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# FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight\*

## I. STATUS

### A. *Presumed Validity of Marriage*

**U**NDER section 2.01 of the Family Code<sup>1</sup> a particular spouse's most recent marriage is presumed to be valid, and the burden of proof is upon a contestant to demonstrate the validity of a prior marriage. In *Wilkins v. Wilkins*<sup>2</sup> the ex-husband brought a bill of review to set aside a 1973 divorce in which the court awarded a part of his retirement benefits to his ex-wife. The petitioner asserted that the divorce should be set aside because the 1950 California marriage the bill sought to dissolve was itself void because the wife was then married to someone else. To demonstrate circumstantially that the earlier marriage was still subsisting in 1950 and for many years afterward, the petitioner showed that his wife's former husband had sued her for divorce in California in 1945 and again in 1961. The first complaint was dismissed in 1957 for failure to prosecute, but no disposition of the second suit was indicated. The former husband, however, was also shown to have died and was survived by a widow other than the woman who had married the petitioner. The ex-wife testified that she thought she was divorced from her former husband when she married the petitioner. The trial court concluded that the petitioner had not borne the heavy burden of proving that his ex-wife had not been divorced from her prior husband. The appellate decision does not state whether the former husband died before the divorce in 1973. Although the petitioner's evidence of the first husband's two suits for divorce suggests that the earlier marriage was still subsisting at the time of the marriage in 1950, the petitioner did not show the domicile of the first husband from the time of his separation from his first wife in 1944. The former husband might have successfully sued his wife for divorce at some other domicile prior to the 1950 marriage, but the two successive suits for divorce brought in 1945 and 1961 demonstrate the great improbability that he did so. Although neither party appears to have raised the point, if

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1. TEX. FAM. CODE ANN. § 2.01 (Vernon 1975).

2. No. 04-89-00517-CV (Tex. App.—San Antonio 1990, no writ), 3 Family Law Forum 7 (no. 8, Sept. 1990).

the former husband had died before the divorce in 1973, under section 2.22<sup>3</sup> the parties' subsisting relationship could have become an informal marriage during the interval prior to the divorce.

### B. Informal Marriage

In a divorce case<sup>4</sup> heard on appeal by the Fort Worth court, the petitioner alleged an informal marriage which the respondent denied. Pending trial, the court ordered the respondent to support an alleged child of the marriage. Denying paternity as well as the marriage, the respondent sought a declaration of non-paternity and restitution of the child-support payments. When the matter came to trial the petitioner moved for a non-suit, and the court dismissed the entire case.<sup>5</sup> The respondent appealed from the dismissal of his claims for affirmative relief. The appellate court held that the respondent's claims for affirmative relief could not be foreclosed, but in the absence of any finding by the trial court, the appellate court was precluded from making a declaration with respect to validity of the informal marriage.<sup>6</sup>

### C. Emotional Distress

In *Chiles v. Chiles*<sup>7</sup> the Houston Fourteenth Court of Appeals held that a spouse could not maintain a cause of action for emotional distress along with a cause of action for divorce.<sup>8</sup> In that case, the emotional distress complained of arose from the husband's activities with other women but with a degree of secrecy. On the other hand, in *Twyman v. Twyman*,<sup>9</sup> where the wife's emotional distress arose from the husband's insistence on having unconventional sexual relations with her, the Austin Court of Appeals affirmed an award for damages for infliction of emotional distress in conjunction with a decree for divorce.<sup>10</sup> Although the court in *Twyman* refers to the husband's negligent infliction of injury, the facts indicate a willful course of conduct directed toward the wife that was in no sense negligent but in a very real sense involved willful acts, coercively imposed.

A logical impasse has been reached in analyzing the propriety of granting a divorce and also in awarding damages for physical or mental injury that make a marriage unreconcilable. This situation stems from a line of three Texas Supreme Court cases<sup>11</sup> in which the court seemed to have assumed that, by removing the interspousal immunity to suit, one spouse could be liable to the other spouse just as though the couple were not married. But as

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3. TEX. FAM. CODE ANN. § 2.22 (Vernon 1975).

4. *Page v. Page*, 780 S.W.2d 1 (Tex. App.—Fort Worth 1989, no writ).

5. *Id.* at 2.

6. *Id.* at 3.

7. 779 S.W.2d 127 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

8. *Id.* at 131.

9. 790 S.W.2d 819 (Tex. App.—Austin 1990, no writ).

10. *Id.* at 822-23. The court stated that the doctrine of interspousal immunity had been abolished in *Price v. Price*, 732 S.W.2d 316 (Tex. 1987).

11. *Stafford v. Stafford*, 726 S.W.2d 14 (Tex. 1987); *Price v. Price*, 732 S.W.2d 316 (Tex. 1987); *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977).

long as immunity to suit existed, courts made no determination whether or in what circumstances a cause of action existed on behalf of one spouse against another. Merely removing the status-bar to suit between the spouses does not, in itself, establish a cause of action for any sort of grievance that may exist between them.

The first<sup>12</sup> of the three cases that came before the Texas Supreme Court was the most difficult. There, children sued their mother's husband who had willfully shot and killed her. As in other cases of wrongful death, the cause of action was derivative and thus the victim must have had a cause of action so that her heirs could recover.<sup>13</sup> The court's concern was principally focused on putting aside the interspousal immunity doctrine.<sup>14</sup> Once that was accomplished, it was assumed without any discussion that the wife would have had a cause of action for willful assault by her husband.<sup>15</sup> Whether she might have coupled such a claim with a suit for divorce was, of course, not before the court. In the two subsequent cases,<sup>16</sup> in somewhat different procedural contexts, the Texas Supreme Court concluded that a spouse might recover for injury inflicted by the negligence of the other spouse.<sup>17</sup> In both instances, the spouses sought damages in the context of a divorce proceeding, but it was not noted whether the facts supporting the causes of action for injury may have been related to the marital breakdown or how much time had elapsed since the acts were committed.

One of the great failings of the system of legal development by judicial decision is that a general analysis of the subject is not undertaken until the process has gone so far that future development by logical extension may be foreordained. In this instance, extension of the principle of spousal liability to all cases of divorce may occur unless the Texas Supreme Court reexamines the entire subject.

#### D. *Privileged Testimony*

No so long ago a spouse was deemed incompetent to testify against the other spouse in most criminal prosecutions.<sup>18</sup> Today the admissibility of spousal evidence with respect to events which occurred during marriage is a matter of privilege<sup>19</sup> rather than competence, but the privilege also extends

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12. *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977).

13. *Id.* at 926.

14. *Id.* at 926-27.

15. *Id.* at 927.

16. *Price v. Price*, 732 S.W.2d 316 (Tex. 1987); *Stafford v. Stafford*, 726 S.W.2d 14 (Tex. 1987).

17. *Stafford v. Stafford*, 726 S.W.2d at 16 (court stated that it need not address issue of negligence action); *Price v. Price*, 732 S.W.2d at 318-20 (court stated that arguments for and against interspousal immunity are equally applicable to intentional and negligent tort cases).

18. See 2 J. WIGMORE, EVIDENCE §§ 600-601 (Chadbourne rev. 1979), 8 J. WIGMORE EVIDENCE §§ 2227-2228 (Chadbourne rev. 1978).

19. An assertion of privilege should ordinarily be made beyond the hearing of the jury, but the state may show that it is not practicable to allow a spouse to invoke the privilege outside the presence of the jury. TEX. R. CRIM. EVID. 513(b); see *Johnson v. State*, No. 70-177 (Tex. Crim. App. Nov. 21, 1990) (Lexis, Tex. library, Tex. Crim. App. file).

to a prospective witness who is no longer married to the accused.<sup>20</sup> Although the rules of criminal evidence now allow a former spouse to testify against a prisoner,<sup>21</sup> even though the offense occurred before the adoption of those rules and while the spouses were married,<sup>22</sup> divorce does not terminate the privilege for confidential communications made during marriage.<sup>23</sup> This privilege, however, extends only to utterances made by the accused and not to his customary behavior, such as habitually carrying a weapon.<sup>24</sup> Additionally, the confidential communications privilege allows an accused spouse to prevent another from disclosing a confidential communication made to his or her spouse while they were married. The privilege, however, only extends to communications made privately to the spouse and not intended to be disclosed to any other person.<sup>25</sup> As the rules now stand, the testimonial privilege allows the spouse of a decedent to testify voluntarily for the state over the objections of the accused, provided that the testimony does not violate the rules for privileged communications.<sup>26</sup>

### E. Interspousal Guardianship and Agency

When it is necessary to appoint a guardian for an adult, that adult's spouse has a statutory preference with certain exceptions.<sup>27</sup> One of the statutory disqualifications includes being a party to a suit in which the prospective ward is also a party.<sup>28</sup> This ground for disqualification lends itself to little, if any, judicial interpretation.<sup>29</sup> Statutory disqualifications are based on actual or potential conflicts of interest between the guardian and ward, but at least one court has found another conflict of interest not specifically defined by the statute.<sup>30</sup> Although no appellate court has pointedly addressed the problem, it appears that if a spousal guardian is engaged in unauthorized self-dealing in handling the ward's affairs, the guardian would hold personal gains in trust for those who benefit by operation of law or those meant by the ward to benefit. A somewhat analogous situation was recently adjudicated<sup>31</sup> in connection with the administration of a non-terminable power of attorney under section 36A of the Probate Code.<sup>32</sup> Although the agent in *In re Estate of Crawford*<sup>33</sup> was the principal's child rather than her husband, the results would have been the same in the case of a spousal

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20. TEX. R. CRIM. EVID. 504.

21. *Id.*

22. *See Freeman v. State*, 786 S.W.2d 56, 57 (Tex. App.—Houston [1st Dist.] 1990, no writ).

23. *Id.* at 59.

24. *Id.*

25. *Gibbons v. State*, 794 S.W.2d 887, 892 (Tex. App.—Tyler 1990, no writ).

26. *Id.* at 893.

27. TEX. PROB. CODE ANN. § 109(c)(1) (Vernon 1980).

28. *Id.* § 110(d).

29. *Mireles v. Alvarez*, 789 S.W.2d 947, 948 (Tex. App.—San Antonio 1990, writ denied).

30. *See Dobrowolski v. Wyman*, 397 S.W.2d 930, 932 (Tex. Civ. App.—San Antonio 1965, no writ).

31. *In re Estate of Crawford*, 795 S.W.2d 835 (Tex. App.—Amarillo 1990, no writ).

32. TEX. PROB. CODE ANN. § 36A (Vernon 1980).

33. 795 S.W.2d 835 (Tex. App.—Amarillo 1990, no writ).

agency. Although the decision is based on the narrow and artificial argument that the agent's disposition of securities was not completed prior to the decedent's death because a new certificate had not yet been issued to the purchaser, the intended beneficiary of the principal should be protected from an unauthorized act of the agent who rearranges the principal's succession.<sup>34</sup> If the agent is guilty of unauthorized self-dealing by diverting the principal's estate from the principal's intended beneficiary to himself, the agent would hold the assets as a constructive trustee for the intended beneficiary.<sup>35</sup>

## II. CHARACTERIZATION OF MARITAL PROPERTY INTERESTS

### A. Premarital and Marital Partitions

Prior to their marriage in 1977, a couple entered into a premarital agreement stating that all property, including deposits in bank accounts standing in the name of either, would be the separate property of the spouse in whose name it stood. After the husband's death in 1981, the wife asserted that the funds accumulated in her bank accounts were her separate property in accordance with the agreement. At the time that the agreement was entered into, the Texas Constitution provided that a "husband and wife . . . may . . . by written instrument . . . partition between themselves . . . all or any part of their existing community property, or exchange between themselves the community interest of one spouse for the community interest of the other spouse in other community property . . . ." <sup>36</sup>The Dallas Court of Appeals held in *Beck v. Beck*<sup>37</sup> that this provision allowed the exchange of future acquisitions of income so that all the earnings in the wife's accounts as well as those of the husband would be the separate property of the spouse in whose name the accounts stood.

In weighing the necessity of amending the Texas Constitution to allow the partition or exchange of future marital profits, the draftsmen of 1979 discussed the prospect of convincing an appellate court that the provision with respect to *exchange* was so isolated from the provision for partition of "existing community property" that the court could hold (as the Dallas court recently did) that the transaction was valid as an exchange of future acquisitions. No one thought that such an argument had the remotest prospect of success. If anyone had then taken such an argument seriously, it would not have been necessary to amend the Constitution in 1980.<sup>38</sup> After the amendment of the Constitution in 1948, the bench and bar had interpreted the reference to community interest in the exchange provisions as applying an

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34. See Marschall, *Council Proposes New Legislation Authorizing a Power of Attorney Not Terminated by Disability*, 7 State Bar of Texas Newsletter of the Real Estate, Probate & Trust Law Section 6 (no. 3, 1969); cf. McKnight, *Objections to the Council Proposal for New Legislation Authorizing a Power of Attorney Not Terminable by Disability*, *id.* at 6-7.

35. *Crawford*, 795 S.W.2d at 841.

36. TEX. CONST. art. XVI, § 15 (1876, amended 1948).

37. 792 S.W.2d 813, 817-18 (Tex. App.—Dallas 1990, writ granted).

38. Very reasonably, the point is not mentioned in Comment, *The Uniform Premarital Agreement Act: Survey of Its Impact in Texas and Across the Nation*, 42 BAYLOR L. REV. 825 (1990).

"existing" community interest as specifically stated in the preceding partition provision.

The Corpus Christi appellate court's error in *Grossman v. Grossman*<sup>39</sup> is even more egregious. Overlooking the fact that a premarital partition to change the character of marital acquisition could not have been validly agreed until the Constitution was amended in 1980, the court relied on the new text of section 5.46<sup>40</sup> enacted in 1987 to fix the burden of proof and therefore the validity of a 1974 pre-marital partition<sup>41</sup> involved in a 1989 divorce proceeding.

In *McBride v. McBride*<sup>42</sup> the husband and wife had entered into a written agreement compromising a suit for divorce in 1982, and the suit was dismissed. The husband agreed to support the wife from his separate property and to make her the beneficiary of his interest in the community estate in his will. The wife agreed that if she should again seek a divorce, she would forfeit her right to any interest in their community property. The husband also agreed to convey his house to the wife and to transfer a car to her. Both of these provisions were executed. The wife later sued for divorce and sought a declaration that the prior agreement was void. The husband asserted that the agreement constituted a valid partition of marital property. The majority of the Fourteenth District appellate court concluded that the agreement did not constitute a partition under the Family Code as it stood in 1982 because the partition there referred to contemplated a division of property rather than a forfeiture of property contingent upon the happening of a future event.<sup>43</sup> Chief Justice Brown would have upheld the validity of the agreement. "The parties entered into this settlement agreement voluntarily. The agreement expressly states that the parties understood that the contract altered their present and future property rights. Both partners were represented by counsel."<sup>44</sup> Broadly viewed, the agreement is construable as a partition of the parties' marital estate,<sup>45</sup> though it is contingent on the wife's bringing a suit for divorce, at which time she consummates the exchange. Although somewhat unusual, allowing a future event to control the partition is not beyond the purview of the constitutional right conferred on spouses to characterize their property interests.

### B. *Rebutting the Community Property Presumption*

All property acquired during marriage or held at the termination of the

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39. 799 S.W.2d 511 (Tex. App.—Corpus Christi 1990, no writ).

40. TEX. FAM. CODE ANN. § 5.46 (Vernon Supp. 1991).

41. *Grossman*, 799 S.W.2d at 513.

42. 797 S.W.2d 689 (Tex. App.—Houston [14th Dist.] 1990, no writ).

43. *Id.* at 692.

44. *Id.* at 694. The Chief Justice also said that the wife was estopped from contesting the validity of the agreement because she had not offered to return the substantial benefits she had received under the contract. *Id.*

45. TEX. CONST. art. XVI, § 15 (1876, amended 1980). The Constitution specifically anticipates the partition of both present community property and future acquisitions that would otherwise be community property and does not limit the partition to the community estate.

marriage is presumed to be community property.<sup>46</sup> The burden of proof of a separate interest acquired during marriage or prior to marriage must be borne by the claimant.<sup>47</sup> The presumption itself is not evidence,<sup>48</sup> but clear and convincing evidence is required to rebut it.<sup>49</sup> Hence, the introduction of merely probative evidence of separate character may not suffice to shift the burden of going forward with proof unless the quality of that evidence is clear and convincing.<sup>50</sup>

In *Saldana v. Saldana*<sup>51</sup> the dispute centered on the characterization of realty that the husband's mother had conveyed to him and his wife for a recited nominal consideration. The husband's position was that the conveyance was meant as neither a sale nor a gift,<sup>52</sup> but as a mere accommodation to help the couple negotiate a loan to build a house on the property and that the couple was therefore holding the property for the husband's mother.<sup>53</sup> The wife testified that she paid the \$10 recited consideration to the grantor<sup>54</sup> with what were presumptively community funds.<sup>55</sup> The appellate court concluded that the conveyance constituted community property but noted, somewhat apologetically, that the result would not have been changed if the conveyance had been characterized as a gift to both spouses in equal shares, because the trial court had divided the property equally between them.<sup>56</sup>

In *Welder v. Welder*<sup>57</sup> the husband sought to show that certain real property bought during marriage was his separate property because he intended to pay for it with his separate property at the time it was acquired.<sup>58</sup> The purchase was largely on credit, however, and it was not clear that the seller looked solely to his separate property to discharge the debt.<sup>59</sup> The court's comment that "the intention of the spouses is the primary consideration af-

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46. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975).

47. Premarital acquisitions are easily shown to be separate property. See *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 667 (Tex. App.—San Antonio 1990, no writ) (car acquired prior to marriage but paid for in part with community funds). Wasting elements of separate property are also easily shown to be separate property. See *Welder v. Welder*, 794 S.W.2d 420, 425 (Tex. App.—Corpus Christi 1990, no writ) (oil royalty from separate property).

48. See J. MCKNIGHT & W. REPPY, TEXAS MATRIMONIAL PROPERTY LAW 31 (1983); see also *Neece v. Neece*, No. 02-89-092 CV, unpub'd (Tex. App.—Fort Worth 1990, no writ).

49. TEX. FAM. CODE ANN. § 5.02 (Vernon Supp. 1991).

50. For comments on the prior law, see J. MCKNIGHT & W. REPPY, supra note 48, at 31-32; *Roach v. Roach*, 672 S.W.2d 524, 530 (Tex. App.—Amarillo 1984, no writ).

51. 791 S.W.2d 316 (Tex. App.—Corpus Christi 1990, no writ).

52. *Id.* at 318. In *Welder v. Welder*, 794 S.W.2d 420, 431-432 (Tex. App.—Corpus Christi 1990, no writ), an argument of gift between the spouses was made and rejected.

53. *Saldana*, 791 S.W.2d at 318-19; cf. *Dulak v. Dulak*, 513 S.W.2d 205, 208 (Tex. 1974) (account in form of joint tenancy account found to be mere convenience account).

54. *Saldana*, 791 S.W.2d at 320.

55. *Id.*

56. *Id.*; see *Halamka v. Halamka*, 799 S.W.2d 351, 354 (Tex. App.—Texarkana 1990, no writ) (court of general jurisdiction may partition spouses' separate interests on divorce).

57. 794 S.W.2d 420 (Tex. App.—Corpus Christi 1990, no writ).

58. *Id.* at 427.

59. The seller's or lender's agreement to look only to the buyer's or borrower's separate property for payment causes the property to be bought or borrowed to be separate property. *Broussard v. Tian*, 156 Tex. 371, 373, 295 S.W.2d 405, 406 (1956); *Gleich v. Bongio*, 128 Tex. 606, 612, 99 S.W.2d 881, 883-84 (1937); see *Ray v. United States*, 385 F. Supp. 372, 377 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228, 1230 (5th Cir. 1976).



fecting the community or separate nature of property acquired with borrowed funds"<sup>60</sup> is clearly mistaken. In the course of its comments, the court also tolerated some extremely dubious notions of fund-tracing,<sup>61</sup> including adherence to the principle that withdrawals from a fund containing deposits of both separate and community property are deemed to be community property without reference to the purpose of withdrawal.<sup>62</sup>

### C. Reimbursement

Although it was once said that a spouse is allowed to spend as much time as deemed necessary to manage his or her separate property,<sup>63</sup> the court refined the rule in *Jensen v. Jensen*<sup>64</sup> to allow a spouse as much time as is reasonably necessary to maintain the separate estate, but such time as is necessary to make the separate estate productive is subject to a community right of reimbursement.<sup>65</sup>

A type of claim more commonly encountered arises from an expenditure by one marital estate for the benefit of another. In *Gutierrez v. Gutierrez*<sup>66</sup> the San Antonio Court of Appeals restated the Texas Supreme Court's comment in *Penick v. Penick*<sup>67</sup> that the rules for reimbursement are the same for payments made by one marital estate for another as for improvements made by one marital estate for another.<sup>68</sup> Thus, the measure of reimbursement is the amount that the benefited estate has been enhanced. Neither court, however, explained how enhancement is measured in the case of discharge of a monetary obligation, whether or not secured by a lien on the property. The situation is illustrated by a point not resolved in *Gutierrez* with respect to a car bought on credit prior to marriage. The car was therefore separate property and the note for payment was discharged with community funds during marriage while the car was depreciating in value. By a strict application of the enhancement standard announced in *Anderson v. Gilliland*,<sup>69</sup> reimbursement is based on the depreciated value of the car and not on the actual amount of money expended.

To secure the payment of an award for reimbursement, a court may impose a lien on benefited realty.<sup>70</sup> In the broad context of divorce, the court

60. *Welder*, 794 S.W.2d at 426.

61. *Id.* at 425-26. An application of the standard rules of tracing when separate or community fungibles are commingled is illustrated by *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 665-66 (Tex. App.—San Antonio 1990, no writ) (herd of livestock).

62. *Welder*, 794 S.W.2d at 433-34; see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 34 Sw. L.J. 115, 124 (1980).

63. *Norris v. Vaughan*, 152 Tex. 491, 499, 260 S.W.2d 676, 680 (1953).

64. 665 S.W.2d 107, 110 (Tex. 1984); see *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 665 (Tex. App.—San Antonio 1990, no writ).

65. This rule is somewhat misstated in *Welder*. 794 S.W.2d at 425.

66. 791 S.W.2d 659 (Tex. App.—San Antonio 1990, no writ).

67. 783 S.W.2d 194, 197 (Tex. 1988). In his concurring opinion Justice Cook promised amplification of the subject on motion for rehearing. *Id.* at 198. Time evidently did not allow for a further explanation.

68. *Gutierrez*, 791 S.W.2d at 663.

69. 684 S.W.2d 673, 675 (Tex. 1985).

70. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 881-82 (Tex. 1984). In *Jensen v. Jen-*

sometimes imposes a money judgment on one of the spouses or puts a lien on the realty of one of them to equalize shares in the division of the community estate.<sup>71</sup> Although some difference of opinion exists concerning this point,<sup>72</sup> the Fort Worth Court of Appeals would also allow a divorce court to put a lien on realty other than that benefited, including non-exempt separate property, in order to secure the payment of reimbursement.<sup>73</sup>

#### D. Agreement for Survivorship to Community Property

Although no appellate court has had occasion to interpret the 1987 constitutional amendment<sup>74</sup> or the implementing legislation of 1989,<sup>75</sup> the professional literature on the subject continues<sup>76</sup> to stress the pitfalls inherent in spousal agreements for survivorship to community property.<sup>77</sup>

### III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

#### A. Spousal Agreement for Sole Management of Community Property

Family Code section 5.22<sup>78</sup> provides for management of community property on the basis of its source. Subsections (b) and (c), however, specifically provide that the spouses may alter those management rights by an agreement which need not be in writing.<sup>79</sup> When such an alleged agreement is not in writing, the courts face the difficulty of evaluating the acts and apparent intentions of the parties in order to determine whether the spouses reached an agreement. Under section 5.22(b),<sup>80</sup> if the spouses mix or combine their solely managed community property, joint management of the properties is required by operation of law in the absence of any agreement to the contrary. In *Brooks v. Sherry Lane Nat'l Bank*<sup>81</sup> the husband's creditor garnished funds in an account that the wife asserted was subject to her sole management. The account was one in which the wife's separate property and her solely managed community were deposited, though the names of both spouses were on the account and the husband had written several

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sen, 665 S.W.2d 107, 110 (Tex. 1984), the court said that imposition of a lien on personalty was inappropriate.

71. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 Sw. L.J. 1, 34-35 (1989); Mullins v. Mullins, 785 S.W.2d 5, 11-12 (Tex. App.—Fort Worth 1990, no writ).

72. See Smith v. Smith, 715 S.W.2d 154, 161 (Tex. App.—Texarkana 1986, no writ).

73. Mullins v. Mullins, 785 S.W.2d 5, 12 (Tex. App.—Fort Worth 1990, no writ).

74. TEX. CONST. art. XVI, § 15 (1876, as amended 1987).

75. TEX. PROB. CODE ANN. §§ 451-462 (Vernon Supp. 1991).

76. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 Sw. L.J. 1, 12 n.83 (1990).

77. See Virden, *Joint Tenancy with Right of Survivorship & Community Property with Right of Survivorship*, 53 TEX. BAR J. 1179 (1990); Quilliam, *A Requiem for Hilley: Is Survivorship Community Property a Solution Worse Than the Problem*, 21 TEX. TECH L. REV. 1153 (1990).

78. TEX. FAM. CODE ANN. § 5.22 (Vernon 1975).

79. See LeBlanc v. Waller, 603 S.W.2d 265, 267 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

80. TEX. FAM. CODE ANN. § 5.22(b) (Vernon 1975).

81. 788 S.W.2d 874 (Tex. App.—Dallas 1990, no writ).

checks on the account under circumstances not explained in the opinion. The court concluded that the spouses "may have intended that [the wife] own the account as [her solely managed] community property, but this intent, voiced prior to opening the account, is superseded by the subsequent opening of the joint account with its joint right of control."<sup>82</sup> The fact of the spouses' tacit agreement was the central issue before the court. Although each party moved for summary judgment, the wife also sought to show a material issue of fact to preclude the success of the other movant's motion, if her own motion failed. The trial court granted the opposing summary judgment and the appellate court concluded that because of the state of the pleadings, there was an insufficient showing of a material fact in issue.<sup>83</sup>

In *Owen v. Porter*<sup>84</sup> a creditor of the husband intervened in the couple's suit for divorce to reach certain items of community property as subject to the husband's sole, or the couple's joint, management. The couple had agreed orally that certain realty in the husband's name and a note made to the husband would be the wife's separate property and that she might collect the rent from the realty and the interest on the note for her support and that of the children. The wife collected those sums but deposited them to a joint account. The trial court, nevertheless, found that the realty and note were subject to the wife's sole management. The appellate court found this conclusion untenable.<sup>85</sup> First, the court held that for lack of writing the agreement failed as a partition under section 5.54<sup>86</sup> or as an agreement incident to divorce under section 3.631.<sup>87</sup> Further, because the apparent agreement between the spouses did not give the wife power to dispose of the realty or the note, which was unendorsed,<sup>88</sup> no agreement as to the wife's sole management of those properties had been reached.<sup>89</sup> The court's handling of the facts in both *Brooks* and *Owen* shows the application of a stricter standard of proof than that applied in *LeBlanc v. Waller*.<sup>90</sup>

### B. Interspousal Liability

Acting alone, either spouse can incur contractual liability that will bind the share of the non-contracting spouse's community property subject to the sole or joint control of the contracting spouse, but the non-contracting spouse is not personally liable for the obligation. Thus Texas law stood from January 1, 1968 when the Matrimonial Property Act of 1967 became effective, but because of so much confusion on the point, it was necessary to codify the rule in Family Code section 4.031<sup>91</sup> in 1987. In *Carr v. Houston*

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82. *Id.* at 877.

83. *Id.* at 878.

84. 796 S.W.2d 265 (Tex. App.—San Antonio 1990, no writ).

85. *Id.* at 267-68.

86. TEX. FAM. CODE ANN. § 5.54 (Vernon Supp. 1991).

87. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1991); *Owen*, 796 S.W.2d at 268.

88. *Owen*, 796 S.W.2d at 269.

89. *Id.*

90. 603 S.W.2d 265, 267-68. (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

91. TEX. FAM. CODE ANN. § 4.031 (Vernon Supp. 1991).

*Business Forms, Inc.*<sup>92</sup> a printing firm with which the husband had contracted for services sued the husband and his wife for the unpaid work. The trial court rendered judgement against both spouses, and the wife appealed. The Houston appellate court held that section 4.031 was clearly applicable to all judgments rendered after November 1, 1987, and that the wife was, therefore, not liable for the husband's contract.<sup>93</sup> Along the way, however, the court made some misleading comments with respect to a non-contracting spouse's implied assent to the other spouse's contracts.<sup>94</sup> Section 4.031 provides that a non-contracting spouse for whom the other spouse is not acting as an agent is not liable for the obligation contracted by the other spouse except with respect to necessities. No implied assent is present, therefore, on the part of the non-contracting spouse except to confirm an undisclosed existing agency.

Although all community property is liable for a tort committed by either spouse,<sup>95</sup> no interspousal agency exists merely by virtue of marriage that causes the torts of one spouse to be attributed to the other.<sup>96</sup> Hence, no personal liability of one spouse for the tortious activities of the other spouse occurs in the absence of a demonstrated agency. In *State Farm Lloyds, Inc. v. Williams*<sup>97</sup> suit was brought against the estates of a husband and wife for the wrongful death of several persons shot by the husband just before he shot himself and his wife. The heirs of the victims sought recovery from a community homeowner's policy which insured "personal liability" of the homeowner. By its terms, therefore, the policy did not cover the liability sought to be imposed on the wife's estate.<sup>98</sup>

### C. Execution Sale

Community property subject to joint management of the spouses is subject to liability incurred by either spouse. On occasions, however, when the court does not order execution on specific property, a levying officer has shown some resistance to making a levy of execution on property held in the name of both spouses when the judgment runs against only one of them.<sup>99</sup> *Gensheimer v. Kneisley*<sup>100</sup> concerned a foreclosure of an abstract of judgment rather than a levy of execution, but the decision should go some way toward relieving the anxiety of a hesitant levying officer.<sup>101</sup> In May, the husband and wife conveyed land to a grantee who failed to record his title. In September a plaintiff was awarded a money judgment against the husband

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92. 794 S.W.2d 849 (Tex. App.—Houston [14th Dist.] 1990, no writ).

93. *Id.* at 852.

94. *Id.* at 851-52.

95. TEX. FAM. CODE ANN. § 5.61(d) (Vernon Supp. 1991).

96. TEX. FAM. CODE ANN. § 4.031(c) (Vernon Supp. 1991).

97. 791 S.W.2d 542 (Tex. App.—Dallas 1990, writ denied).

98. *Id.* at 545-46.

99. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 Sw. L.J. 131, 145-46 (1984).

100. 778 S.W.2d 138 (Tex. App.—Texarkana 1989, no writ).

101. TEX. LOC. GOV'T CODE ANN. § 85.021 (Vernon 1988) (officer's liability for failure to levy as directed) may also provide effective encouragement.

and at the end of October an abstract of judgment was filed against him. The abstract of judgment lien on the property previously sold was then foreclosed. The plaintiff had purchased the property at the foreclosure sale and received a sheriff's deed. The day after the plaintiff abstracted his judgment, the grantee recorded his conveyance. The plaintiff brought an action in trespass to try title to the property and was awarded a summary judgment. On appeal the grantee argued that because the plaintiff's judgment did not extend to the wife, the abstract of judgment would not reach the whole of the property. The appellate court rejected this argument by a literal reading of section 5.61(c).<sup>102</sup> The plaintiff who had no notice of the prior sale to the grantee established a valid lien on all of the jointly held community realty by his abstract of judgment against the husband only.<sup>103</sup>

#### D. Homestead: Designation and Extent

A domiciliary of Texas may claim an urban or a rural homestead but not both.<sup>104</sup> Once a homestead is established, its character as urban or rural may be changed by alteration of population density in the area where the home is located.<sup>105</sup> The acreage protected from creditors' claims and the amount of ad valorem taxes assessed differ radically as a result. A 1989 legislative amendment to Property Code section 41.002<sup>106</sup> was meant to serve the rural homestead claimant in both of these respects: "A homestead is considered to be rural if, at the time that the designation is made, the property is not served by municipal utilities and fire and police protection."<sup>107</sup> In this context the word designation is a term of art referring to the time the property initially became a homestead.<sup>108</sup> Thus, if the property is rural when the homestead is established, it continues as a rural homestead, until "served by municipal utilities and fire and police protection."<sup>109</sup> Further, if a rural area is taken into a municipality, the rural homes located in the area do not automatically become urban homesteads. That change continues to depend on the character of the region as either rural or urban.<sup>110</sup>

102. TEX. FAM. CODE ANN. § 5.61(c) (Vernon 1975); *Gensheimer*, 778 S.W.2d at 140.

103. *Gensheimer*, 778 S.W.2d at 140-41. *But see* TEX. CIV. PRAC. & REM. CODE ANN. § 34.046 (Vernon 1986) (purchaser at sheriff's sale other than creditor protected as good faith purchaser only if would have been so "had the sale been made voluntarily [by the debtor] and in person").

104. *Exall v. Sec. Mortgage & Trust Co.*, 15 Tex. Civ. App. 643, 39 S.W. 959, 960 (Tex. Civ. App.—Dallas 1897, writ ref'd); *see In re Bohac*, 117 Bankr. 256, 259-60 (Bankr. W.D. Tex. 1990).

105. *Lauchheimer & Sons v. Saunders*, 97 Tex. 137, 140-41, 76 S.W. 750, 751 (1903) (change from rural to urban); *In re Lee*, 570 F.2d 1301, 1302 (5th Cir. 1978) (change from urban to rural).

106. TEX. PROP. CODE ANN. § 41.002 (Vernon Supp. 1991).

107. *Id.* § 41.002(c).

108. It is apparent from the context that the word designation and various forms of designate in TEX. PROP. CODE ANN. §§ 41.005, .021-.024 (Vernon Supp. 1991) indicate a different meaning in those provisions.

109. *Id.*

110. *Jones v. First Nat'l Bank of McAllen*, 259 S.W. 157, 159 (Tex. Comm'n App. 1924, judgm't adopted); *Vistron Corp. v. Winstead*, 521 S.W.2d 754, 755 (Tex. Civ. App.—Eastland 1975, no writ).

But even if the region is factually urban, the change of homestead type now is precluded when the legislative restriction applies. Again, the test of changed circumstances is factual. When the property can be served with both types of municipal services, the homestead claimant may defer the change by declining to accept utility service when that option is available. A choice with respect to fire and police protection does not appear to be open to the claimant; the prompt availability of those services seems to be the controlling factor.

Once homestead character affixes to property, that characteristic continues until the property is abandoned as a homestead.<sup>111</sup> Because a claimant of a homestead can have only one homestead at a time, a new homestead cannot be established until the prior homestead has been abandoned.<sup>112</sup> Thus, if the claimant maintains an existing homestead by continued residence there, a new homestead cannot be acquired even though the claimant may intend to move and readies the new premises for occupancy preparatory to moving.<sup>113</sup>

When a spouse is deprived of homestead occupancy by a divorce decree, the homestead right is not abandoned by virtue of that fact alone. As commonly happens, the continuing owner of a fractional undivided interest in the former family home will establish a new home, and the prior homestead right is therefore lost. But if a new homestead is not acquired and the ex-spouse given occupancy of the property abandons it, the dispossessed ex-spouse may reenter and continue the suspended homestead right.<sup>114</sup> In *In re Johnson*<sup>115</sup> the wife separated from her husband and moved out of the community home. A year later a divorce was granted to her, and the homestead property was divided equally between the spouses. The ex-husband was awarded occupancy of the home in order to sell it. The ex-wife later filed for bankruptcy and claimed her half interest in the house as exempt property. She testified that it was agreed that the husband would occupy the house for the time being, but that if he should vacate the house, she would have the right to reoccupy it. She also testified that she did not abandon her homestead interest and had not established a new homestead. The ex-husband, who had been attempting to sell the house, was making all current payments on the mortgage note, and it was agreed that he would have credit for half the reduction of principal of the indebtedness in the division of the proceeds. The court concluded that the ex-wife of the childless marriage lost her homestead rights as a result of the divorce.<sup>116</sup> A more precise way of putting the point is to say that, as a result of the divorce by which she lost any foreseeable right of occupancy, the ex-wife of the childless marriage lost her

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111. *Archibald v. Jacobs*, 69 Tex. 248, 251, 6 S.W. 177, 178-79 (1887).

112. *Silvers v. Welch*, 127 Tex. 58, 62, 91 S.W.2d 686, 687 (1936).

113. *In re Bohac*, 117 Bankr. 256, 263 (Bankr. W.D. Tex. 1990).

114. *Speer & Goodnight v. Sykes*, 102 Tex. 451, 454-55, 119 S.W. 86, 88 (1909). The father maintained a continuing family in that instance. The father and the children reoccupied the home after the mother's departure.

115. 112 Bankr. 15 (Bankr. E.D. Tex. 1990).

116. *Id.* at 17.

homestead right. Hence, as a bankrupt, she could not use section 522(f)(1) of the Bankruptcy Code<sup>117</sup> to avoid a creditor's judicial lien fixed on her share of the exempt property. If there had been some reasonable anticipation that the debtor might resume occupancy of the home, however, the court's conclusion would have been contrary to principle.<sup>118</sup>

The business homestead, if asserted, is an integral part of the residential homestead which may include a residence and a place of business, or either. The same rules apply to both types of use.<sup>119</sup> A person may claim only one residential homestead and may assert only one place of business as exempt<sup>120</sup> along with such outlying areas that are necessary for the operation of the business.<sup>121</sup> The residential and business homestead are also subject to the same rules with respect to mortgage: 1) the same constitutional limitations apply with respect to the purposes for which a valid lien may be put on the homestead property,<sup>122</sup> and 2) the same formalities of spousal joinder are applicable for fixing a lien on the property.<sup>123</sup>

Well established law provides that if the owner of a mobile home affixes it to realty in which the owner has a property interest, even a month-to-month tenancy, the home is protected from seizure as a homestead.<sup>124</sup> It was recently asserted that the adherence of personalty to realty as a fixture allows the avoidance of a prior lien put on a portable building before the building was fixed on the realty and occupied as a home. The argument was rejected in *In re Brown*.<sup>125</sup> The lien does not lose its efficacy merely because the building is affixed to realty.

### E. Liens on Homesteads

The usual means of circumventing the prohibition of mortgage of a homestead as security for other purposes than those allowed by the Texas Constitution<sup>126</sup> is to convey the home to a corporation owned by the homeowner.

117. 11 U.S.C. § 522(f)(1) (1988).

118. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 40 Sw. L.J. 1, 18-20 (1986) (discussing *In re Clafin*, 761 F.2d 1088 (5th Cir. 1985)).

119. See McSwain, *The Texas Business Homestead in 1990*, 42 BAYLOR L. REV. 657, 681-686 (1990).

120. *In re Webb*, 4 Tex. Bankr. Ct. Rep. 344, 346 (Bankr. N.D. Tex. 1990).

121. *In re Krug*, 102 Bankr. 98, 99 (Bankr. W.D. Tex. 1989); *Ford v. Aetna Ins. Co.*, 424 S.W.2d 612, 616 (Tex. 1968).

122. TEX. CONST. art. XVI, § 50 (1876, amended 1973).

123. *In re Moore*, 110 Bankr. 255, 258 (Bankr. N.D. Tex. 1990). For an earlier stage of this dispute, see *In re Moore*, 93 Bankr. 480 (Bankr. N.D. Tex. 1988), discussed in McKnight, *supra* note 71, at 19-20.

124. *Hoffman v. Love*, 494 S.W.2d 591, 593-94 (Tex. Civ. App.—Dallas 1973), writ ref'd n.r.e. *sub nom.* *Love v. Hoffman*, 499 S.W.2d 295 (Tex. 1973).

125. 4 Tex. Bankr. Ct. Rep. 204, 205 (Bankr. N.D. Tex. 1990); see also *In re Brown*, 4 Tex. Bankr. Ct. Rep. 203, 204 (Bankr. N.D. Tex. 1990).

126. TEX. CONST. art. XVI, § 50 (1876, amended 1973). In April, 1990 the Texas Research League issued its study of arguments for and against amending the Texas Constitution to allow mortgages of an owner's equity in a home. Texas Research League, *The Texas Homestead Law—Intrusive Anachronism or Venerable Safeguard?*, 11 ANALYSIS 1 (No. 4, 1990). In October, 1990 the federal Congress rejected proposed legislation allowing the federal government to fix and foreclose a lien on homesteads for the non-payment of student loans, veterans' loans, and loans made by financial institutions in the hands of federal authorities.

The corporation then mortgages the home and makes the loan proceeds available to the use of the former owner. The corporation is not precluded from mortgaging a home, because it cannot claim a homestead.

In *In re Rubarts*<sup>127</sup> a potential inroad was made on the effectiveness of this common practice. The Fifth Circuit Court of Appeals concluded that if the lender knows that the transfer to the corporation is merely a means of circumventing the constitutional mortgage-prohibition and the occupant of premises intends to stay in possession, the mortgage is void.<sup>128</sup> In *Rubarts* the court recognized that a homestead interest may be terminated by a sale of the property, but the court concluded that the creditor has the burden of showing that the sale was not a sham because it is the creditor's burden to show that the homestead has been terminated.<sup>129</sup> No Texas authority is directly on point. Although a similar issue is raised in conjunction with a purchaser's duty of inquiry as to the nature of the seller's title when a former owner has remained in possession of residential property, the Texas rule in that situation is rather murky.<sup>130</sup> Though the Fifth Circuit court's point of view is not binding on Texas courts, its conclusions are functionally authoritative in bankruptcy cases where the issue very commonly arises. But if a federal entity seeks to foreclose a mortgage involving similar facts, the homestead claimant will be barred from asserting a sham transfer arising out of a side-agreement with the mortgagee under the Federal Deposit Insurance Act.<sup>131</sup>

In *In re Worth*<sup>132</sup> the couple's business homestead was awarded on divorce to the husband subject to a lien in the favor of the wife to secure payment of the husband's note for her community interest in the property. In his subsequent bankruptcy, the ex-husband sought to avoid the wife's lien on the business homestead under the provision of the Bankruptcy Code. In allowing avoidance of a judicial lien for a homestead the congressional draftsman probably had only creditors' liens in mind as some courts have held,<sup>133</sup> but a broader interpretation of the provision is consistent with the language of the Code<sup>134</sup> and with the technique of interpreting provisions of the Code specifically denying discharge of alimony and child support orders.<sup>135</sup> Paradoxically the judicial lien arising from a familial or fiduciary relationship is the only type of judicial lien that will reach a homestead in

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127. 896 F.2d 107 (5th Cir. 1990).

128. *Id.* at 115.

129. *Id.* at 110-11.

130. See *Moore v. Chamberlain*, 109 Tex. 64, 195 S.W. 1135 (1917); *Ramirez v. Smith*, 94 Tex. 184, 59 S.W. 258 (1900); *Love v. Breedlove*, 75 Tex. 649, 13 S.W. 222 (1890); *Hurt v. Cooper*, 63 Tex. 362 (1885); *Eylar v. Eylar*, 60 Tex. 315 (1883).

131. 12 U.S.C. § 1823(e) (1988); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 460-61 (1942); *Templin v. Weisgram*, 867 F.2d 240, 242 (5th Cir. 1989), *cert. denied* 110 S. Ct. 63 (1989).

132. 100 Bankr. 834 (Bankr. N.D. Tex. 1989).

133. See *In re Boyd*, 741 F.2d 1112, 1113-114 (8th Cir. 1984); *In re Thomas*, 32 Bankr. 11, 12 (Bankr. D. Ore. 1983).

134. *In re Sanderfoot*, 899 F.2d 598, 600-01 (7th Cir. 1990, *cert. granted*).

135. *Exclusio unius est exclusio alterius*. See *In re Pederson*, 78 Bankr. 264, 267 (9th Cir. 1987); *In re Duncan*, 85 Bankr. 80, 83 (W.D. Wis. 1988).



Texas, for if realty is exempt, an ordinary judgment creditor's lien will not attach to it. Further, the only question that needs to be answered in Texas is whether the property subject to the alleged lien is a homestead. If the property is a homestead, a judicial lien in favor of a creditor will not fix on the property and there is no need for recourse to the Bankruptcy Code. In *Worth* the court gave a literal reading to the section, but still managed to preserve the lien.<sup>136</sup> The court reasoned, as the Fifth Circuit Court of Appeals had done<sup>137</sup> with respect to the Texas personal property exemptions,<sup>138</sup> that only the unencumbered portion of the property is exempt.<sup>139</sup> Hence, the part subject to the lien was not exempt property, and, therefore, the lien was not subject to avoidance.<sup>140</sup>

A more troublesome instance of interaction of federal and state law arises from the provisions of federal banking laws. It has been asserted that<sup>141</sup> the federal Home Owners' Loan Act of 1933 (HOLA)<sup>142</sup> and regulations issued under it<sup>143</sup> allow federally chartered savings and loan associations to take a mortgage on a Texas homestead for purposes forbidden by the Texas Constitution.<sup>144</sup> Although the Texas Attorney General is not persuaded that the federal law has the effect asserted,<sup>145</sup> his opinion is not as convincing as might be desired. The Attorney General's conclusion is just as unconvincing that the federal Alternative Mortgage Transaction Parity Act of 1982 (Parity Act)<sup>146</sup> does not extend similar authority to state-chartered savings and loan associations.<sup>147</sup> Federal legislation may be the only available means of curing the disquieting effects of HOLA and the Parity Act.

#### F. Exempt Personalty

In *In re Sugarek*<sup>148</sup> a bankrupt had chosen federal exemptions and sought to remove non-possessory, non-purchase money liens from tools of trade.<sup>149</sup> Although the encumbered portions of Texas personal property exemptions are construed as non-exempt,<sup>150</sup> a lien that impairs a federally defined exemption may be avoided.<sup>151</sup> The court construed the federal reference to

136. *Worth*, 100 Bankr. 834, 840.

137. TEX. REV. CIV. STAT. art. 3836, repealed and replaced by TEX. PROP. CODE ANN. § 42.001(c) (Vernon 1991); see McKnight, *Texas Family Exemption Laws*, 21 Tex. Tech L. Rev. 1121, 1143 (1990).

138. *In re Allen*, 725 F.2d 290, 292-93 (5th Cir. 1984).

139. *Id.* at 293.

140. *Worth*, 100 Bankr. 834-39.

141. Letter of Deputy General Counsel of Home Loan Bank Board to Associate General Counsel of Department of Housing and Urban Development (Aug. 4, 1989), cited in Op. Tex. Att'y Gen. No. JM-1269 (1990).

142. 12 U.S.C. § 1464(c)(1)(E) (1988).

143. 12 C.F.R. § 545; 48 Fed. Reg. 23,032-33 (May 23, 1983).

144. TEX. CONST. art. XVI, § 50 (1876, amended 1973).

145. Op. Tex. Att'y Gen. No. JM-1269 (1990).

146. 12 U.S.C. §§ 3801-3806 (1988).

147. Op. Tex. Att'y Gen. No. JM-1269.

148. 117 Bankr. 271 (Bankr. S.D. Tex. 1990).

149. 11 U.S.C. § 522(d)(6) (1988).

150. *In re Allen*, 725 F.2d 290, 293 (5th Cir. 1984).

151. 11 U.S.C. § 522(f)(2)(B) (1988).

tools of trade to include large agricultural implements<sup>152</sup> contrary to congressional legislative history<sup>153</sup> and some Texas authority giving the concept a more limited meaning.<sup>154</sup>

Unpaid wages are exempt from seizure under both the Texas Constitution<sup>155</sup> and the Property Code,<sup>156</sup> but money due to an independent contractor for services is not construed as wages and is therefore unprotected.<sup>157</sup> Although it has been suggested that the Texas personal property exemptions be expanded to cover money due for some personal services, there is no significant sentiment to extend exemptions to cover debts due to all independent contractors.<sup>158</sup>

When directing an employee-debtor to turnover wages as they are received, a turnover order goes to, but does not cross, the line laid down by the Texas Constitution forbidding seizure of wages in the hands of an employer. Enforcing a turnover order by civil contempt, however, would impinge on that constitutional prohibition against garnishment of wages. Without ruling on the latter point, in *Raborn v. Davis*<sup>159</sup> the Texas Supreme Court sustained the validity of an order to turnover wages as received. After a motion for rehearing was filed, however, the parties settled their dispute and the court dismissed the case as moot.<sup>160</sup> In its dismissal the court observed that the parties had not argued the effect of the statute, effective on June 15, 1989,<sup>161</sup> making turnover orders inapplicable to a judgment rendered before or after that date except with respect to the payment of child-support obligations. Thus the court must give further consideration to the validity of orders to turnover wages to satisfy a 1987 judgment.<sup>162</sup> In the meantime the Texarkana appellate court had followed *Raborn* in affirming a turnover or-

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152. *Sugarek*, 117 Bankr. at 274.

153. *Id.* at 273; see also *In re Trainer*, 56 Bankr. 21, 23 (Bankr. S.D. Tex. 1985) (large truck and trailer not tool of trade of trucker).

154. See, e.g., *Willis v. Morris*, 66 Tex. 628, 633-34 1 S.W. 799, 801-02 (1886). But see *Green v. Raymond*, 58 Tex. 80, 84 (1882). For a discussion of both lines of authority, see Olds & Palmer, *Exempt Property in CREDITORS' RIGHTS IN TEXAS* 23, 51-54 (J. McKnight ed. 1963).

155. TEX. CONST. art. XVI, § 28 (1876).

156. TEX. PROP. CODE ANN. § 42.002(8) (Vernon 1984). Because unpaid wages are constitutionally exempt from seizure by creditors, they are not subject to inclusion in the statutorily exempt amount allowed for a family or single adult. *Sloan v. Douglass*, 713 S.W.2d 436, 442 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

157. *In re Martin*, 117 Bankr. 243, 246 (Bankr. N.D. Tex. 1990); *In re Perciavalle*, 92 Bankr. 688, 689-90 (Bankr. W.D. Tex. 1988).

158. A general revision and clarification of Title 42 of the Texas Property Code was passed by both houses of the Texas Legislature at the regular session of 1989. In the House bill (H.B. 2763) "commissions for personal services" were designated as exempt from creditors' seizure, whereas in the Senate bill (S.B. 400) "current income from personal service contracts" was defined as exempt. This inconsistency and others had not been resolved at the end of the legislative session. Thus, neither provision was enacted.

159. 33 Tex. Sup. Ct. Rep. 633 (1990).

160. *Id.* at 634.

161. TEX. CIV. PRAC. & REM. CODE § 31.002 (Vernon Supp. 1991).

162. *Caulley v. Caulley*, 777 S.W.2d 147, 151 (Tex. App.—Houston [14th Dist.] 1989, writ granted).

der affecting wages without considering the effect of the 1989 statute.<sup>163</sup>

In 1987 the Texas Legislature enacted Property Code section 42.0021<sup>164</sup> to exempt a broad range of pension and retirement interests without monetary limitation. More reported decisions have subsequently dealt with this type of exemption than any other.<sup>165</sup> The scope of the Texas statute includes interests which qualify under the federal Employee Retirement Income Security Act of 1974 (ERISA)<sup>166</sup> as well as retirement devices such as individual retirement accounts and certain Keogh plans, which are beyond the control of ERISA.

The bankruptcy courts have been most concerned with ERISA-qualifying plans, and the courts have analyzed the effects of the Texas statute in notably different ways. Some have concluded that ERISA preempts the entire field of pension plans qualifying under it, and thus leaves no room for the operation of Texas law with respect to exemption of ERISA-qualifying interests. In spite of the breadth of ERISA-preemption of matters associated with retirement interests, adherence to this view seems to be waning.<sup>167</sup> The United States Supreme Court has recently stressed its own recognition of limits to ERISA's preemption clause.<sup>168</sup> A second view accepts the preemptive effect of ERISA with respect to ERISA-qualifying plans but goes on to treat ERISA as creating a type of federal non-bankruptcy exemption recognized by section 522(b)(2)(A) of the Bankruptcy Code<sup>169</sup> and hence available to a debtor who chooses state rather than federal bankruptcy exemptions. The Bankruptcy Court of the Western District of Texas reached this conclusion in *In re Komet*,<sup>170</sup> and that view was followed in two later cases.<sup>171</sup> Other courts have enunciated a third view: Although ERISA creates pension interests dealt with by the Texas act, the subject matter is not preempted by the federal statute and thus the federal and state statutes can operate together.<sup>172</sup> Hence, the Texas act is fully effective to exempt its subject matter which will therefore qualify as exempt property under section 522 of the Bankruptcy Code. In reviewing decisions of bankruptcy judges

163. *Schmerbeck v. River Oaks Bank*, 786 S.W.2d 521 (Tex. App. — Texarkana 1990, no writ) (Grant, J., concurring with great reluctance on basis of stare decisis).

164. TEX. PROP. CODE ANN. § 42.0021 (Vernon Supp. 1991), as clarified and amended in 1989.

165. For previous developments, see Hendrick, *Federal Nonbankruptcy Law Includes ERISA*, 53 TEX. BAR J. 854 (1990); Comment, *Protecting ERISA Plans in Bankruptcy: Is There Still Hope for Texas Debtors?*, 42 BAYLOR L. REV. 757 (1990).

166. 26 U.S.C. § 401(a)(13) (1988); 29 U.S.C. § 1056(d)(1) (Supp. 1990).

167. For an example of this view, see *In re Deisher*, 4 Tex. Bankr. Ct. Rep. 90, 94 (Bankr. N.D. Tex. 1990).

168. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990). The court nevertheless held that an action by an employee for wrongful discharge under state law was preempted by ERISA because discharge was based on the employer's desire to avoid making contributions to an ERISA-qualifying pension fund for the benefit of the employee. *Id.* at 486.

169. 11 U.S.C. § 522(b)(2)(A) (1988).

170. 104 Bankr. 799, 805-16 (Bankr. W.D. Tex. 1989).

171. *In re Felts*, 114 Bankr. 131, 133-34 (Bankr. W.D. Tex. 1990); *In re Majul*, 119 Bankr. 118, 124 (Bankr. W.D. Tex. 1990).

172. See Hendrick, *supra* note 165, at 855-56.

two federal District courts expressed this view. In *In re Dyke*<sup>173</sup> the court concluded that the Texas exemption statute is beyond the preemptive reach of ERISA<sup>174</sup> because an exemption is not sufficiently "related to" ERISA to be preempted by it.<sup>175</sup> Thus, section 42.0021 simply adds another property exemption to the already established list and "[t]he fact that the property interest is a retirement plan, the administration of which is regulated by ERISA, is of no moment."<sup>176</sup> A similar conclusion was reached in *In re Volpe*.<sup>177</sup>

In *Volpe* the court also considered the application of section 42.0021 to seven individual retirement accounts which are clearly beyond the scope of ERISA. Because section 42.0021 refers to "an individual retirement account" the court was at pains to construe the debtor's separate accounts as but one plan and therefore exempt.<sup>178</sup> The court's ingenuity is overstrained. Because the Texas statute does not deal with an enumeration of items and because there is no applicable monetary limit, the reference to "an account" should be construed as "any account" in the context of the statute.

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

##### A. Jurisdiction

In *Redus v. Redus*<sup>179</sup> the Austin Court of Appeals considered the validity of a foreign state judgment with respect to personal property of the petitioning husband when the wife was not subject to the personal jurisdiction of the court. In *Fox v. Fox*<sup>180</sup> the same court had the same issue before it with respect to the validity of a Texas order made without personal jurisdiction of the foreign respondent. Without mentioning its earlier decision, but evidently aware of the adverse criticism of it,<sup>181</sup> the Austin court concluded in *Redus* that the California divorce court lacked jurisdiction to divide personal property without jurisdiction over the respondent.<sup>182</sup> The Corpus Christi appellate court resolved a somewhat similar jurisdictional dispute in *Ramirez v. Lagunes*.<sup>183</sup> The court concluded that a Texas court lacking personal jurisdiction over an ex-husband could not entertain a bill of discovery directed toward finding the moveable assets of a non-domiciliary, divorced by a foreign court.<sup>184</sup> But if a Texas court has personal jurisdiction over a respondent in a suit for divorce, the court may enjoin the respondent from

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173. 119 Bankr. 536 (Bankr. S.D. Tex. 1990), *rev'g* 99 Bankr. 343 (Bankr. S.D. Tex. 1989).

174. *Id.* at 539.

175. *Id.* at 537-39.

176. *Id.*

177. 120 Bankr. 843, 848 (W.D. Tex. 1990), *aff'g* 100 Bankr. 840, 856 (Bankr. W.D. Tex. 1989).

178. *Id.*

179. 794 S.W.2d 418 (Tex. App.—Austin 1990, no writ).

180. 559 S.W.2d 407 (Tex. Civ. App.—Austin 1977, no writ).

181. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 121-22 (1978).

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

183. 794 S.W.2d 501 (Tex. App.—Corpus Christi 1990, no writ).

184. *Id.* at 504.

filing a similar suit in another state or nation.<sup>185</sup>

Once a respondent to a petition for divorce has made an appearance, he is entitled to notice of a trial setting as a matter of due process. In the absence of such notice, the court cannot grant a divorce by default.<sup>186</sup> If the respondent is represented by counsel at a trial, however, he cannot be said to have defaulted in making an appearance.<sup>187</sup>

### B. Interlocutory Orders

Since the enactment of the first divorce act of 1841, the Texas divorce court has been empowered to grant temporary spousal support during the pendency of the suit.<sup>188</sup> By an extension of that principle, the court may order one spouse to make mortgage payments on the family home as a part of spousal support.<sup>189</sup> For enforcement of such an order by civil contempt the order requiring performance must be clear but need not conform to the exacting statutory standards<sup>190</sup> of a child-support order.<sup>191</sup>

In *Chiles v. Schuble*<sup>192</sup> the wife sought a writ of mandamus to compel the trial court to enforce temporary support orders by contempt. The appellate court responded that it could not compel the trial court "to reach a result that necessarily involves his discretion", but the trial court must nonetheless entertain the motion and hold a hearing.<sup>193</sup>

### C. Agreements Incident to Divorce

In *Smith v. Smith*<sup>194</sup> the husband and wife entered into a written property settlement including variations by written addenda executed prior to their divorce. The ex-wife later denied the validity of the addenda because they were not reduced to writing by the court reporter and introduced into the record. The court held, however, that Rule 11<sup>195</sup> was complied with by reading the addenda in open court and being entered in the record.<sup>196</sup> In another case<sup>197</sup> the ex-wife resisted enforcement of the terms of a property settlement agreement requiring her to contribute to discharge liabilities incurred during marriage because the ex-husband might have asserted a defense to the enforcement of the obligation but chose not to do so. Because the agreement did not require the ex-husband to avail himself of the defense,

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185. *Espada Garrido v. Iglesias de Espada*, 785 S.W.2d 888, 890 (Tex. App.—El Paso 1990, no writ).

186. *Vining v. Vining*, 782 S.W.2d 261, 262 (Tex. App.—Houston [14th Dist.] 1989, no writ).

187. *LeBlanc v. LeBlanc*, 778 S.W.2d 865 (Tex. 1989).

188. 1840-1841 Republic of Texas Laws, 5th Cong. 19, § 8 at 21, 2 H. GAMMEL, LAWS OF TEXAS 483, 485 (1898).

189. TEX. FAM. CODE ANN. § 3.59 (Vernon 1975).

190. TEX. FAM. CODE ANN. § 14.33 (Vernon Supp. 1991).

191. *Ex parte Graham*, 787 S.W.2d 141, 143 (Tex. App.—Houston [14th Dist.] 1990).

192. 788 S.W.2d 205 (Tex. App.—Houston [14th Dist.] 1990, no writ).

193. *Id.* at 207.

194. 794 S.W.2d 823 (Tex. App.—Dallas 1990, no writ).

195. TEX. R. CIV. P. 11.

196. *Smith*, 794 S.W.2d at 827.

197. *Bass v. Bass*, 790 S.W.2d 113 (Tex. App.—Fort Worth 1990, no writ).

the terms of the agreement were binding on the ex-wife.<sup>198</sup>

In *Wesley v. Pickard*<sup>199</sup> the divorce property settlement agreement of 1983 provided that the husband would pay contractual alimony for ten years and that it would be binding upon his estate through February 1, 1985. The ex-husband made all payments in accordance with the agreement until his death in 1987. The court held that the only reasonable interpretation of the agreement was that in the event of the ex-husband's death, his estate would have no further obligation to pay beyond the time specified.<sup>200</sup> A less specific agreement was before the court in *Alexander v. Alexander*.<sup>201</sup> The settlement agreement provided that in case of litigation concerning breach of the agreement the prevailing party would be entitled to his or her attorney's fees. The dispute occurred after the ex-husband's death. The court held that in the absence of a specific term of the agreement, only the ex-husband, but not his estate, was bound by this provision.<sup>202</sup>

In *Traylor v. Traylor*<sup>203</sup> the Texarkana appellate court commented on an ex-wife's effort to clarify a divorce decree incorporating a property settlement agreement by which her former husband undertook to provide her with medical insurance. The appellate court concluded that because the order to provide insurance was not referable to the division of community property, it was not the sort of order a divorce court could have made, and therefore the court could not enforce it through its contempt powers.<sup>204</sup> For the same reason<sup>205</sup> such a provision cannot be enforced under section 3.72.<sup>206</sup> The language of the agreement did not lend itself to enforcement as a contract to pay a sum of money, but the court suggested that such a contractual term could have been included in the agreement and could therefore have been enforced as a contractual obligation.<sup>207</sup>

The scope of judicial construction is restricted when the law of judgments rather than the law of contracts is applicable to determine the meaning of a divorce decree. In *Haworth v. Haworth*<sup>208</sup> the ex-husband asked the court to clarify a judgment which did not embody an agreement incident to divorce. The parties merely signed the court's decree to approve its form and such approval does not cause the decree to be an agreed judgment.<sup>209</sup> In construing such a judgment the court looks to the language of the court in the light of the record but cannot inquire of the intentions of the parties.<sup>210</sup> The 1980

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198. *Id.* at 117-18.

199. 783 S.W.2d 589 (Tex. App.—Houston [1st Dist.] 1989, no writ).

200. *Id.* at 591-92.

201. 784 S.W.2d 112 (Tex. App.—Fort Worth 1990, writ denied).

202. *Id.* at 114.

203. 789 S.W.2d 701 (Tex. App.—Texarkana 1990, no writ).

204. *Id.* at 703. Although the dispute did not involve a property settlement agreement, the types of orders a trial court can make are discussed in *Reiter v. Reiter*, 788 S.W.2d 201, 202-04 (Tex. App.—Fort Worth 1990, writ denied).

205. *Traylor*, 789 S.W.2d at 703.

206. TEX. FAM. CODE ANN. § 3.72 (Vernon Supp. 1991).

207. *Traylor*, 789 S.W.2d at 703-04.

208. 795 S.W.2d 296 (Tex. App.—Houston [14th Dist.] 1990, no writ).

209. *Id.* at 298.

210. *Id.*

divorce decree before the court had been drawn too broadly to grant the wife separate property interests of the husband arising after the divorce. But to rectify that error would have required a modification, not a mere clarification of the decree.<sup>211</sup> Thus the decree was required to stand as entered.

In *Spradley v. Hutchison*<sup>212</sup> the Fort Worth Court of Appeals reiterated its decision in *Herbert v. Herbert*<sup>213</sup> that although a property settlement agreement is interpreted by the law of contracts rather than the law of judgments, a contract defense cannot be pled against the enforcement of a judgment.<sup>214</sup> Such contractual defenses may nevertheless be considered in fixing damages for breach.<sup>215</sup>

In making a division of marital property, a divorce court may grant a custodial parent occupancy of the separate family home of the other parent as an element of child support,<sup>216</sup> but such a divestiture of separate property cannot extend beyond the period for which the property owner owes a duty of child-support.<sup>217</sup> By the terms of the settlement agreement approved by the court in *de los Santos v. de los Santos*,<sup>218</sup> the husband and wife partitioned their community home in separate undivided shares. During the minority of the children the wife was to have possession of the home and thereafter the house would be sold and the proceeds divided. The husband was to pay \$200 a month as child-support. Three years after the divorce the ex-wife moved for an increase in child-support to \$500 a month. That proceeding was compromised by a further agreement by which the ex-husband would continue to pay only \$200 a month for child-support, and he would transfer his interest in the property to his ex-wife in lieu of any increase in child support. Two years later the ex-wife sought a further increase in child support. The validity of the modification agreement was in issue. The court held that the parties' effort to modify the child-support order was void on two grounds.<sup>219</sup> First, the court itself, as well as the parties, lacks power to modify child-support provisions of a judicially approved property settlement agreement that sets aside real property for the benefit of minor children.<sup>220</sup> Second, an agreement to forbear from seeking child-support in exchange for title to realty is an unenforceable agreement.<sup>221</sup>

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211. *Id.* at 300 (relying on TEX. FAM. CODE ANN. § 3.71(a) (Vernon Supp. 1991)).

212. 787 S.W.2d 214 (Tex. App.—Fort Worth 1990, writ denied).

213. 699 S.W.2d 717, 725-26 (Tex. App.—Fort Worth 1985), *rev'd on other grounds*, 754 S.W.2d 141 (Tex. 1987).

214. *Spradley*, 787 S.W.2d at 220.

215. *Id.*; see *Giddings v. Giddings*, 701 S.W.2d 284, 289 (Tex. App.—Austin 1985, writ *ref'd n.r.e.*).

216. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 141-42 (Tex. 1977).

217. *Id.* at 139; see *Lambourn v. Lambourn*, 787 S.W.2d 431, 432 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (court lacked power to order parent to maintain life insurance policy for non-disabled child until child reached age twenty-two).

218. 794 S.W.2d 528 (Tex. App.—Corpus Christi 1990, no writ).

219. *Id.* at 529-30.

220. *Martinez v. Guajardo*, 464 S.W.2d 944, 946-47 (Tex. Civ. App.—San Antonio 1971, no writ).

221. *Galaznik v. Galaznik*, 685 S.W.2d 379, 383 (Tex. App.—San Antonio 1984, no writ).

#### D. Property Not Subject to Division

In *Berry v. Berry*<sup>222</sup> the Texas Supreme Court concluded that the Uniform Services Former Spouses Protection Act (USFSPA)<sup>223</sup> does not apply to divisions of marital property on divorce made prior to its enactment. The doctrine of *res judicata* controls in that situation. Similarly, in *Baxter v. Ruddle*<sup>224</sup> the Texas Supreme Court held that an unappealed 1978 award of a specific percentum of subsequent retirement benefits was not affected by a 1983 decision of the Texas Supreme Court<sup>225</sup> that divorce benefits should be calculated at the date of divorce.<sup>226</sup>

The ex-wife in *Adams v. Adams*<sup>227</sup> asserted a right in her ex-husband's military retirement benefits undivided by a Tennessee divorce decree in 1975. Under Tennessee law such undivided marital property is subject to partition. The court concluded that military retirement benefits arising after June 25, 1981<sup>228</sup> in accordance with the USFSPA were subject to partition.<sup>229</sup> Whether federal Veterans Administration benefits are subject to division under Texas law under the USFSPA was not before the court in either case. In *Gallegos v. Gallegos*,<sup>230</sup> however, the issue was before the San Antonio appellate court. The court held that the amount by which military retirement benefits are reduced by acceptance of Veterans Administration disability pay is not subject to division by a Texas divorce court.<sup>231</sup> The court also concluded that the amount by which military retirement benefits are reduced to receive current wages from the federal Civil Service is also not subject to division.<sup>232</sup>

#### E. Making the Division

The divorce court has very wide discretion in dividing the marital estate and in the absence of a clear showing of abuse, an appellate court will not disturb the trial court's division.<sup>233</sup> Although the division of property in *Mullins v. Mullins*<sup>234</sup> was very much in favor of the wife and the trial judge's remarks "border[ed] on being abusive and threatening,"<sup>235</sup> the appellate court was unable to say that the property division was improper in the ab-

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222. 786 S.W.2d 672, 673 (Tex. 1990). *Elliott v. Elliott*, 797 S.W.2d 388, 391-92 (Tex. App.—Austin 1990, no writ), resolved a similar point.

223. 10 U.S.C. § 1408 (1988); see *Mansell v. Mansell*, 490 U.S. 581 (1989).

224. 794 S.W.2d 761 (Tex. 1990).

225. *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983).

226. *Id.* at 946.

227. 787 S.W.2d 619 (Tex. App.—San Antonio 1990, no writ).

228. *McCarty v. McCarty*, 453 U.S. 210 (1981).

229. *Adams*, 787 S.W.2d at 623-24.

230. 788 S.W.2d 158 (Tex. App.—San Antonio 1990, no writ).

231. *Id.* at 160.

232. *Id.* at 161.

233. See *In re Marriage of D.M.B. and R.L.B.*, 798 S.W.2d 399, 406 (Tex. App.—Amarillo 1990, no writ); *Martin v. Martin*, 797 S.W.2d 347, 351 (Tex. App.—Texarkana 1990, no writ); *Laprade v. Laprade*, 784 S.W.2d 490, 494 (Tex. App.—Fort Worth 1990, writ denied).

234. 785 S.W.2d 5 (Tex. App.—Fort Worth 1990, no writ).

235. *Id.* at 9-10 (alleging that husband was being punished by court for being involved with drug-dealer).



sence of findings of fact and conclusions of law.<sup>236</sup> But when the trial court makes an error in the characterization of marital property of any significance, the appellate court remands the matter for a redivision.<sup>237</sup>

The award of attorney's fees is an integral part of a property division on divorce.<sup>238</sup> Although it is improper for an attorney to seek a judgment for a legal fee against his own client in a divorce proceeding,<sup>239</sup> a former attorney of a client may intervene to seek recovery. Though the wife in *Rossen v. Rossen*<sup>240</sup> had not preserved her point of error with respect to the award of attorney's fees to her former attorney who had not formally intervened, Justice Dunn was nevertheless troubled that the decree included an order that the wife pay a fee to an attorney who had represented her in the suit.<sup>241</sup> It appears that the wife's prior attorney was allowed to withdraw toward the end of the trial, and another attorney replaced him.<sup>242</sup> The wife's former attorney was therefore a party for the purpose of receiving an award of fees and was bound by any earlier negotiations with respect to fees.<sup>243</sup> The trial court, therefore, properly treated the wife's former attorney as a party in awarding his fees.

On December 13 the parties in *Hollaway v. Hollaway*<sup>244</sup> announced that they had reached a settlement, and the terms of the agreement were dictated to the court reporter in open court. On being asked by the judge, each party expressed satisfaction with the agreement. The record showed that the judge then stated

I'll grant the Divorce and approve the settlement. It's on the Record. I will approve the settlement in January. However, it's my intention the Divorce is rendered today. The signing of the Decree will merely be a ministerial act. Because it's over with and done. The agreement is entirely dictated on the Record.<sup>245</sup>

At a hearing on January 10 to sign the judgment, the wife attempted to repudiate the property settlement agreement in which she said that her participation had been coerced. The trial judge stated that he had already rendered a final judgment.<sup>246</sup> The appellate court affirmed the trial judge's ruling that final judgment had been rendered on December 13.<sup>247</sup>

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236. *Id.* at 9-10, 12.

237. *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985); see *Welder v. Welder*, 794 S.W.2d 420, 434 (Tex. App.—Corpus Christi 1990, no writ). Whether a new trial will be necessary will depend on the circumstances of each case. See *Halbert v. Halbert*, 794 S.W.2d 535, 536-37 (Tex. App.—Tyler 1990, no writ).

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

239. Texas Ethics Committee Opinion No. 374, 37 TEX. BAR J. 1085 (1974).

240. 792 S.W.2d 277 (Tex. App.—Houston [1st Dist.] 1990, no writ).

241. *Id.* at 279-80.

242. *Id.* at 278-79.

243. See *Mullinax, Wells, Mauzy & Collins v. Dawson*, 478 S.W.2d 121 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); see also *McKnight, Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 459-60 (1976).

244. 792 S.W.2d 168 (Tex. App.—Houston [1st Dist.] writ denied).

245. *Id.* at 169.

246. *Id.* For the consequence of a premature motion for new trial in a divorce context, see *Syn-Labs, Inc. v. Franz*, 778 S.W.2d 203 (Tex. App.—Houston [1st Dist.] 1989, no writ).

247. *Hollaway*, 792 S.W.2d 168, 170.

A court's plenary jurisdiction to set aside the judgment expires thirty days after its entry.<sup>248</sup> In *Valencia v. Valencia*<sup>249</sup> the divorce court awarded the family home to the wife along with custody of the parties' child.<sup>250</sup> The court ordered the husband to pay child-support of \$100 a month, but because his community share of the equity in the house was \$15,000, the court gave the husband credit for 150 semi-monthly child-support payments in advance.<sup>251</sup> A subsequent change of custody was granted to the father, and the mother was ordered on sale of the house to repay \$13,100 previously credited to her from the husband's share of the equity; the court put a lien on the house to secure repayment.<sup>252</sup> The appellate court held that the trial court had exceeded its powers under Family Code section 3.71(a)<sup>253</sup> which specifically provides that the court may not modify the division of property in the divorce decree.<sup>254</sup> The mother could have been ordered to pay child support but putting the lien on her realty was beyond the court's power.<sup>255</sup>

#### F. Effect of Bankruptcy

In *In re Biggs*<sup>256</sup> the husband and wife had entered into an agreement incident to divorce in which the husband obligated himself to pay contractual alimony each month. After the ex-husband became delinquent in his payments, the ex-wife recovered a money judgment for the amount in arrears.<sup>257</sup> The ex-husband then filed a petition in bankruptcy and asserted that his obligation under the agreement and judgment were dischargeable because Texas divorce courts cannot award permanent alimony, which would be non-dischargeable under the Bankruptcy Code.<sup>258</sup> But contractual alimony has been long recognized in Texas,<sup>259</sup> and if the agreed payments are meant for support rather than as elements of a property division,<sup>260</sup> the contractual obligation is not dischargeable in bankruptcy.<sup>261</sup>

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248. TEX. R. CIV. P. 329b; see *Anderson v. Anderson*, 786 S.W.2d 79, 81 (Tex. App.—San Antonio 1990, no writ); *Davis v. Boone*, 786 S.W.2d 85, 87 (Tex. App.—San Antonio 1990, no writ).

249. 792 S.W.2d 565 (Tex. App.—El Paso 1990, no writ).

250. *Id.* at 566.

251. *Id.*

252. *Id.*

253. TEX. FAM. CODE ANN. § 3.71(a) (Vernon Supp. 1991).

254. *Valencia*, 792 S.W.2d at 567.

255. *Id.*

256. 907 F.2d 503 (5th Cir. 1990).

257. *Id.*

258. 11 U.S.C. 523(a)(5) (1988).

259. *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967).

260. See *In re Benich*, 811 F.2d 943, 945 (5th Cir. 1987); *Roberts v. Poole*, 80 Bankr. 81, 85 (Bankr. N.D. Tex. 1987).

261. *Biggs*, 907 F.2d at 506.

