

177. 736 S.W.2d 632 (Tex. 1987).

178. *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543 (Tex. App.—Houston [1st Dist.] 1994, no writ).

179. 911 S.W.2d 91 (Tex. App.—El Paso 1995, n.w.h.).



lien, the ex-husband brought suit for foreclosure, which the ex-wife sought to enjoin. The appellate court denied the ex-wife's appeal and recognized what amounted to a vendor's lien on the homestead for payment of the husband's community interest in the property.<sup>180</sup>

The dispute in *Lawrence v. Lawrence*<sup>181</sup> was rooted in an asserted error in a property division on divorce.<sup>182</sup> But the husband had failed to appeal and subsequent efforts to attack the decree were to no avail. Promptly after being awarded a life estate in the husband's separate homestead along with a money judgment, the ex-wife in possession abstracted her judgment to perfect her judgment lien and to give notice of the passing of title. Thereafter the ex-husband made a conveyance to his son of the acreage subject to the ex-wife's life estate. The ex-wife then brought suit against the son for a declaratory judgment to confirm her lien on the property, presumably apprehensive that her lien would not attach because of her own homestead occupancy. The son defended her suit on the ground that the lien did not reach his interest because he was the successor of his father's homestead interest by conveyance. The appellate court might have simply rejected this plea with the comment that a homestead right is not subject to transfer by mere conveyance. Rather, the court undertook to explain that the ex-husband had no homestead estate to convey because he had been stripped of his homestead interest as a consequence of the decision in *Laster v. First Huntsville Properties Co.*<sup>183</sup> In *Laster* the ex-husband out of possession mortgaged his fee interest in the former marital homestead. Because the appellate courts treated the mortgage as valid, the grantor had presumably lost his homestead claim as a result of acquiring another homestead or through abandonment, though the appellate court did not specify the cause. There is certainly no reason for the court's assertion in *Lawrence* that the Texas Supreme Court in *Laster* treated the ex-husband's loss of his homestead as due to ouster of possession by the divorce court or that the court meant to overrule earlier authority by which the owner (having established a homestead) is deemed to retain the homestead until abandonment is proved.<sup>184</sup> The fundamental reason that the ex-wife's cause had to prevail was that a homestead estate is simply not subject to transfer as such. It is a grantee's establishing homestead occupancy—the fact of his claim—that estab-

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180. *Id.* at 94 (citing *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984), and *Colquette v. Forbes*, 680 S.W.2d 536, 537 (Tex. App.—Austin 1984, no writ)).

181. 911 S.W.2d 450 (Tex. App.—Texarkana 1995, n.w.h.).

182. See *Lawrence v. Lawrence*, 911 S.W.2d 443 (Tex. App.—Texarkana 1995, n.w.h.).

183. 826 S.W.2d 125 (Tex. 1991) (discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 46 SMU L. REV. 1475, 1497-98 (1993)); see also *Svacina v. Gardner*, 905 S.W.2d 780 (Tex. App.—Texarkana 1995, n.w.h.).

184. *Speer & Goodnight v. Sykes*, 102 Tex. 451, 119 S.W. 86 (1909); *Posey v. Commercial Nat'l Bank*, 55 S.W.2d 515 (Tex. Comm'n App. 1932, holding approved). The court also garbled the conclusion of the court in *Intertext, Inc. v. Kneisley*, 837 S.W.2d 136, 138 (Tex. App.—Houston [14th Dist.] 1992, writ denied). A purchaser of a homestead does not lose the protection of his predecessor's homestead claim as a result of the grantee's failure to record promptly. But a failure to avoid a "gap" in homestead occupancy will allow an already recorded lien to attach to the property. *Id.*

lishes his homestead right. In *Lawrence* the son could not have acquired a homestead claim because he had established no right by occupancy.<sup>185</sup>

A different reliance upon the authority of *Laster* (a voluntary transfer case) prevailed in *Patterson v. First National Bank of Lake Jackson*<sup>186</sup> (an acquisition by foreclosure case). There, the husband and wife were divorced in 1981, and the wife was awarded occupancy of the community home with their minor children. Her right of occupancy, however, was to terminate on her remarriage when the house would be sold and the proceeds divided between the ex-spouses. She remarried in 1982. At that point the ex-husband might have asserted his right to reoccupy the premises but he failed to do so. The ex-wife was divorced in 1983 and remarried in 1988, while continuing to maintain her residence in the house. In 1986 the ex-husband borrowed money from a bank. When he defaulted on the loan, the bank took a judgment against him and abstracted its judgment. Subsequently the bank levied execution on the property and bought the ex-husband's interest at the sheriff's sale. In 1993 the bank brought a partition suit, which the ex-wife opposed. It does not appear that the ex-husband intervened to assert the invalidity of the levy or the sheriff's sale, but the appellate court stated that he had offered an affidavit which showed that he had not claimed any other homestead and that he intended that his children stay in the house.<sup>187</sup> Both the ex-wife and the bank moved for summary judgment and the bank's motion was granted. On appeal the court reversed the trial court's ruling on the apparent ground that assertion of the ex-husband's rights precluded relief for the bank. *Laster* was understood as holding that an ex-spouse's future right of possession might be cut off by the grantee of his interest on which his homestead right depended but not by his judgment creditor. In *Patterson*, however, there was ample evidence that the ex-husband had not abandoned his homestead right under *Speer & Goodnight v. Sykes*,<sup>188</sup> whereas in *Laster* he may have actually abandoned his homestead right or was assumed to have done so by his voluntary conveyance.

In *State v. 1204 North 12th Street*,<sup>189</sup> the state had asserted a right to seize a couple's homestead under the Contraband Forfeiture Act<sup>190</sup> but on appeal merely sought to seize the right of the guilty spouse and was allowed to recover. There was no assertion that the house was a homestead. If homestead protection had been asserted, the position of the state sovereign is fundamentally different from that of the national sovereign whose power as against rights under state law have the authority of

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185. A harder case would be that of an unmarried son who had lived on the premises and asserts a derivative claim from his father who maintains a homestead right in the remainder and purports to transfer his fee interest to the son along with the homestead right based on the son's prior occupancy.

186. 921 S.W.2d 240 (Tex. App.—Houston [14th Dist.] 1995, n.w.h.).

187. *Id.* at 246.

188. 102 Tex. 451, 119 S.W. 86, 88 (1909).

189. 907 S.W.2d 644 (Tex. App.—Corpus Christi 1995, n.w.h.).

190. TEX. CODE CRIM. PROC. arts. 59.01-.11 (Vernon Supp. 1996).

the Supremacy Clause of the United States Constitution<sup>191</sup> to support it. The state of Texas, however, is subject to the homestead provisions of the Texas Constitution<sup>192</sup> unless relieved from their strictures by some other provision of the fundamental law.

In *Auclair v. Sher*<sup>193</sup> the Fifth Circuit Court of Appeals drew a distinction between the federal government's power to reach homestead property to collect a fine<sup>194</sup> and the lack of power of a victim of a federal crime<sup>195</sup> to enforce a restitution award against similar property. Federal law does not give the victim greater power than any other person would have to enforce a civil judgment.<sup>196</sup>

#### F. EXEMPT PERSONALTY

In *In re Henry*<sup>197</sup> a Chapter 7 bankrupt debtor moved for removal of a non-purchase-money lien from a piece of welding equipment as a tool of trade.<sup>198</sup> The lien creditor asserted that the equipment was not a tool of trade because the debtor was a full-time salaried employee and used the equipment only in part-time work. Using "a common sense interpretation on a case-by-case basis,"<sup>199</sup> the Bankruptcy Court held that the equipment used in a part-time business was an exempt tool of trade and avoided the lien.

The court held in *In re Standel*<sup>200</sup> that the assets of a deferred compensation plan were exempt either as a "plan or program of annuities and benefits in use by any employer" under article 21.22 of the Insurance Code<sup>201</sup> or as "current wages" under Property Code section 42.001.<sup>202</sup> The assets were not exempt under Property Code section 42.0021, however, because the plan was not a "'qualified pension, profit sharing or stock plan' under the Internal Revenue Code."<sup>203</sup>

#### G. TURNOVER PROCEEDING

A turnover proceeding is a device designed to give a creditor a means of reaching a debtor's non-exempt assets that are not accessible by other means of forced seizure.<sup>204</sup> The debtor is protected by an exemption of

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191. U.S. CONST. art. I, cl. 2.

192. TEX. CONST. art. XVI, § 50.

193. 63 F.3d 407 (5th Cir. 1995).

194. 18 U.S.C. § 3663(h)(1) (1995); 18 U.S.C. § 3613 (1995).

195. 18 U.S.C. § 3663(h)(2) (1995).

196. *Auclair*, 63 F.3d at 409.

197. 183 B.R. 748 (Bankr. N.D. Tex. 1995), in which the debtor claimed federal exemptions.

198. *Id.* at 749; 11 U.S.C.S. § 522(f) (1995).

199. *In re Walkington*, 42 B.R. 67, 72 (Bankr. W.D. Mich. 1984) (cited in *Henry*, 183 B.R. at 750).

200. 185 B.R. 227 (Bankr. E.D. Tex. 1995).

201. *Id.* at 231-33, 235; TEX. INS. CODE ANN. art. 21.22, § 1 (Vernon Supp. 1996).

202. *Id.* at 234-35; TEX. PROP. CODE ANN. § 42.001(b)(1) (Vernon Supp. 1996).

203. *Id.* at 233, 235; TEX. PROP. CODE ANN. § 42.0021 (Vernon Supp. 1996).

204. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (Vernon 1986 & Supp. 1996).

"the proceeds of current wages"<sup>205</sup> and circumstances that show an abuse of discretion by the court's imposing the order to turnover assets.<sup>206</sup> In *DeVore v. Central Bank & Trust Co.*<sup>207</sup> the debtor asserted error in the court's judgment in both respects. The debtor, an attorney who was paid almost \$11,000 monthly by a corporation he had represented for many years, had been ordered to pay \$2,000 monthly from this amount to discharge a judgment debt. The majority of the court found, as had the trial court apparently, that the debtor was not an employee of the corporation but an independent contractor and that his earnings therefore did not constitute "current wages" in a master-servant context<sup>208</sup> and were therefore not protected from seizure. The appellate court also rejected the debtor's contention that the trial court abused its discretion.<sup>209</sup>

In *Ex parte Prado*<sup>210</sup> the court applied a stricter standard in favor of the debtor, a self-employed ticket scalper. After a long discussion as to whether the debtor's earnings were more akin to an employee's wages or an attorney's accounts receivable the court said that such a distinction, if any, was not controlling.<sup>211</sup> In granting the debtor's release by a writ of habeas corpus, the court concluded that the trial court's order forced the debtor "to choose between work and jail . . . [and] that the imposition of such a choice is beyond the power of the statute."<sup>212</sup> In saying that the debtor "had no existing nonexempt property or the future rights to any such nonexempt property . . .,"<sup>213</sup> the court clearly concluded that the debtor's earnings were "current wages" because there was no other type of exempt property that described them. The court's explanation was merely that the court's commitment of the debtor to jail for failure to comply with the court's order constituted "unconstitutional imprisonment for debt."<sup>214</sup>

#### IV. DIVORCE

##### A. DIVORCE PROCEDURE

1. *Personal Jurisdiction.* In *Dawson-Austin v. Austin*<sup>215</sup> on a motion for rehearing, the court commented on a number of procedural points in

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205. *Caulley v. Caulley*, 806 S.W.2d 795, 798 (Tex. 1991) (citing the 1989 amendment to TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(f) (Vernon 1986)); TEX. PROP. CODE ANN. § 42.001(b)(1) (Vernon Supp. 1996).

206. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991).

207. 908 S.W.2d 605 (Tex. App.—Fort Worth 1995, n.w.h.).

208. 908 S.W.2d at 610. The term "current wages" implies a master and servant relationship, not an attorney engaged in private practice as an independent contractor. *Brink v. Ayre*, 855 S.W.2d 44, 45 (Tex. App.—Houston [14th Dist.] 1993, no writ).

209. *Id.* at 607-09. The dissenting judge disagreed on the facts and on the failure of the creditor to show that other means of recovery had failed.

210. 911 S.W.2d 849 (Tex. App.—Austin 1995, n.w.h.).

211. *Id.* at 850.

212. *Id.*

213. *Id.*

214. *Id.* (citing TEX. CONST. art. I, § 18).

215. 920 S.W.2d 776 (Tex. App.—Dallas 1996, n.w.h.) (see text following note 305 *infra*).

relation to personal jurisdiction over the wife who was not a domiciliary of Texas. These included her waiver of a special appearance and its consequences<sup>216</sup> and her lack of specificity in making a conditional motion to quash service of citation,<sup>217</sup> as well as her plea in abatement.<sup>218</sup>

2. *Venue*.<sup>219</sup> In *Atkinson v. Arnold*<sup>220</sup> the court held that in the absence of a showing of peculiar circumstances, a temporary injunction (rather than a plea in abatement) is an inappropriate remedy to lay the venue of a suit in another county and thus protect the jurisdiction of the court in which a dispute has proceeded.<sup>221</sup> The matter in dispute was the breach of a property settlement agreement reached in a prior divorce proceeding. In *Newton v. Newton*<sup>222</sup> the plaintiff sued for damages for intentional infliction of emotional distress. Venue was laid in the county in which the damages had been allegedly inflicted rather than the county where the divorce had been granted. The Fort Worth Court of Appeals held that the laying of venue was proper<sup>223</sup> and that in the venue contest, the plaintiff is not required to defeat affirmative defenses, such as the statute of limitation.<sup>224</sup> Under the circumstances, however, the court found that under "the continuing course of conduct" doctrine, the statute of limitation did not begin to run until the wrongful conduct ceased.<sup>225</sup>

3. *Citation*. After filing his petition for divorce in *Spivey v. Holloway*,<sup>226</sup> the husband procured the wife's waiver of service of citation, but it was defective in that it lacked the wife's address. The husband nevertheless proceeded to trial in the wife's absence and the divorce was granted. Before the court signed the decree, however, the husband filed a corrected waiver of citation that included the wife's address, and the decree was approved and signed by both parties. The wife appealed on the grounds that she had not made a proper waiver of service and that the

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216. *Id.* at 781-83.

217. *Id.* at 784-85.

218. *Id.* at 785-86. This point made in the court's vacated opinion, *Dawson-Austin v. Austin*, 1995 WL 1680 \*1, \*6-9 (Tex. App.—Dallas, Jan. 3, 1995, n.w.h.), was noted in Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1260 (1995), and is substantially unchanged. The court also commented on the requirement of verification of discovery responses under TEX. R. CIV. P. 168(5), *id.* at 792, and a showing of good cause to overcome failure to supplement a discovery response concerning an expert witness under TEX. R. CIV. P. 215(5), *id.* at 794. See notes 380-81 *infra* and accompanying text.

219. Though the appellate decisions here discussed do not consider the problem of jurisdiction to grant a divorce, the court in *Dechon v. Dechon*, 909 S.W.2d 950, 954-55 (Tex. App.—El Paso 1995, n.w.h.), commented briefly on personal jurisdiction in the clarification and enforcement phases of divorce practice.

220. 893 S.W.2d 294 (Tex. App.—Texarkana 1995, n.w.h.).

221. *Id.* at 298.

222. 895 S.W.2d 503 (Tex. App.—Fort Worth 1995, n.w.h.).

223. *Id.* at 505-06 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 15.063(1) (Vernon 1986) and TEX. R. CIV. P. 87)).

224. *Id.* at 506 (citing *Dallas Joint Stock Land Bank v. Harrison*, 131 S.W.2d 742, 744 (Tex. Civ. App.—Fort Worth 1939, no writ) and TEX. R. CIV. P. 87(2)(b)).

225. *Id.* (citing *Twyman v. Twyman*, 790 S.W.2d 819, 821 (Tex. App.—Austin 1990), *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993)).

226. 902 S.W.2d 46 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.).

corrected waiver signed after the hearing could not cure the court's error retrospectively. The Houston First District Court of Appeals rejected this argument in that the defective waiver of service did not constitute error on the face of the record because the address-requirement<sup>227</sup> is not mandatory in consent-judgment cases.<sup>228</sup> The appellate court went on to hold that the wife's signing of the divorce decree constituted a general appearance.<sup>229</sup> Standing alone, that point could have sufficed to sustain the court's position. The court might have buttressed its other ground by relying on Rule 118<sup>230</sup> that allows amendment of any proof of service at the court's discretion "unless it clearly appears that 'material prejudice' would result to the substantial rights of the party against whom the process issued."<sup>231</sup>

4. *Answer. Sabanos v. Rivera*<sup>232</sup> raised the recurring question whether a letter to the court may constitute an answer so that the respondent is entitled to notice of a trial setting under rule 245.<sup>233</sup> In this instance the husband who had been sued for divorce wrote the court that he was "unable financially" to hire counsel but that he had an appointment for assistance with a legal aid society about six weeks later. Attached to the letter was a signed waiver of citation and entry of an appearance in which he authorized the court to consider the cause without further notice to him. After the court gave judgment noting that the husband "wholly made default,"<sup>234</sup> the husband appealed by writ of error to assert that his letter constituted an answer. The appellate court interpreted the words of the judgment to mean that the husband had filed no answer. Thus, because the document in the record constituted an answer, error was apparent on the face of the record in order to meet the requirement for reversal by writ of error.<sup>235</sup> The court said that its other alternative was to presume that the trial court had considered the husband's letter as an answer but nonetheless had granted a post-answer default judgment because the formal waiver of citation allowed the court to proceed without notice. This alternative was rejected because it presumed the invalidity of the default judgment, "a presumption prohibited by the applicable standard of review."<sup>236</sup>

The wife's appeal in *Miller v. Miller*<sup>237</sup> rested on the court's overruling

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227. TEX. R. CIV. P. 119.

228. *Spivey*, 902 S.W.2d at 48 (distinguishing *Travieso v. Travieso*, 649 S.W.2d 818 (Tex. Civ. App.—San Antonio 1983, no writ), as a default judgment case).

229. TEX. R. CIV. P. 124.

230. TEX. R. CIV. P. 118.

231. *Id.*; see Carroll G. Robinson, *Keeping Up with Civil Procedure*, 33 HOUS. LAW. 12 (Nov.-Dec. 1995).

232. No. 01-94-01269-CV, 1995 Tex. App. LEXIS 2298 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.) (not designated for publication).

233. TEX. R. CIV. P. 245.

234. *Sabanos*, 1995 LEXIS 2298, at \*2.

235. *Id.* at \*3 (citing *Hughes v. Habitat Apartments*, 860 S.W.2d 872, 873 (Tex. 1993); *Smith v. Lippman*, 826 S.W.2d 137, 138 (Tex. 1992)).

236. *Id.* at \*4.

237. 903 S.W.2d 45 (Tex. App.—Tyler 1995, n.w.h.).

her motion for a new trial. The wife's attorney had originally filed a petition for divorce on her behalf in county A, but the court there abated the proceeding on the ground that she had not been a resident of that county for ninety days as of the filing date.<sup>238</sup> Her husband then filed for divorce in county B, and after the wife was served with citation, her attorney asked the husband's attorney for a continuance of the temporary hearing because the wife's attorney was ill. Both parties apparently agreed to the continuance, and the trial judge passed the case. Without filing an answer the wife's attorney then informed her that he could not represent her because of his illness. The wife then employed another lawyer who advised her that he could not attend to her case for at least two weeks because of other commitments. The husband and his attorney then sought judgment which was granted in light of the wife's failure to answer. When the wife heard that judgment had been entered, she notified her counsel and he filed a motion for a new trial on the basis of the wife's lack of knowledge of the status of her case, rather than conscious indifference on her part. Neither the wife nor her attorney was aware that her prior counsel had failed to file an answer. The court nevertheless overruled her motion. The appellate court followed the prevailing tendency to grant a new trial with liberality<sup>239</sup> in that the wife's failure to appear was not intentional, that she had a meritorious defense to the husband's plea for custody of the children and division of property, and that she had offered to reimburse her husband for any cost that he had incurred in obtaining the judgment.<sup>240</sup> Most particularly, the court concluded that under the circumstances a reasonable layman in the wife's position would not have realized that an answer had not been filed on her behalf.<sup>241</sup>

The sequence of events was somewhat different in *Bennett v. Bennett*.<sup>242</sup> There, after the respondent had failed to file an answer, the petition for divorce was granted. Before the written decree was entered, however, the respondent entered her answer, though it did not contain a certificate of service. The filing of the answer, though defective, therefore prevented proper entry of a written decree, and the respondent was entitled to a new trial.<sup>243</sup>

5. *Notice of Trial*. In *Marr v. Marr*<sup>244</sup> the consequences of the wife's, or her attorney's, inattention to the petitioning husband's discovery request was saved by her prior filing of a request for a jury trial. After the wife had filed her answer to her husband's petition for divorce, the wife was ordered to produce certain documents. Over seven months after her

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238. TEX. FAM. CODE ANN. § 3.21 (Vernon 1993).

239. *Miller*, S.W.2d at 47 (citing *Iley v. Reynolds*, 319 S.W.2d 194 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.)).

240. *Id.* at 47-48 (citing *Craddock v. Sunset Bus Lines*, 134 Tex. 388, 133 S.W.2d 124 (1939)).

241. *Id.* at 47.

242. 868 S.W.2d 408 (Tex. App.—Houston [14th Dist.] 1993, n.w.h.).

243. *Id.* at 409 (citing *Reitmeyer v. Charm Craft Publisher*, 619 S.W.2d 441, 442 (Tex. App.—Waco 1981, no writ)).

244. 905 S.W.2d 331 (Tex. App.—Waco 1995, n.w.h.).

failure to produce the documents, the husband filed a motion to compel the production of the documents and for contempt and sanctions for failure to do so. Almost a year after the initial order to produce, at a hearing the court reset the trial and ordered that if the requested documents were not produced within three weeks, the wife's pleading would be struck. On the day following the unmet deadline for production and just after the court had advised the wife's attorney's partner by telephone that the trial would proceed, the court struck the wife's pleadings and then heard and granted the husband's petition in the wife's absence. A decree was entered three days later.

Rule 243<sup>245</sup> provides that a defendant who has requested a jury trial be provided a hearing before a jury even though an argument on the merits of the case has been forfeited. On appeal, the majority of the Waco court held that the rule applies to divorce cases because the jury's function in the characterization and valuation of marital property in divorce cases is analogous to the fixing of unliquidated damages specifically referred to by the rule.<sup>246</sup> A concurring judge disagreed as to the applicability of Rule 243, however, because a matter of unliquidated damages was not in dispute, rather (he asserted) the dispute entailed fact questions of a decidedly different nature.<sup>247</sup> Extending the logic of the majority's position, he said, would require Rule 243 to be applied "any time the court has to decide a fact question before it can enter a final judgment following a default . . . ."<sup>248</sup> The concurring judge went on to say that striking the wife's pleadings did not constitute a failure to answer so that a default judgment might have been entered against her.<sup>249</sup> That is, because a true default judgment cannot be entered in a divorce case,<sup>250</sup> Rule 215<sup>251</sup> (allowing the striking of pleadings as a sanction) cannot amount to a default. Although the trial court could strike the wife's pleadings as a sanction against her, "it could not enter a default judgment against her without giving her notice of the hearing at which the court would hear allegations in her husband's petition."<sup>252</sup> On the effects of her demand for a jury trial the concurring judge made the further point that the wife was entitled to a jury trial on any fact question related either to the divorce or to the division of property. "The court did not strike her jury demand when it struck her pleadings."<sup>253</sup> On both points the con-

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245. TEX. R. CIV. P. 243.

246. *Marr*, 905 S.W.2d at 334. The brief time allowed for preparation for trial after notice was sufficient under Rule 243.

247. *Id.* at 335.

248. *Id.*

249. *Id.*

250. TEX. FAM. CODE ANN. § 3.53 (Vernon 1993); *Mason v. Mason*, 282 S.W.2d 320 (Tex. Civ. App.—San Antonio 1955, no writ).

251. TEX. R. CIV. P. 215.

252. *Marr*, 905 S.W.2d at 335.

253. *Id.* (citing *Global Serv., Inc. v. Bianchi*, 901 S.W.2d 934, 938 (Tex. 1995) (quoting *TransAmerican Natural Gas v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). The imposition of any sanction in connection with compliance with a discovery request must "be no more severe than [is] necessary to satisfy its legitimate purpose.")).



curing judge's arguments are persuasive.

After the wife had answered her husband's petition for divorce in *Misium v. Misium*<sup>254</sup> and her counsel had received notice of a trial setting, her attorney filed a motion to withdraw as counsel, stating that there was no setting for the trial. The court granted the motion and a copy of the order was sent to the husband's attorney. The husband's attorney nevertheless proceeded to trial on the original trial setting and a divorce was granted in the absence of the wife. After the court had overruled the wife's motion for a new trial, the wife appealed on the ground that the court had erred in rendering judgment because she had no notice of the trial setting. The wife's attorney had stated in his motion to withdraw that there was no trial setting and the motion was approved by the trial court. The wife, therefore, could rely on the lack of a trial setting, and she was entitled to a new trial because the case had gone to trial without her receiving notice.<sup>255</sup>

In *Rolon v. Rolon*<sup>256</sup> the divorce proceeding had been commenced by the wife, the husband had filed an answer and counterclaim, and temporary orders had been entered. A trial date was set, but the husband's attorney was sick in the hospital and was not notified of the trial setting until a day or two before trial. When told by the court that he could either proceed or withdraw, the attorney chose to withdraw and the husband proceeded to trial without counsel. After a judgment was entered in favor of the wife, the husband procured new counsel, but the court denied his motion for a new trial. On the husband's appeal the Beaumont Court of Appeals held that the trial court had committed error even though the husband's attorney had received notice of the trial in accordance with the rules.<sup>257</sup>

6. *Temporary Orders.* In *Ex parte Chunn*<sup>258</sup> the husband had been ordered to make monthly mortgage payments on the family home as an element of support payments. In May, the wife moved the court to find the husband in contempt of the court's order for failure to make payments for March, April, and May and added that she believed that her husband would fail to make payments for June, July, and August. At a hearing held in late June the court found the husband in contempt for failure to make payments for March through June. The husband sought release by writ of habeas corpus in which he alleged that his right to due process had been violated because he had been found guilty of an offense that occurred after the motion for contempt was filed. The court agreed.<sup>259</sup> Because the finding of non-payment in June was void, the

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254. 902 S.W.2d 195 (Tex. App.—Eastland 1995, writ denied).

255. *Id.* at 197.

256. 907 S.W.2d 670 (Tex. App.—Beaumont 1995, n.w.h.).

257. *Id.* at 671.

258. No. 01-95-00803-CV, 1995 Tex. App. LEXIS 2720 (Tex. App.—Houston [1st Dist.], Nov. 2, 1995, n.w.h.).

259. *Id.* at \*4 (citing *Ex parte Oliver*, 736 S.W.2d 277 (Tex. App.—Fort Worth 1987, no writ)).

court held that the entire order was void and the relator was entitled to be released.

*Ex parte Kimsey*<sup>260</sup> concerned a husband who sought release from commitment for civil contempt resulting from his failure to pay attorney's fees. He argued that the attorney's fees were merely debts owed by his wife to her attorney and that his commitment therefore constituted imprisonment for debt contrary to the Texas Constitution.<sup>261</sup> The court denied his application for release, once again reiterating the distinction between support obligations (which include the payment of attorney's fees in a divorce proceeding) and debt obligations to other persons.<sup>262</sup> Whether a husband is ordered to pay his wife temporary alimony, which includes her attorney's fees, or to pay an amount into the registry of the court for his wife's attorney's fees is of no consequence in this context. "In each instance, the wife is recouping the benefit of the support award."<sup>263</sup>

7. *Name Change*. In 1995 the legislature amended the correlative provision concerning the name change of a party to a divorce, annulment, or a suit to declare a marriage void<sup>264</sup> in sections 3.64(a) and 32.24(a) of the Family Code.<sup>265</sup> The amendment provides that "the court shall change the name of a party specifically requesting the change to a prior used name unless the court states in the decree a reason for denying the change . . . ."<sup>266</sup> The change of name is virtually available on request of the court, provided a name previously used is desired. If a name other than one previously used is sought, the petitioner may rely on name change by reputation. It is also worthy of note that the person wishing the change must make the request personally. A request made by the other party will not suffice. If an ex-parte divorce is sought and the respondent wishes a change of name, the petitioner's request for the name change of the other spouse should be supported by the respondent's sworn request for name change with a statement of the reason for the change.

8. *Expert Witness*. In an en banc rehearing of *Collins v. Collins*<sup>267</sup> the Houston First District Court of Appeals (with two judges dissenting) concluded that the husband (as well as his closest business associate who was not a party to the proceeding) should not have testified to the value of

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260. 915 S.W.2d 523 (Tex. App.—El Paso, 1995).

261. TEX. CONST. art I, § 18.

262. *Kimsey*, 915 S.W.2d at 525 (citing *Ex parte Hall* 854 S.W.2d 656, 658 (Tex. 1993)).

263. *Id.* at 526.

264. The reference to a suit to declare a marriage void was added to § 3.64 in 1995. Although the second sentence of § 3.64 was repealed in 1995, the amendment does not affect the prior statement there that a change of name does not affect prior liability or the right of the party whose name is changed. The statement was deleted merely because it was deemed superfluous.

265. TEX. FAM. CODE ANN. §§ 3.64(a), 32.4(a) (Vernon Supp. 1996).

266. TEX. FAM. CODE ANN. § 3.64(a) (Vernon Supp. 1996). Thus the petitioner will have a ground for appeal readily available.

267. 904 S.W.2d 792 (Tex. App.—Houston [1st Dist.] 1995, writ denied, with per curiam opinion) (en banc).

two corporations (half-owned by the community estate) because they were not designated as expert-witnesses and the substance of their testimony was not produced before trial.<sup>268</sup> The trial court had allowed the expert-testimony over the wife's objection. In response to the wife's interrogatories the husband and his associate had not been listed as expert-witnesses. Hence, the court could allow their testimony only on proof of "good cause," which was not shown by the husband.<sup>269</sup> The dissenting judges regarded the testimony as that of lay witnesses as to value rather than expert-testimony.<sup>270</sup> Neither the court nor the dissenting judges offered any guidance for dealing with this sort of definitional impasse unless one assumes, as the court seemed to assume, that seemingly harmful evidence as to valuation of a significant asset offered by a witness was expert evidence.<sup>271</sup> One ground for disagreement between the judges was the fact that the husband and his associate testified prior to trial that they would give no testimony as to value, and the husband's counsel assured the wife's lawyer that the husband would not testify about value unless he changed his mind, in which case the wife's counsel would be informed in advance.<sup>272</sup> Those assurances apparently were not honored.

9. *Death of a Spouse.* As between the spouses, death of one of them before rendition abates a suit for divorce and any issue of custody between them.<sup>273</sup> In *Nichols v. Nichols*,<sup>274</sup> however, the husband died on the evening of the day an agreed judgment for divorce was entered, and the wife sought a new trial. During five years prior to the wife's filing for divorce the husband had suffered an acute debilitating disease that had exhausted much of the couple's assets, and they had decided that a divorce was the best means of protecting the wife's financial interests. On the grounds of the extreme emotional and physical stress under which she suffered and her lack of understanding of the agreed order and its effects, the wife moved that the order be set aside and a new trial be granted. Within thirty days of rendering the decree the court granted her motion. The husband's children, who had not received notice of the wife's motion, moved to reinstate the decree, and on the court's refusal they appealed. The Tyler Court of Appeals sustained the trial court's exercise of discretion to grant a new trial<sup>275</sup> and concluded that the court was not unreasonable in doing so in light of the severe stress under which the wife suffered at the time the decree was entered. The court agreed with the children's position that they were entitled to notice of the motion for a

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268. *Id.* at 799 (citing TEX. R. CIV. P. 166b(2)(e)(1), *Exxon Corp. v. West Texas Gathering Co.*, 868 S.W.2d 299, 304 (Tex. 1993), *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992), and *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986)).

269. *Id.* at 802.

270. *Id.* at 806.

271. *Id.*

272. *Collins*, 904 S.W.2d at 800.

273. *Smelser v. Smelser*, 901 S.W.2d 708, 709 (Tex. App.—El Paso 1995, n.w.h.).

274. 907 S.W.2d 6 (Tex. App.—Tyler 1995, n.w.h.).

275. *Id.* at 10 (citing *Turner v. Ward*, 910 S.W.2d 500 (Tex. App.—El Paso 1994, n.w.h.)).

new trial, but the court concluded that under the circumstances they were not harmed by the action taken.<sup>276</sup>

10. *Appeal*. A timely appeal from the report of a family court master (or associate judge) is entitled to a hearing de novo before the referring court.<sup>277</sup> If the referring court should inadvertently sign an order adopting the master's report, however, an appeal should be taken to the court of appeals. If the appellant to the referring court fails to take his appeal within the time allowed, the order will be no longer appealable and he must attack it by a bill of review.<sup>278</sup> *State ex rel. Latty v. Owens*<sup>279</sup> concerned an appeal from the subsequent order of the referring court finally entered after a trial de novo. The Texas Supreme Court held that the second order of the referring court (that was entered after a trial de novo) was void because the first order was left standing without appellate challenge.<sup>280</sup>

The timeliness of a hearing on a contest of ability to pay costs of an appeal by writ of error was in issue in *Sabanos v. Rivera*.<sup>281</sup> The Houston First District Court of Appeals held that the trial court must rule on such a contest or sign an order within ten days after the contest is filed and the court may not extend the time for more than twenty days after an order of extension<sup>282</sup> or the appellant's allegations must be taken as true.<sup>283</sup> The trial court's failure to act within the time allowed therefore defeated the contest.

A panel of the Houston First District Court of Appeals in *Rafferty v. Finstad*<sup>284</sup> divided on the rankling question of the duty of a trial court to make findings of fact and conclusions regarding valuations and characterizations of marital assets to be divided on divorce. Although the majority of the court deemed such findings and conclusions as not "ultimate and controlling issues" within TEX. R. CIV. P. 298,<sup>285</sup> Justice O'Connor, dissenting, cogently pointed out that "[w]ithout information about the trial court's underlying assumptions about the character of the property, reimbursement to the community, and value of the property, we have no way

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276. *Id.* at 11; TEX. R. CIV. P. 152.

277. TEX. GOV'T CODE ANN. § 54.012 (Vernon 1988).

278. TEX. R. APP. P. 52.

279. 907 S.W.2d 484 (Tex. 1995) (per curiam) (reversing *State ex rel. Latty v. Owens*, 893 S.W.2d 728 (Tex. App.—Texarkana 1995)).

280. *Id.* at 486.

281. 893 S.W.2d 275 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.) (per curiam).

282. TEX. R. CIV. P. 40(a)(3)(E).

283. *Sabanos*, 893 S.W.2d at 275-76.

284. 903 S.W.2d 374 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.).

285. *Id.* at 376 (citing *inter alia* *Finch v. Finch*, 825 S.W.2d 218, 221 (Tex. App.—Houston [1st Dist.] 1992, no writ), and *Wallace v. Wallace*, 623 S.W.2d 723, 723 (Tex. App.—Houston [1st Dist.] 1981, writ dismissed)). Only the "just and right" division of community property under TEX. FAM. CODE ANN. § 3.63 (Vernon 1993) is the ultimate and controlling issue. *Id.* Both *Finch* and *Wallace* were severely criticized by William Dudley, *Preservation of Error and Appellate Practice*, 1994 ADVANCED FAMILY LAW COURSES NN-1 at NN-24 (State Bar of Texas 1994).

to decide if the trial court's ultimate division is 'just and right'.<sup>286</sup> Justice O'Connor's conclusion is hard to fault.<sup>287</sup>

11. *Alternative Dispute Resolution*. In 1995 the legislature required a petitioner for divorce and a respondent to state a willingness to submit to other methods of dispute resolution (including mediation) rather than litigation to settle the issues in contest.<sup>288</sup> When reduced to writing, the mediated settlement is enforceable "in the same manner as any other written contract"<sup>289</sup> and may be incorporated in the court's decree.<sup>290</sup>

## B. PROPERTY SETTLEMENT AGREEMENTS

Two cases involved property settlement agreements repudiated by one of the parties to a divorce. In *Sohocki v. Sohocki*<sup>291</sup> a settlement agreement was read into the record after a trial on the merits before a special master. Three weeks later and before the district court adopted the master's recommendation and signed the decree, the wife filed a revocation of the agreement. In response to the wife's appeal the husband sought to sustain the judgment by asserting that the wife was required to present direct testimony of her revocation. The appeals court rejected his argument and held that the decree was void for want of consent.<sup>292</sup> *Cary v. Cary*<sup>293</sup> was a harder case. After a court-ordered mediation proceeding the couple reached a Rule 11<sup>294</sup> agreement that was signed by both parties. By the time the court convened to render a consent decree about three weeks later, the wife had repudiated the agreement. The court, nevertheless, ruled that the agreement was valid under chapter 154 of the Civil Practice and Remedies Code<sup>295</sup> and rendered the divorce accordingly. The Houston First District Court sustained the wife's appeal and rejected the conclusion of the Amarillo Court of Appeals in *In re Ames*.<sup>296</sup> The Houston Court relied on the provision of Family Code section 3.631(a)<sup>297</sup> that the agreement may be repudiated. That section provides that the agreement may be repudiated prior to rendition "unless it is binding under some other rule of law."<sup>298</sup> This provision, the court

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286. *Rafferty*, 903 S.W.2d at 380 (citing *Joseph v. Joseph*, 731 S.W.2d 597, 598 (Tex. App.—Houston [14th Dist.] 1987, no writ)).

287. There is an intimation to the same effect in *Capellen v. Capellen*, 888 S.W.2d 539 (Tex. App.—El Paso 1994, writ denied).

288. TEX. FAM. CODE ANN. § 3.522 (Vernon Supp. 1996). One wonders whether the requirement was meant to be jurisdictional.

289. TEX. CIV. PRAC. & REM. CODE ANN. § 154.071 (Vernon Supp. 1996).

290. *Id.* See generally Harper Estes, *Enforcement of Settlement Agreements Made in Mediation*, 58 TEX. B.J. 338 (1995).

291. 897 S.W.2d 422 (Tex. App.—Corpus Christi 1995, n.w.h.).

292. *Id.* at 424.

293. 894 S.W.2d 111 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.).

294. TEX. R. CIV. P. 11 (agreed judgment).

295. TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (Vernon Supp. 1996) (alternative dispute resolution).

296. 860 S.W.2d 590, 592 n.1 (Tex. App.—Amarillo 1993, no writ); see also *Davis v. Wickham*, 917 S.W.2d 414 (Tex. App.—Houston [1st Dist.] 1996, n.w.h.).

297. TEX. FAM. CODE ANN. § 3.631(a) (Vernon 1993).

298. *Id.*

held, does not encompass a mediation under the Civil Practice and Remedies Code.<sup>299</sup> To so conclude, the court said, "would transform mediation into binding arbitration."<sup>300</sup> The court went on to say that the husband may nevertheless pursue an action for breach of the contract arising from the mediation for which he may be awarded "damages and specific performance, where applicable," which he may plead in his divorce case so that all matters are tried together.<sup>301</sup> The provisions of the Civil Practice and Remedies Code section 154.071,<sup>302</sup> as enacted in 1995 does not address the consequences of a repudiated settlement agreement.

On a previous appeal of the same dispute before the court in *Parker v. Parker*<sup>303</sup> the court had concluded that a binding contract had not been reached,<sup>304</sup> but on remand the trial court awarded damages for breach of that contract. The appellate court held that the trial court had erred.<sup>305</sup>

### C. DIVISION ON DIVORCE

Although a panel of the Dallas Court of Appeals in *Dawson-Austin v. Austin*<sup>306</sup> described the principal point at issue before it as one of "characterization" of matrimonial property, the issue is more accurately described as property "classification" under section 3.63(b)<sup>307</sup> of the Family Code (for the purpose of property division on divorce) when the property was acquired before the parties became subject to Texas law. Prior to marriage the husband had inherited a substantial interest in a Minnesota corporation and the couple were domiciled in Minnesota for many years of their marriage. After their separation the husband moved to Texas and brought suit for divorce against his wife who was living in California. The shares of the corporation had greatly appreciated in value during the marriage, and the wife argued that their appreciation in value should be divided on divorce as it would have been if the divorce proceedings had been brought in Minnesota. In an early stage of the trial, however, the trial court had granted a partial summary judgment for the husband by which the securities (as appreciated in value) were adjudged to be his separate property under Texas law and, thus, were not subject to division. At the end of the trial the court divided the far less significant (but still very considerable) community estate between the parties.

On the wife's appeal, it was agreed that the inherited corporate shares were indeed the husband's separate property when acquired, but the parties continued to disagree as to the proper classification of the apprecia-

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299. *Cary*, 894 S.W.2d at 112.

300. *Id.* at 113.

301. *Id.*

302. TEX. CIV. PRAC. & REM. CODE ANN. § 154.071 (Vernon Supp. 1996).

303. 897 S.W.2d 918 (Tex. App.—Fort Worth 1995, writ denied).

304. *Parker v. Parker*, No. 2-88-170-CV (Tex. App.—Fort Worth, Nov. 22, 1989, writ denied) (not designated for publication).

305. *Parker*, 897 S.W.2d at 924.

306. 920 S.W.2d 776 (Tex. App.—Dallas 1996, n.w.h.).

307. TEX. FAM. CODE ANN. § 3.63(b) (Vernon 1993).

tion of the shares for the purpose of division. The wife sought application of Minnesota law, and the husband argued that the law of Texas should apply. First, the husband argued that because section 3.63(b) provides that property acquired during marriage that would have been community property if it had been acquired by Texas domiciliaries is divided as community property in a Texas divorce, all other property is separate property for that purpose. The appellate court rejected the sweeping conclusion that section 3.63(b) constitutes "a comprehensive choice-of-law provision"<sup>308</sup> but concluded that the different rules of Texas and Minnesota law for the divisibility of the increase in value of the separate shares needed to be addressed in a choice-of-law context. The court looked to the most significant contacts principle propounded in *Duncan v. Cessna Aircraft Co.*<sup>309</sup> as a general choice-of-law rule. Applying the rule in *Duncan*<sup>310</sup> the court concluded that Texas is the state with the most significant relationship to the action, and thus Texas law rather than Minnesota law should apply in classifying the increase in value of the property, which both states treat as separate property.<sup>311</sup>

#### D. MAKING THE DIVISION

The husband complained of the divorce court's division of property on a number of grounds in *Siefkas v. Siefkas*.<sup>312</sup> The court had ordered that the husband discharge a second mortgage contracted by both spouses for the improvement of the family home of which the wife was given possession and ordered to pay the first mortgage on the property. The husband asserted that his being ordered to pay the second mortgage constituted an invalid award of alimony to the wife.<sup>313</sup> The appellate court rejected this argument because the husband was not ordered to make periodic post-divorce monetary payments to his ex-wife but was merely ordered to discharge a debt that he already owed. Ordering him to make the payment, the court said, was commensurate to an award of a money judgment to the wife to balance the equities as between the parties in making a division of property.<sup>314</sup>

The husband also objected to the divorce court's giving the wife possession of certain community personalty (awarded to him) until he paid the second mortgage against the home. The appellate court also approved

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308. *Dawson-Austin*, 920 S.W.2d at 789.

309. 665 S.W.2d 414 (Tex. 1984). See also *Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50 (Tex. 1991).

310. *Dawson-Austin*, 920 S.W.2d at 789-91.

311. It is in that respect that the decision was most radically changed on rehearing. In its earlier opinion the court had observed that "application of Minnesota law in this case does not impair the husband's rights because he 'loses no more than he loses in a judgment rendered' in Minnesota." *Dawson-Austin*, 1995 WL 1680 at \*12 (quoting *Cameron*, 641 S.W.2d 210, 222-23 (Tex. 1982)).

312. 902 S.W.2d 72 (Tex. App.—El Paso 1995, n.w.h.).

313. *Id.* at 75.

314. *Id.* (citing *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 733 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); *Price v. Price*, 591 S.W.2d 601, 603 (Tex. Civ. App.—Tyler 1979, no writ)).

what it termed a sort of possessory lien against the personalty that constituted "a reasonable and properly focused incentive for [him] to [discharge] the lien as ordered . . . and requires no threat of cumbersome efforts to seek court enforcement to be effective."<sup>315</sup> The court also noted that the divorce court had similarly awarded the husband possession of personalty awarded to the wife and he was allowed to hold it until his property was returned to him.<sup>316</sup>

The husband in *Siefkas* also complained that certain personalty was awarded to his wife that was shown to be either his separate property or property of his separately owned corporation. Although the corporation was not a party to the proceeding and the evidence in the record was murky, the appellate court remanded the case for a redivision of the assets<sup>317</sup> but "without conducting a new evidentiary hearing or taking any new evidence whatsoever."<sup>318</sup>

In this<sup>319</sup> and other appellate challenges to divisions of property for abuse of discretion<sup>320</sup> the court found no abuses by the trial court.

#### E. EX-SPOUSAL MAINTENANCE

After over thirty years of evasive, desolatory consideration of the matter,<sup>321</sup> the Legislature at its 1995 session enacted a bill to provide for judicially ordered maintenance of a former spouse.<sup>322</sup> This post-divorce maintenance provision is applicable to all suits for divorce filed from September 1, 1995.<sup>323</sup> A spouse is eligible for such a maintenance award (1) if the marriage has existed for ten years and the spouse will have insufficient property to provide for minimal needs or (2) if the other spouse was convicted (or received a deferred adjudication and was placed under community supervision) for an act of family violence.<sup>324</sup> The recipient ex-spouse's inability to provide for minimal needs can be the result of

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315. *Id.* at 76.

316. *Id.*

317. *Id.* at 80 (citing *Jacobs v. Jacobs*, 687 S.W.2d 731, 732 (Tex. 1985); *McKnight v. McKnight*, 543 S.W.2d 863, 866 (Tex. 1976)).

318. *Id.* (citing *LeBlanc v. LeBlanc*, 761 S.W.2d 450, 453 (Tex. App.—Corpus Christi 1988, writ denied); *Barker v. Barker*, 688 S.W.2d 121, 122 (Tex. App.—Corpus Christi, 1984, no writ)).

319. *Id.* at 74.

320. See *Forgason v. Forgason*, 911 S.W.2d 893, 896 (Tex. App.—Amarillo 1995, n.w.h.); *Abernathy v. Fehlis*, 911 S.W.2d 845 (Tex. App.—Austin 1995, n.w.h.); *In re Moore*, 890 S.W.2d 821, 838-39, 841-43 (Tex. App.—Amarillo 1995, n.w.h.). In *Dawson-Austin*, 920 S.W.2d at 795, the court rejected an assertion of abuse of discretion seemingly based on the trial court's failure to note disparity of earning power.

321. See James W. Paulsen, *Remember the Alimony!* *The Unique Texas Bar on Permanent Alimony and the Development of Community Property Law*, 56 LAW & CONTEMP. PROBS. 7 (1993).

322. TEX. FAM. CODE ANN. §§ 3.9601-3.9611 (Vernon Supp. 1996) (passed as a part of the 1995 Welfare Reform Act).

323. If a petitioner for divorce took a non-suit of a petition between January 1, 1995 and August 31, 1995, the alimony act is inapplicable to any further suit for divorce filed by that person before January 1, 1997 [Act of Sept., 1995, 74th Leg., R.S., ch. 655, Sec. 1003(a)], codified as TEX. FAM. CODE ANN. § 3.9601 (Vernon Supp. 1996).

324. TEX. FAM. CODE ANN. § 3.9602 (Vernon Supp. 1996).



physical or mental incapacity, the care of a child who requires supervision because of physical or mental disability, or a lack of earning ability.<sup>325</sup> Thus, apart from the length of the marriage, eligibility is based on need or fault. But such need or fault may be factually unrelated to the marital relationship.

The amount of monthly maintenance awarded, however, cannot exceed the lesser of \$2,500 or twenty percent of the obligor's average monthly gross income<sup>326</sup> and cannot extend for a period beyond three years.<sup>327</sup> The recipient ex-spouse is therefore put under some pressure to become self-sufficient but, because of the length of time allowed, may be unwilling or unable to do so. The state could thereby be temporarily relieved of some of the responsibility to care for such an ex-spouse (for reasons which in some instances may not relate to the obligor's act or omissions toward the recipient) but not permanently.

If there are sound reasons for bringing a marriage to an end by divorce and thus rendering each former spouse a single person, there is no sound reason for requiring one of them to compensate the other except for a marriage-related cause. Elsewhere post-divorce awards have been given for maintenance by a misplaced analogy to maintenance awards made to a separated spouse who was still married. Awards of post-divorce maintenance initially resulted from an unwillingness of legislatures and courts either (1) to divide a husband's property by accelerating the wife's vested rights of dower and its statutory substitutes or (2) to grant damages for marital wrongs that justified a divorce. If we must make such awards, we should identify them for what they are and provide for monetary awards with some care. The 1995 maintenance act is a legislative effort at solving a problem but is not an appropriate solution—a careless response to pressures of over thirty years to conform to an irrational concept prevailing elsewhere. There are certainly instances when the wrongs suffered by one spouse cannot be compensated because of a lack of community property to divide or possibly by the nature of the wrong inflicted. But the relief fashioned by the legislature is seriously flawed.

An order to pay maintenance under the act is a personal obligation of the obligor and terminates on the obligor's death<sup>328</sup> as it would in the case of a penalty against the obligor. Even if the needs of the recipient are the consequences of a wrong or a condition of marriage unreasonably imposed on the recipient by the obligor, the recipient forfeits the provision's for maintenance if the recipient remarries or cohabits with another person on a "continuing conjugal basis."<sup>329</sup> Thus, the award may not fully compensate for the wrong suffered. On the other hand, if the award is not based on a wrong perpetrated by the obligor, the imposition of main-

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325. *Id.*

326. *Id.* § 3.9606(a).

327. *Id.* § 3.9605(a)(1).

328. *Id.* § 3.9607(a).

329. *Id.* A material change in circumstances will allow downward modification of the maintenance award but not its increase. TEX. FAM. CODE ANN. § 3.9608(a).

tenance puts an unwarranted burden on the obligor—an order to pay a sort of private welfare benefit to the recipient.

The divorce court is directed to limit the duration of the maintenance award to the shortest reasonable period of time to allow the recipient to achieve employment in order to meet reasonable needs.<sup>330</sup> If a spouse is unable to provide self-support because of mental or physical incapacity, however, the award may continue for the duration of the incapacity or indefinitely if its duration is not specifically terminated.<sup>331</sup> If the cause of disability is not related to the marriage, fastening a duty of support on the other spouse is unjustifiable.

During the last century when the concept of requiring a former husband to pay for maintenance of his former wife was developed, the law ordinarily made an award to compensate for the husband's wrongful acts during marriage, circumstances of marriage that benefited the obligor but not the obligee, or acts that were detrimental to the obligee. In the past allowing a spouse to recover for marital wrongs or deprivations has been accepted in Texas only in relation to division of community property. Since the abolition of the spousal tort immunity in 1977, a spouse may recover for wrongs inflicted during marriage by the other spouse apart from emotional distress negligently caused. If a policy of allowing recovery for marital wrongs is a reasonable concept, to limit the award to a particular period of time or marital or cohabital status in the case of post-divorce maintenance seems contrary to the principles of our system of justice.

#### F. PROPERTY UNDIVIDED ON DIVORCE

The former wife in *Forgason v. Forgason*<sup>332</sup> brought suit for division of community property left undivided on divorce in 1979. The property consisted of benefits of a private pension plan of the ex-husband who later retired in 1985. Prior to his retirement the ex-husband had arranged for an annuity for his second wife and had thus reduced his own benefits. The ex-husband died in 1991, when his second wife began to receive benefits under the plan. The ex-wife sued the widow for a division of property under sections 3.90 through 3.93 of the Family Code<sup>333</sup> but waived any claim to benefits received by the ex-husband prior to his death. The two-years statute of limitation under section 3.90 was not pled. Purporting to act exclusively under section 3.91, the trial court exercised its discretion to award all the benefits to the widow. Although the appellate court appreciated that the result was to deprive the ex-wife of her vested interest in the community property, the court pointed out that the Texas Supreme Court allows that result in authorizing discretionary disposition

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330. *Id.* § 3.9605(a)(2).

331. *Id.* § 3.9605(b).

332. 911 S.W.2d 893 (Tex. App.—Amarillo 1995, n.w.h.).

333. TEX. FAM. CODE ANN. §§ 3.90-3.93 (Vernon 1995).

of community property on divorce.<sup>334</sup>

#### G. CLARIFICATION AND ENFORCEMENT OF DIVORCE DECREES

Numerous disputes continue to arise in construing agreed orders for divorce. In one instance after another the written expression, or incomplete expression, of the parties' intentions produces a later dispute. In such instances the courts rely on the law of contracts to resolve the dispute and hear evidence with respect to the parties' intentions.<sup>335</sup> In *Harvey v. Harvey*<sup>336</sup> the parties' agreed order for divorce had stated that the wife was entitled to fifty-five percent of accrued benefits from the husband's corporate pension plan, but the plan-administrators refused to apply the decree as a qualified domestic relations order (QDRO)<sup>337</sup> because it did not specify whether the wife was entitled to the benefits of a surviving spouse. On the basis of testimony adduced at the trial, the appellate court affirmed the trial court's clarifying order that included survivorship benefits as being within the terms of the decree.<sup>338</sup> In *Bina v. Bina*<sup>339</sup> the parties' agreed order had failed to specify types of securities included within a general description of securities awarded to the wife so that the order could be enforced by contempt. The appellate court affirmed the trial court's clarification of what it construed as an ambiguous order expressing the parties' intent when there was no evidence in the record to refute the trial court's conclusion. Again, in *Echols v. Echols*<sup>340</sup> the spouses' agreed order, which provided that the husband would make an equal monthly division with his ex-wife of his corporate retirement benefits, was clarified to provide arithmetically equivalent benefits for the ex-wife after the ex-husband decided to take all his benefits in a lump sum rather than in monthly payments. The appellate court affirmed the trial court's conclusion that the parties had agreed to divide the benefits by halves however paid.<sup>341</sup>

In *Dechon v. Dechon*<sup>342</sup> the El Paso Court of Appeals affirmed a trial court's clarification of the spouses' mutual mistake in their property settlement agreement incorporated into their divorce decree. In the course

334. *Forgason*, 911 S.W.2d at 896 (citing *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982)). Cf. *Mendoza v. Mendoza*, 621 S.W.2d 420, 423 n.2 (Tex. Civ. App.—San Antonio 1981, no writ).

335. See Joseph W. McKnight, *Family Law: Husband & Wife, Annual Survey of Texas Law*, 47 SMU L. REV. 1161, 1189 (1994).

336. 905 S.W.2d 760 (Tex. App.—Austin 1995, n.w.h.).

337. See text at notes 356-57 *infra*.

338. The 1995 enactment of TEX. FAM. CODE ANN. § 3.711 (Vernon Supp. 1996) allows a suit to amend a QDRO. In *Dechon v. Dechon*, 909 S.W.2d 950, 961 n.9 (Tex. App.—El Paso 1995, n.w.h.), the court noted that an order under section 3.711 is like a clarification order under section 3.72 "as they both constitute prerequisites to enforcement rather than methods of enforcement." The court in *Dechon* also supplies a very useful concise history of Texas's decree-clarification process. *Id.* at 955-58.

339. 908 S.W.2d 595 (Tex. App.—Fort Worth 1995, n.w.h.).

340. 900 S.W.2d 160 (Tex. App.—Beaumont 1995, writ denied).

341. *Id.* at 163.

342. 909 S.W.2d 950 (Tex. App.—El Paso 1995, n.w.h.).

of its opinion the court commented that section 3.70(c)<sup>343</sup> must apply to "all methods of enforcement" whether the court acted under section 3.63 or section 3.631,<sup>344</sup> and "the method of enforcement sought" is irrelevant.<sup>345</sup> The court further noted that no statute of limitation is applicable to the clarification process itself, but once clarification is achieved, a limited period is applicable for achieving enforcement.<sup>346</sup>

The time when a statute of limitation begins to run to preclude enforcement was at issue in *Dickey v. Dickey*.<sup>347</sup> In a divorce rendered in 1967, the husband was ordered to maintain two policies of insurance on his life in favor of his ex-wife. It was apparently not until after the ex-husband's death in 1989 that the ex-wife learned that both policies had lapsed in the early seventies. In 1991 the ex-wife brought suit against the ex-husband's estate for her loss incurred by the failure of the decedent to comply with the divorce court's order. In her motion for summary judgment, however, the plaintiff failed to assert when she had become aware of the lapse of the policies. The appellate court held that a motion for summary judgment should not have been granted without determining when the statute of limitation would have begun to run against an action for non-compliance with the judgment.<sup>348</sup>

In *Day v. Day*<sup>349</sup> enforcement was sought of a 1989 divorce decree into which the parties property settlement agreement had been incorporated. The agreement provided that if particular conditions were not met by the husband, the wife could foreclose a lien on certain properties. After the conditions were not met, the ex-wife sought foreclosure of the lien. The trial court dismissed her motion on the ground that enforcement was barred by lapse of time from the entry of the decree. The appellate court concluded that the limitation period did not begin to run until the ex-husband had failed to meet the conditions prescribed and remanded the case for trial.

The dispute concerning enforcement in *Thomas v. Thomas*<sup>350</sup> arose out of a property settlement agreement whereby the husband agreed to pay his wife post-divorce alimony. The ex-husband ceased making payments in 1991, and the ex-wife sued for payments due and damages for anticipatory breach of the contract. The trial court awarded the recovery claimed for arrears and found anticipatory breach of contract but awarded no damages therefor. The ex-wife did not appeal. In 1993 she sued again for subsequent failure to make alimony payments in accordance with the settlement contract. The ex-husband responded with a motion for a declaration by way of summary judgment, contending that the ex-wife's right had

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343. TEX. FAM. CODE ANN. § 3.70(c) (Vernon 1993).

344. *Id.* §§ 3.63, 3.631.

345. *Dechon*, 909 S.W.2d at 961.

346. *Id.* at 955, 960, 962.

347. 908 S.W.2d 311 (Tex. App.—San Antonio 1995, n.w.h.).

348. *Id.* at 313.

349. 896 S.W.2d 373 (Tex. App.—Amarillo 1995, n.w.h.).

350. 902 S.W.2d 621 (Tex. App.—Austin 1995, writ denied).

been determined in the prior suit for anticipatory breach. The trial court rendered judgment in his favor. The ex-wife had made two serious mistakes: bringing suit for anticipatory breach in the first place and then failing to appeal after having been awarded no damage for the breach.<sup>351</sup> The appellate court relied on collateral estoppel as an alternative ground for its conclusion.<sup>352</sup>

Somewhere in legal classification between clarification and enforcement (or perhaps beyond both), one might find a proper niche for *Beach v. Beach*.<sup>353</sup> While a suit for divorce was pending, the husband and wife executed what was termed a "mutual release" from liability for any action taken in connection with their proceeding by either of them or their legal representatives. Anticipating that the ex-wife might sue him concerning pleadings that he had filed in the divorce proceeding, the ex-husband's counsel purported to intervene in the divorce case after entry of the decree of divorce in order to enforce the decree and to seek a declaratory judgment that the ex-wife had no cause of action against him. The ex-wife then moved to dismiss the attorney's action and (true to anticipation) filed suit in another court against her former husband's attorney for malicious prosecution and conspiracy. The ex-husband then filed a motion to enforce the decree and for a declaratory judgment that the ex-wife had no cause of action against him or his counsel. The divorce court denied the ex-wife's plea to the jurisdiction and her alternative pleas in bar and entered a declaratory judgment that the ex-husband's counsel was not liable to the ex-wife for any cause of action based on his representation of the ex-husband in the suit for divorce. On the ex-wife's appeal, the court held that the attorney's intervention after the divorce was untimely and that his intervention (and that of his client, the ex-husband) should have been stricken because the couple's release was not a part of the divorce decree and could not be enforced through a motion to enforce the decree.<sup>354</sup> The appellate court held that the decree of the trial court in favor of the post-divorce motions was a nullity and the intervention should be dismissed.<sup>355</sup>

The Legislature provided in 1995 that if a qualified domestic relations order (QDRO) is not entered on divorce, a QDRO may be entered at some later time to clarify the final decree for the division of a pension or other retirement benefit.<sup>356</sup> If on divorce a QDRO was entered which did not accomplish its purpose, that order may be later corrected to achieve its purpose within the terms rendered by the divorce court.<sup>357</sup>

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351. *Id.* at 625.

352. *Id.* at 626.

353. 912 S.W.2d 345 (Tex. App.—Houston [14th Dist.] 1995, n.w.h.).

354. *Id.* at 347-48.

355. *Id.*

356. TEX. FAM. CODE ANN. § 3.711 (Vernon Supp. 1996).

357. *Id.*

## H. EFFECTS OF BANKRUPTCY

If the remedies sought in *Beach* cause the mind to wobble, the reader needs some bracing before examining *In re Davis*.<sup>358</sup> In 1968 the divorce court awarded the wife support payments in accordance with the parties' agreement. In 1987 the ex-husband and his new wife filed for bankruptcy and their homestead and other exempt property was awarded to them. The ex-husband also commenced an adversary proceeding against his former wife for a declaratory judgment that his indebtedness under the divorce decree was discharged in bankruptcy. In 1991 the parties settled that dispute, and an agreed money-judgment was entered for the ex-wife with a declaration that the award was not dischargeable under section 523(a)(5) of the Bankruptcy Code.<sup>359</sup> In 1993 the ex-wife filed an application for a turnover order and other relief in aid of her judgment. She asserted that she had been unable to collect the judgment from her ex-husband, and that by using a Texas turnover order<sup>360</sup> the bankruptcy court should require him to convey his homestead and to deliver certain exempt personally to her in satisfaction of the judgment. The ex-wife asserted that the Bankruptcy Code not only has the effect of making exempt property available to discharge pre-petition family support obligations under sections 522(c)(1)<sup>361</sup> and 523(a)(5)<sup>362</sup> by way of federal preemption but also allows the court to use the Texas turnover statute to achieve that result. Without resolving the very difficult questions of interpretation raised by the first assertion, her argument founders on the second. Reiterating the conclusion reached by the bankruptcy judge, the federal district court held that the Texas turnover statute does not have the force ascribed to it.<sup>363</sup> After an attempt at explaining the effect of the references in section 522(c)(1) to sections 523(a)(1) and 523(a)(5) by saying that "under Texas law, a homestead remains liable for debts of the type specified . . . because liens may be perfected against the property

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358. 188 B.R. 544 (Bankr. N.D. Tex. 1995).

359. 11 U.S.C. § 523(a)(5) (1988).

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

361. 11 U.S.C. § 522(c)(1) (1988):

Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except—(1) a debt of a kind specified in section 523(a)(1) [federal taxes] or 523(a)(5) [alimony and child-support] of this title . . . .

362. 11 U.S.C. § 523(a)(5) (1988). The individual debtor is not discharged from debts "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record. . . or property settlement agreement . . ." See *In re Davis*, 170 B.R. 892, 898 (Bankr. N.D. Tex. 1994), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1273 (1995). In *In re Pate*, 8 Tex. Bankr. Ct. Rptr. 169 (Bankr. N.D. Tex. 1995), the bankruptcy court found that unpaid temporary alimony, unpaid mortgage payments ordered to be paid as temporary alimony, and attorney's fees ordered to be paid by a divorce court were not dischargeable under section 523(a)(5).

363. *Davis*, 188 B.R. at 550.

[for that purpose],<sup>364</sup> the federal District Court went on to suggest that, by way of the reference in section 522(c)(1) to section 523(a)(5), the ex-wife could have perfected a lien against the ex-husband's homestead by abstracting her agreed money judgment. The court further stated that "[i]n the absence of § 522(c)(1), a debtor could invoke the protection of § 522(f) to avoid the fixing of a lien on his exempt property for family support obligations."<sup>365</sup>

Although the ex-wife's first argument has been scarcely explored in Texas,<sup>366</sup> it is not untenable. But her proposed remedy is novel as well as inappropriate, because a Texas turnover order is specifically made inapplicable to the seizure of exempt property.<sup>367</sup> A bankruptcy court should nevertheless be able to fashion an appropriate remedy when called upon to apply the provisions of section 522(c)(1) in relation to section 523(a)(5). The Fifth Circuit Court of Appeals should suggest a mode of proceeding in the appeal of this case. A further question will have to be resolved later: the effect of these provisions of the Bankruptcy Code in a non-bankruptcy context.

In the course of a marriage when there are both separate and community assets, it is common for benefits to be rendered by one marital estate for another. When that situation occurs, the benefiting estate is said to have an equitable claim for reimbursement against the benefited estate. That claim is sometimes referred to as an equitable charge or equitable lien. But such an equity is unenforceable until a court finds a right of reimbursement.<sup>368</sup> When that finding is made, the right ceases to be a mere equity and is enforceable like any other judicial order, though the enforceable right is sometimes carelessly referred to as an equity as though the judicial determination has not yet been made. Such casual reference is made to liens put on various interests in personalty by a 1994 divorce decree in *In re Levi*.<sup>369</sup>

Rather than partition the community interests in various types of personalty between the spouses, the divorce court in *Levi* (perhaps in accordance with an agreement of the parties) awarded certain interests amassed by the husband to him. The properties consisted of a partnership interest, individual retirement accounts [IRAs], insurance policies on the husband's life, and two retirement accounts. The court put a lien on those accounts for a money judgment to the wife for an amount equal to one half of the community interests therein, in disregard of the Texas Supreme Court's observation in *Jensen v. Jensen*<sup>370</sup> that money judgments

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364. *Id.*

365. *Id.*

366. See *In re Meadows*, 75 B.R. 695, 697 (Bankr. N.D. Tex. 1987).

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

368. Even if a right of reimbursement arises by operation of law as in the case of a purchase-money lien in *McGoodwin v. McGoodwin*, 671 S.W.2d 880 (Tex. 1984), the lien is unenforceable until the amount of the claim is judicially fixed.

369. 183 B.R. 468, 470 (Bankr. N.D. Tex. 1995).

370. 665 S.W.2d 107, 110 (Tex. 1984). See Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 38 Sw. L.J. 131, 139 (1984).

rather than liens should be awarded in dealing with reimbursement interests in personalty. All the property interests here were clearly community property except the life insurance policies that might have been acquired by the husband before his marriage. If the court had merely divided the community interests between the parties, the bankruptcy court, whose protection the ex-husband sought after the divorce, would not have been faced with the problems encountered.<sup>371</sup> But the divorce court chose to proceed otherwise and in doing so fixed "liens" on exempt property in all but two instances (the partnership interest and one of the retirement trust accounts). With respect to the exempt properties the ex-husband sought to remove the liens under section 522(f) of the Bankruptcy Code.<sup>372</sup> In response to the ex-wife's assertion that the liens were not "judicial liens" but "equitable liens," the bankruptcy court held that for purposes of bankruptcy law the liens were "judicial", a matter to be determined by federal law.<sup>373</sup> Indeed, if a lien had been judicially *fixed*, it must have been a judicial lien.

The court then proceeded to characterize the pre-divorce interests in the various items of personalty and then applied the rule in *Farrey v. Sanderfoot*<sup>374</sup> in declining to remove liens from the prior community property ownership elements.<sup>375</sup> With respect to the life insurance policies the court applied the community property presumption to reach the conclusion that the policies were community assets in the absence of any evidence to the contrary.<sup>376</sup> On the authority of *Seaman v. Seaman*<sup>377</sup> the court found that the lack of cash surrender value for the policies was not determinative of their character and in the absence of any evidence of the date of acquisition.

In *In re Norton*<sup>378</sup> a divorce court had awarded the husband two community policies of life insurance on his life and fixed a "lien" on the policies to secure the ex-wife's compensating money judgment awarded to her for her community interest in the policies. In a subsequent bankruptcy proceeding, the authority of *Farrey* precluded the ex-husband's reliance on Section 522(f) to extinguish the ex-wife judicial lien on exempt personalty.<sup>379</sup>

In *Dawson-Austin v. Austin*<sup>380</sup> the wife had brought suit for divorce in

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371. See *In re Chandler*, 805 F.2d 555 (5th Cir. 1986), commented on in Joseph W. McKnight, *Family Law: Husband and Wife Annual Survey of Texas Law*, 47 SMU L. REV. 1161, 1195 (1994).

372. 11 U.S.C. § 522(f) (1988).

373. *Levi*, 183 B.R. at 471-72.

374. 500 U.S. 291, 300 (1991).

375. *Levi*, 183 B.R. at 472-73.

376. *Levi*, 183 B.R. at 473.

377. 756 S.W.2d 56, 56 (Tex. App.—Texarkana 1988, no writ). See *Estate of Cavanaugh v. Comm'r of Internal Revenue*, 100 T.C. 407 (1993), *aff'd in part, rev'd in part*, 51 F.3d 597 (5th Cir. 1995), discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1238-40 (1995).

378. 180 B.R. 168 (Bankr. E.D. Tex. 1995).

379. *Id.* at 169.

380. *Dawson-Austin*, 920 S.W.2d 776.



California on April 10, 1992. The husband filed suit for divorce in Texas on the following September 10 and the wife was served with process on September 14. The husband was not served with process in the wife's suit until October 14. Both suits proceeded to trial. The Texas appellate court sustained the trial court's denial of the wife's plea in abatement to the husband's suit for her lack of diligence in achieving service in her California suit.<sup>381</sup> On August 6, however, the California court had granted the wife a divorce but made no division of property. In her Texas appeal the wife asserted the applicability of section 3.91(b)<sup>382</sup> to require division of the property by the Texas court in accordance with California law under which court had rendered a final decree of divorce.<sup>383</sup> The appellate court pointed out, however, that because the wife had filed for bankruptcy in California before the entry of the California divorce decree, the California court did not have jurisdiction to make a property division under section 3.91(b) because of the automatic stay imposed under section 362 of the Bankruptcy Code.<sup>384</sup> Thus, section 3.91(b) was inapplicable to the division of the property when the California decree was rendered, and after the automatic stay was lifted, the Texas court proceeded to divide the property pursuant to either section 3.92(b)<sup>385</sup> or 3.63.<sup>386</sup>

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381. *Id.* at 785-86.

382. TEX. FAM. CODE ANN. § 3.91(b) (Vernon 1993).

383. *Dawson-Austin*, 920 S.W.2d at 787 (citing CAL. CIV. CODE § 4514 (recodified as CAL. FAM. CODE § 2341 (Deering 1994))).

384. 11 U.S.C. § 362 (1988).

385. TEX. FAM. CODE ANN. § 3.92(b) (Vernon 1993).

386. *Id.* § 3.63.