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FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight*

I. STATUS

A. Computing Degrees of Relationship

THE most radical change in the Texas law of status relates to the mode of counting degrees of relationship in both civil and criminal matters.¹ This change affects the law of husband and wife only tangentially (but pervasively) and is only notable here because of the intimate relationship of these rules to the law of marriage since at least the fifteenth century. In his book on *Tenures*, Thomas Littleton² said that descent to land was controlled by the canonical mode of counting degrees of relationship ordinarily used for computing kinship of a couple allowed to marry. The rule resulted from an extension of the law of marriage to the law of succession to lands under marriage contracts and thence to succession to lands generally. By an analogy to the prohibited degrees of marriages³ which, though tempo-

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1. TEX. REV. CIV. STAT. ANN. arts. 5996a, 5996c, 5996h, 5996i (Vernon Supp. 1992); TEX. AGRIC. CODE ANN. §§ 201.202(3), 252.023(d) (Vernon Supp. 1992); TEX. CIV. PRAC. & REM. CODE ANN. § 72.001 (Vernon Supp. 1992); TEX. CRIM. PROC. CODE ANN. arts. 19.08, 30.01, 35.16(b),(c), 42.141 (Vernon Supp. 1992); TEX. EDUC. CODE ANN. §§ 21.916(a), 86.52(b) (Vernon Supp. 1992); TEX. ELEC. CODE ANN. §§ 16.031(b), 32.054(a), 33.033(a), 102.003(c), 103.001(a), 243.007(b) (Vernon Supp. 1992); TEX. GOV'T CODE ANN. §§ 21.005, 52.011(d), 62.105, 82.066, 404.011(d), 415.093(d), 415.114, 495.003(a) (Vernon Supp. 1992); TEX. HEALTH & SAFETY CODE ANN. §§ 193.007(c), 242.002(6), 246.002(3), 402.014, 713.010, 713.025 (Vernon Supp. 1992); TEX. HUM. RES. CODE ANN. §§ 50.004(h), 51.002(2) (Vernon Supp. 1992); TEX. LOC. GOV'T CODE ANN. §§ 171.002(c), 212.017(c), 232.0048(c) (Vernon Supp. 1992); TEX. PENAL CODE ANN. §§ 25.07(b), 32.441(c), 38.01(8) (Vernon Supp. 1992); TEX. TAX CODE ANN. §§ 6.035(a)-(c), 6.05(f),(g), 6.412, 41.69 (Vernon Supp. 1992); TEX. PROB. CODE ANN. § 130E(b) (Vernon Supp. 1992); TEX. WATER CODE ANN. §§ 50.023(a), 50.026(a), 51.0851(a), 51.235(a), 53.0721(a), 53.089(e), 54.1231(a), 57.262 (Vernon Supp. 1992); TEX. REV. CIV. STAT. ANN. arts. 41a-1, 46c-3, 135b-6, 179d §§ 13(q), 13b(c), 13e(a), 19(d), 179e §§ 205, 6.16, 342-104, 342-214, 2461-11.08, 3271a § 4(b), 4413(29cc), 4413(36) §§ 203(b), 209(f), 4442d § 3A(1), 4495b § 2.09(f), 4512b § 3(e), 4512c § 5(g), 4512e § 2(h), 4512g § 4(e)-(f), 4512j § 3(a), 4513 § 3, 4528c § 5(d), 4542a-1 § 8(a), 4542a-1 § 15(c), 4543 § 3, 4552 § 2.02(c), 4566 § 102(g), 4568(c), 4582b §§ 2A(3),(4), 5155 § 1(3), 5221b-5 § 7(c)(7)(A)(iii), 5282c § 7(a), 6243-101 § 4(b), 6252-9b § 4(c), 6252-11c § 6A, 7621e § 6(d), 8280c § 4.07(a), 8470a §§ 29B(a)(b), 8451a § 7(a),(b), 8751 § 4, 8851 § 3(d), 8890 § 5(1) (Vernon Supp. 1992).

2. THOMAS LITTLETON, *TENURES* I.20, at 9-10 (circa 1481) (Eugene Wambaugh, ed. 1903).

3. The canon law mode of counting, and the civil law mode (until now in effect in Texas since the adoption of English law), are well illustrated by computing the degrees of relationship between a decedent and his brother's grandson by both systems. The *continuous* civil count is made by counting upward from the decedent through the nearest common ancestor

rally germane to marriage settlements, were not very well suited to regulate succession in any context, old English law embraced a rule which the more sophisticated continental legal systems avoided.⁴ In the nineteenth century most American jurisdictions took their law of descent to land from the continental rule,⁵ which had been appropriated by the English statute for the distribution of personalty,⁶ but Texas followed the pattern of old English common law which employed the canonical degrees of prohibited marriage for that and other purposes.⁷ Most of the profession in Texas was unaware of this peculiarity of Texas law because disputes involving the rule arose so rarely. In relation to property, the issue arose in matters of intestate succession to a decedent who had no direct descendant or parent and in relation to the disqualification of a judge or juror in a criminal case who was related within the third degree to the crime-victim. The problem did not arise in connection with marriage because the prohibited degrees were statutorily defined in a manner different from the canonical system. The issue was brought to a head in 1990 in a case before the First court of appeals.⁸ As a result of that case, two Houston legislators introduced a bill by which Texas law was changed so that degrees of relationship are now counted by the civil law system for all purposes.⁹ The result of amending the mode of counting degrees without changing the degrees is to shrink the scope of the former statute for whatever purpose it was intended.

and on to the brother's grandson: the parent of the decedent (first degree), the brother (second degree), the brother's son (third degree) and the brother's grandson (fourth degree). Using the *broken* canon law method the count also begins with the parent of the decedent (first degree). Because the decedent's parent is the common ancestor of the decedent and the brother's grandson, the count breaks there at the second degree, and a new count is made to the common ancestor from the brother's grandson: the brother's son (first degree), the brother (second degree) and the common ancestor (third degree). Because the two counts are different, the degree of relationship is the greater of the two. Thus, by the *continuous* civil count the decedent and the brother's grandson are related in the fourth degree, whereas by the *broken* canon law method of counting they are related in the third degree.

4. Continental legal systems followed the Roman civil law method of counting degrees of relationships for purposes of succession but used the canonical system of counting the prohibited degrees of consanguinity for the purpose of marriage.

5. See, e.g., TAPPING REEVE, A TREATISE ON THE LAW OF DESCENT IN THE SEVERAL UNITED STATES OF AMERICA 389-515 (1825).

6. 22 & 23 Car. 2, ch. 10, § 3 (1670).

7. *Indemnity Insurance Co. v. McGee*, 163 Tex. 412, 414, 356 S.W. 2d 666, 667 (1962); *Whitworth v. Bynum*, 679 S.W. 2d 608, 610-11 (Tex. App.—Houston [1st Dist.] 1984, *rev'd on other grounds*, 669 S.W. 2d 194 (Tex. 1985); *Warner v. Rice*, 541 S.W. 2d 896, 898-99 (Tex. Civ. App.—Eastland 1976, no writ); *Jernigan v. Lauderdale*, 73 Sw. 39, 41-42 (Tex. Civ. App.—San Antonio 1903), *rev'd on other grounds sub nom.* *Witherspoon v. Jernigan*, 97 Tex. 98, 76 S.W. 445 (1903); *Baker v. McRimmon*, 48 S.W. 742 (Tex. Civ. App.—Fort Worth 1899, no writ).

8. The case is unreported but was apparently a prosecution for sheltering a runaway child. Under TEX. PENAL CODE ANN. § 25.07 (Vernon Supp. 1992) a relative within the second degree is not guilty of the crime. See also *O'Connor v. Smith*, 815 S.W. 2d 338, 346 n.1 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

9. TEX. REV. CIV. STAT. ANN. art. 5996h (Vernon Supp. 1992).

B. Informal Marriage

In *Winfield v. Renfro*¹⁰ it was alleged that the couple contracted an informal marriage "on or about April 11, 1982."¹¹ Although the 1989 amendment to Texas Family Code section 1.91 was inapplicable to the case,¹² it is evident from the reference to the agreement to marry that the appellate court was conscious of the amendment. The proof of the marriage did not turn on the agreement to be married, however, but on the couple's holding themselves out to others as being married. There was apparently no serious argument that the couple agreed to be married on April 11, 1982 and that they cohabited as husband and wife thereafter from time to time, though they were not together again until August 1982. The man was a well-known baseball player who, according to the woman, instructed her not to represent herself as married. Thus, only her relatives and acquaintances were aware of the secret. On April 11, 1982 the man registered them as a married couple at a hotel where they stayed for three days. In light of current mores, the majority of the court held that "a three-day stay in a hotel with a person of the opposite sex is not enough to establish the element of holding out as married."¹³ Thereafter, "only [the woman] did anything, and she did not do much, that could be interpreted as holding them out as married in 1982 and in 1983. [The man] did not tell anyone he was married and nothing in the record contradicts him on this point, not even [the testimony of the woman]."¹⁴ The majority of the court seemed somewhat embarrassed by its earlier decision in *In re Estate of Giessel*.¹⁵ *Giessel* was a succession case in which the Houston court sustained the probate court's finding of an informal marriage, though the man had steadfastly denied the fact to his close associates over twenty years of cohabitation. In *Winfield* evidence indicated that during a trip to the Bahamas, the man's acts could have been interpreted as holding the woman out as his wife. The majority of the court, however, stressed the point that, under the language of the statute, holding out must occur in Texas and that failure to make this point clear in the jury charge constituted reversible error.¹⁶ The other striking point of the majority decision was its insistence that sufficient evidence to establish each essential element of an informal marriage must occur in close proximity to the date on which the marriage was alleged to have occurred.¹⁷ The dissenting judge

10. 821 S.W.2d 640 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

11. *Id.* at 643.

12. TEX. FAM. CODE ANN. § 1.91 (Vernon Supp. 1992). In 1989 the legislature repealed the provision that if (1) living together as husband and wife and (2) holding each other out to the public as married were proved, the court might infer an agreement to be married. The marriage in *Winfield* was not only alleged to have occurred prior to the 1989 amendment, but the trial also commenced prior to the enactment. See *Winfield v. Daggett*, 775 S.W.2d 431 (Tex. App.—Houston [1st Dist.] 1989, no writ).

13. 821 S.W.2d at 651.

14. *Id.*

15. 734 S.W.2d 27 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 42 Sw. L.J. 1, 2 (1988).

16. 821 S.W.2d at 644.

17. *Id.* at 648.

took a different view: that it is sufficient if later facts corroborate the allegation of an earlier marriage.¹⁸

In *Mossler v. Shields*¹⁹ the assertion of an informal marriage arose in the context of enforcing a disciplinary sanction. The suit to establish an informal marriage was brought after a prior suit on the same claim had been dismissed with prejudice for discovery abuse under Rule 215(2)(b)(5).²⁰ The court of appeals had allowed the appeal from the trial court's refusal to hear the evidence on the ground that the trial court's decision "forever barred [the spouses] from obtaining a divorce."²¹ The Texas supreme court pointed out that the lower court's conclusion that the decree "created a life sentence in marriage" rested on a misapprehension of the burden of proof: the dismissal merely precluded a party from asserting the existence of an informal marriage.²² The supreme court went on to point out that the legislature also indicated in its 1989 amendment to section 1.91 a policy barring claims of an informal marriage brought more than one year after the cohabital relationship ends.

C. Annulment

*Husband v. Pierce*²³ demonstrates that a petition for a writ of habeas corpus without a prior adjudication of annulment does not give non-consenting parents a quick means of breaking up an underage child's asserted informal marriage. A man and a girl of fifteen entered into a formal marriage in Mexico without her parents' consent. On the couple's return to their home in east Texas the girl's parents sought a writ of habeas corpus for possession of their daughter. The trial court granted the writ. Although the parents also brought a suit for annulment of the marriage and the man was served at the habeas corpus hearing, that suit was severed for a later hearing. In response to the court's order, the man responded with a petition to the court of appeals for a mandamus to compel the trial judge to vacate the writ of habeas corpus. In addition to asserting the validity of their Mexican marriage, the couple also asserted an informal marriage under Texas law. Sustaining the prima facie validity of the Mexican ceremonial marriage as entered into with apparent requisite formalities but, nevertheless, subject to annulment for non-age of one of the parties,²⁴ the appellate court went on to say that the Texas informal marriage was valid but subject to attack for lack of parental consent.²⁵ In either case the daughter was emancipated by marriage and therefore was not subject to a writ of habeas corpus for forcible return to her parents as a minor.²⁶

18. *Id.* at 656 (Mirabal, Jd., dissenting).

19. 818 S.W.2d 752 (Tex. 1991).

20. TEX. R. CIV. P. 215(2)(b)(5).

21. 810 S.W.2d 325, 326 (Tex. App.—Beaumont), *rev'd*, 818 S.W.2d 752 (Tex. 1991).

22. 818 S.W.2d at 754.

23. 800 S.W.2d 661 (Tex. App.—Tyler 1990, no writ).

24. *Id.* at 664.

25. *Id.*

26. *Id.* at 663-64. See TEX. FAM. CODE ANN. § 14.10 (Vernon Supp. 1992).

In putting its primary reliance on the validity of the Mexican ceremonial marriage, the court relied on the law of the place of marriage as the basic principle governing the validity of a foreign contract in a conflict of laws context.²⁷ That principle must now be regarded as superseded by the most significant contacts doctrine.²⁸ Thus, the law of the place of contracting, with which neither contracting party had any significant contact apart from proximity by air-flight from Texas, should have little bearing on their permanent status when they intended, as the couple evidently did, to maintain their domiciles in Texas. On the part of such a runaway couple, therefore, primary reliance should be put on the validity of the Texas informal marriage rather than on the Mexican ceremonial marriage. Although the court seemed to treat sections 2.03 (Ceremony Conducted by Unauthorized Person)²⁹ and 2.41 (Underage [Voidable Marriage])³⁰ as applicable to the Mexican ceremonial marriage,³¹ there is considerable doubt that the terms of those sections are properly applicable to non-Texas marriages.³²

In *Kerckhoff v. Kerckhoff*³³ the husband, through a next friend, petitioned to annul his marriage on the ground of mental incompetence. This is the first reported Texas case on this point, although in *Coulter v. Melady*³⁴ the heirs of one of the parties made an unsuccessful effort to declare a marriage void on the ground of lack of consent of a party. There, the facts shown did not support the argument. In *Kerckhoff* the court held that the facts, including evidence of the husband's later incompetency from which his condition at the time of the marriage might be reasonably inferred, were sufficient to show that he suffered from an organic brain disease.

D. Suit to Declare a Marriage Void

To show a prior marriage as the ground for a declaration of a void marriage, it is not enough to demonstrate that a spouse was previously married and not divorced. It is also necessary to show that the marriage was not dissolved by the death of the other spouse. In *Loera v. Loera*³⁵ the wife married in 1958 and was immediately abandoned by her husband, whom she did not see again. She married her second husband in 1977, and he sought avoidance of the marriage on the ground of a continuing prior marriage.³⁶ The appellate court reversed the trial court's decree of nullity because the second husband failed to discharge the burden of proof imposed by Family

27. 800 S.W.2d at 663.

28. *Maxus Exploration Co. v. Moran Bros.*, 817 S.W.2d 50, 53 (Tex. 1991); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420 (Tex. 1984).

29. TEX. FAM. CODE ANN. § 2.03 (Vernon 1975).

30. *Id.* § 2.41 (Vernon Supp. 1992).

31. 800 S.W.2d at 664.

32. See HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 127-31 (2d ed. 1987); ALBERT EHRENZWEIG, *CONFLICTS IN A NUTSHELL* 111-13 (3d ed. 1986).

33. 805 S.W.2d 937 (Tex. App.—San Antonio 1991, n.w.h.).

34. 489 S.W.2d 156 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.), cert. denied, 414 U.S. 823 (1973).

35. 815 S.W.2d 910 (Tex. App.—Corpus Christi 1991, n.w.h.).

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

Code section 2.01 (State Policy [Favoring Validity of More Recent Marriage]).³⁷ Although there was conflicting evidence that the prior marriage had been dissolved by divorce, the husband introduced no evidence that the first husband was still alive. As a matter of law, the court said, he was presumed dead after a seven years' absence.³⁸

E. Alienation of Affection

Although the Texas legislature abolished the cause of action for alienation of affection prospectively in 1987,³⁹ the appellate courts continue to consider cases filed before the effective date of the statute. In *DeLeon v. Hernandez*,⁴⁰ for example, the court concluded that the plaintiff-wife's cause of action for alienation of affection was not affected by evidence that the husband had a sexual relationship with another woman prior to that with the defendant.⁴¹

F. Intentional Torts and Emotional Distress

One of the principal objects of the legislative abolition of the cause of action for alienation of affection was recognition of the freedom of each spouse to engage in extramarital sexual relationship without putting liability on his or her paramour as a consequence. Ironically, not long after the passage of this legislation, great pressure was put on the appellate courts to recognize expanded liability for intentional and negligent infliction of harm by one spouse on the other. In addition to the suit for alienation of affection in *DeLeon*, the emotionally wounded wife also asserted a cause of action against her husband for both assault and false imprisonment, actions which the court held were unaffected by the plaintiff's failure to seek medical treatment or police protection at the time of the alleged acts.⁴²

In *Price v. Price*⁴³ the Texas supreme court specifically recognized the demise of the doctrine of interspousal immunity and in *Stafford v. Stafford*⁴⁴ the court recognized that the transmission of an infectious disease, such as genital herpes, between spouses supports a cause of action against the transmitting spouse. The court had already pronounced in *Bounds v. Caudle*,⁴⁵ which involved a suit by the wife's heirs to recover for wrongful death against her husband, that the interspousal immunity doctrine did not apply. In her suit for divorce in *Flores v. Lively*⁴⁶ the wife also asserted a cause of action for personal injury resulting from genital herpes. The couple had been married in 1981 and in 1982 the husband was diagnosed as having the disease. Although both spouses were advised by a physician of ways to mini-

37. 815 S.W.2d at 912 (relying on TEX. FAM. CODE ANN. § 2.01).

38. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 133.001 (Vernon Supp. 1991)).

39. TEX. FAM. CODE ANN. § 4.06 (Vernon Supp. 1992).

40. 814 S.W.2d 531 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.).

41. *Id.* at 533-34.

42. *Id.* at 533.

43. 732 S.W.2d 316 (Tex. 1987).

44. 726 S.W.2d 14 (Tex. 1987).

45. 560 S.W.2d 925 (Tex. 1977).

46. 818 S.W.2d 460 (Tex. App.—Corpus Christi 1991, n.w.h.).

mize transmission of the disease to the wife, in January 1983 the wife was also diagnosed as infected. The suit for divorce and the suit for personal injury were filed in April 1989. The husband pleaded the two-year statute of limitation against the personal injury claim and his argument was sustained by a majority of the Corpus Christi Court of Appeals.⁴⁷ The court reasoned that the wife's suit should have been filed no later than January, 1985. Although the *Price* case was not decided until 1987, the limitations period had begun to run on the cause of action in 1983. The decision in *Price* did not create a new cause of action but merely recognized the disappearance of a defense, which might or might not have been raised by the husband.⁴⁸

G. Criminal Interference with Personal Rights of Other Spouse

Criminal prosecutions for disregarding the public duty of support⁴⁹ have greatly outnumbered those for interspousal acts which violate the rights of personal security, though the recent legislative act removing the bar to prosecution for interspousal rape indicates a growing concern for such matters.⁵⁰ Instances in which either civil or criminal sanctions have been sought for interference with the separate property rights of one spouse by the other have also been rare, though the ordinary rules of trespass, conversion, theft, and arson are clearly applicable. Although from the mid-nineteenth century Texas courts have recognized a civil action to restrain the wrongful disposition by one spouse of the community share of the other spouse,⁵¹ recovery for one spouse's destruction or other wrongful dealing with the other spouse's interest in community property presents difficult conceptual problems beyond a right of reimbursement. *Davis v. State*⁵² was a prosecution for wrongful entry by an estranged spouse into the apartment of the other spouse. The lessee-spouse had brought suit for divorce and her tenancy was a community property interest, but the interference, nonetheless, constituted a breach of personal security. Under the terms of Family Code section 5.22(a)⁵³ the wife clearly had management of the property, and she had given her husband notice not to come onto the property as specified in Penal Code section 30.03⁵⁴ as a requisite to a criminal trespass prosecution. That the divorce court had not given him further notice by way of a restraining order was irrelevant.⁵⁵

47. *Id.* at 462. The Corpus Christi court did not mention *Bounds v. Caudle*, though it was an appeal from that court.

48. *Id.*

49. TEX. PENAL CODE ANN. § 25.05 (Vernon 1989).

50. *Id.* § 22.011 (Vernon Supp. 1992).

51. See *Stramler v. Coe*, 15 Tex. 211, 215 (1855); *Mahoney v. Snyder*, 93 S.W.2d 1219, 1221 (Tex. Civ. App.—Amarillo 1936, no writ); *Bettis v. Bettis*, 83 S.W.2d 1076, 1078 (Tex. Civ. App.—El Paso 1935, no writ); *Moore v. California-Western States Life Ins. Co.*, 67 S.W.2d 932, 933 (Tex. Civ. App.—Amarillo 1934, writ dismissed by agreement); *Coss v. Coss*, 207 S.W. 127, 128 (Tex. Civ. App.—San Antonio 1918, no writ).

52. 799 S.W.2d 398 (Tex. App.—El Paso 1990, writ refused).

53. TEX. FAM. CODE ANN. § 5.22(a) (Vernon 1975).

54. TEX. PENAL CODE ANN. § 30.05 (Vernon 1989).

55. 799 S.W.2d at 400. See *Stanley v. State*, 631 S.W.2d 751 (Tex. Crim. App. 1982).

*Kent v. State*⁵⁶ was an appeal from the revocation of probation of a convicted felon for a violation of the criminal wiretap statute.⁵⁷ The prisoner was charged with placing an unauthorized listening device on his home telephone so that he might intercept his wife's telephone conversations at his place of business half a mile away. The prisoner argued that no violation of the statute had occurred and cited *Simpson v. Simpson*,⁵⁸ where the Fifth Circuit court of appeals construed the federal anti-wiretapping statute⁵⁹ (on which the Texas statute is based) as not applicable to an interspousal wiretap to monitor a residential telephone within the family home. The Dallas court of appeals held that the Texas statute nevertheless prohibited all wiretapping not specifically permitted. Because interspousal wiretapping is not excepted under Texas law, the statute encompassed the offense.⁶⁰

H. Privileged Testimony

The doctrine of privileged marital communication now has a very narrow scope in criminal cases. The marital privilege may be asserted only by the spouse, not by the accused, and a spouse or former spouse is allowed to testify against a prisoner, even if the offense occurred before the adoption of the present Rules of Criminal Evidence.⁶¹ In *Boyle v. State*⁶² this point was reiterated. The testimony of the prisoner's wife concerned events which occurred before the promulgation of the new rule on September 1, 1986. The trial took place after that date. As a procedural provision, the rule was applicable though it was not in force when the offense occurred.⁶³ The prisoner testified voluntarily and thus the testimony was admissible.⁶⁴

II. CHARACTERIZATION OF MARITAL PROPERTY

A. Premarital and Marital Partitions

It has become increasingly common over the last three decades for the drafters of Texas civil statutes to include an effective-date clause and sometimes a provision that a statute is applicable, or inapplicable, to particular disputes, usually defined in terms of the date on which a suit is initiated. In the absence of an effective-date clause for later effectiveness, an ordinary act takes effect ninety days after the close of the session at which it was enacted.⁶⁵ A statute that is designated as an emergency act and receives a recorded affirmative vote of two-thirds of the members of both legislative

56. 809 S.W.2d 664 (Tex. App.—Amarillo 1991, n.w.h.).

57. TEX. PENAL CODE ANN. 16.02 (Vernon 1989).

58. 490 F.2d 803 (5th Cir.), cert. denied, 419 U.S. 897 (1974).

59. 18 U.S.C. § 2511 (1988).

60. 809 S.W.2d at 668.

61. TEX. R. CRIM. EVID. 504. See *Freeman v. State*, 786 S.W.2d 56, 57 (Tex. App.—Houston [1st Dist.] 1990, no writ).

62. 820 S.W.2d 122 (Tex. Crim. App. 1989) (en banc), cert. denied 112 S. Ct. 1297 (1992).

63. *Id.* at 144.

64. *Id.* at 145.

65. TEX. CONST. art. III, § 39.

houses, however, becomes effective immediately on passage.⁶⁶

The effective date of a constitutional amendment is less clearly defined, and the provisions of the Texas Constitution offer little guidance.⁶⁷ The Texas Constitution merely states that after a constitutional amendment has been ratified by the electorate, it shall be proclaimed by the Governor,⁶⁸ but the gubernatorial proclamation has been long acknowledged as having no bearing on the effectiveness of the amendment.⁶⁹ The provision of the Election Code on the canvassing of election ballots seems to supply the effective date.⁷⁰

During the Texas supreme court's terms of 1987 through 1989, the court decided two cases⁷¹ concerning the applicability of statutes to contracts in general and to premarital and marital partitions in particular. In *Wesseley Energy Corp. v. Jennings*⁷² the court laid down the general rule that the law in force at the time a contract is made is a part of the contract and is therefore properly consulted in the interpretation of the contract. In a later marital partition case,⁷³ however, the court said that the governing procedural law was that in effect at the time "the divorce decree was signed."⁷⁴ The statute in issue in that case dealt with the burden of proof.⁷⁵ The substantive law applicable to the dispute would be that in effect at the time the transaction occurred. Lower courts⁷⁶ construed the later opinion as laying down a general rule that the procedural law in effect at trial provides the governing law for the trial of disputes involving premarital and marital partitions.

It was in this somewhat uncertain state of the law that the Texas supreme court decided *Beck v. Beck*,⁷⁷ a case concerning a premarital partition entered into prior to the constitutional amendment of 1980, which allowed the making of premarital partitions to alter the character of future acquisitions of community property. In an ingeniously well-crafted opinion by Justice Cornyn,⁷⁸ the court concluded that the 1980 amendment was meant to have retrospective effect to validate prior premarital partitions affecting future

66. *Id.*

67. TEX. CONST. art. XVII, §§ 1,2.

68. *Id.*

69. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 SW. L.J. 1, 5 n.44 (1989).

70. TEX. ELEC. CODE ANN. § 67.012 (Vernon Supp. 1992).

71. *Sadler v. Sadler*, 769 S.W.2d 886 (Tex. 1989); *Wesseley Energy Corp. v. Jennings*, 736 S.W.2d 624 (Tex. 1987).

72. 736 S.W.2d 624 (Tex. 1987).

73. *Sadler*, 769 S.W.2d 886.

74. *Id.* at 887.

75. A more precise wording of the rule is that the procedure governing the trial is that in effect when the suit was initiated. In *Sadler* the law at trial and that when the suit began and ended were identical. 769 S.W.2d at 886. It was not until after *Sadler* was appealed that the burden of proof was changed. See TEX. FAM. CODE ANN. § 5.55 (Vernon Supp. 1992).

76. See *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, no writ); *Daniel v. Daniel*, 779 S.W.2d 110, 113 n.3 (Tex. App.—Houston [1st Dist.] 1989, no writ).

77. 814 S.W.2d 745 (Tex. 1991).

78. *Id.*

marital acquisitions.⁷⁹ Because the record was silent on the legislative intent in proposing the amendment, the court took judicial notice of an ambiguous fragment of testimony before the House Committee on Constitutional Amendments⁸⁰ to fill the void.⁸¹ Although two members of the court were then sitting in the Senate and therefore may have been aware of the thoughts of their colleagues in this regard, there was no intent on the part of the drafters of the amendment and no discussions between them and the legislative sponsors of the amendment that the amendment should have retrospective effect. After the adoption of the amendment, its principal draftsman published an essay⁸² in which he suggested an argument that might be made to support retrospective effect of the amendment, provided that no vested rights were thereby affected.⁸³ It is with this issue of vested rights that the opinion is most skillfully expressed. The court's argument was that there was no vested right standing in the way of retrospective effect of the amendment because the preamendment partition was merely voidable but not void.⁸⁴ This interpretation of a constitutionally inhibited act, previously so termed by the court,⁸⁵ is nevertheless unconvincing. It was, in fact, the court's forthright statement of 1977 that such transactions were void⁸⁶ (albeit in an obiter dictum) that impelled the constitutional amendment; the federal district court's opinion in *Castleberry v. Commissioner*⁸⁷ merely provided the opportunity for the amendment. The 1980 constitutional amendment was unnecessary unless such partitions were ineffective, and the bench and bar were in agreement that the Texas supreme court had stated authoritatively that they were void, in reliance on *Arnold v. Leonard*.⁸⁸

The most troubling aspect of *Beck* relates to constitutional interpretation and not to Texas matrimonial property law, which should only be temporarily affected by the decision. Justice Cook emphasized the constitutional problem in a concurring opinion:⁸⁹ "This doctrine [of retroactive validation] should be used only where the public policy is so clearly and broadly stated as to be unmistakable. The amendment of the state constitution to allow

79. *Id.* at 748.

80. *Id.*

81. It has been suggested in Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1106 (1991), that the intention of the electorate may also be relevant to the interpretation of constitutional amendments, but finding that intent is even more conjectural than discerning the intent of the legislature in proposing an amendment.

82. Joseph W. McKnight, *The Constitutional Redefinition of Texas Matrimonial Property As It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY'S L.J. 449 (1982).

83. *Id.* at 474. It was perhaps irresponsible on the author's part not to note that a situation in which rights were not vested contrary to the purport of the partition would be hard to imagine.

84. 814 S.W.2d at 749.

85. *Williams v. Williams*, 569 S.W.2d 867, 868 (Tex. 1978).

86. *Id.*

87. 68 T.C. 682 (1977), *rev'd*, 610 F.2d 1282 (5th Cir. 1980).

88. 114 Tex. 535, 273 S.W. 799 (1925). The court might have also cited *Burton v. Bell*, 380 S.W.2d 561, 566 (Tex. 1964), and *Gorman v. Gause*, 56 S.W.2d 855, 857-58 (Tex. Comm'n App. 1933, judgment adopted).

89. 814 S.W.2d at 750.

recharacterization of property is such an instance."⁹⁰ Justice Cook's fears are borne out in *Haynes v. Stripling*,⁹¹ where the Eastland Court of Appeals found retrospective effect for the 1987 constitutional amendment allowing spousal agreements for the survivor's succession to community property in the mere legislative perception of a need for change and the fact that the legislature later implemented the amendment by statute.⁹² The court then stated that "no vested rights have been impaired."⁹³ One wonders how that court defines a vested right.

The number of instances of pre-1980 purported premarital partitions affected by the *Beck* decision is likely very few.⁹⁴ A continuing problem, however, is the interpretation of premarital and marital partitions entered into after 1980. In *Scott v. Scott*⁹⁵ the premarital partition agreement defined the process by which future income from both spouses' separate property would be the separate property of each: either party "may deposit . . . excess income and revenue to the corpus of [his or her] separate property and such funds shall then become the separate property of the spouse whose separate property produced such income or revenue."⁹⁶ Thus, by future acts "to capitalize the income" a spouse might make the income his or her separate property. The court held that merely saving and investing such income in making payments on a home did not comply with the process defined in the partition agreement.⁹⁷ The court's interpretation of the partition agreement should serve as a warning that if future acts of the parties are used to designate separate property, they should be carefully defined and a client should be advised that the provisions should be carefully followed. Formulation of an agreement in terms of the effects of future acts should also be avoided when possible. To obviate estate (and possible future gift) tax problems, a partition should be put in terms of a present partition of a future acquisition.⁹⁸ Use of verbs of the present tense in referring to the process of partition and avoiding words of future connotation, such as "then", should be practiced in the formulation of the instrument.

A trust agreement which the court took for a marital partition was discussed in *Pearce v. Pearce*.⁹⁹ During marriage the husband and wife and the husband's son entered into a trust agreement by which it was provided that

90. *Id.* The public policy to which Justice Cook refers is adverted to by Justice Cornyn with a quotation from the RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. c (1981). 814 S.W.2d at 749.

91. 812 S.W.2d 397 (Tex. App.—Eastland 1991, n.w.h.)

92. *Id.* at 399-400. A bizarrely inaccurate account of Texas legal history compiled by a legislative aide and attached to Senate Joint Resolution 35 is quoted by the court to support its conclusion. *Id.* at 399.

93. *Id.* at 399.

94. Instances have nevertheless been heard of from the late 1970s when lawyers advised their clients that they might safely execute unwanted premarital partitions because such partitions were void. One of these instances might still be litigated.

95. 805 S.W.2d 835 (Tex. App.—Waco 1991, writ denied).

96. *Id.* at 837-38.

97. *Id.* at 838.

98. See McKnight, *supra* note 82, at 468-69.

99. 1991 WL 250884 (Tex. App.—El Paso 1991, n.w.h.)

the income from the trust corpus contributed by the husband would be the separate property of the husband. The validity of the transaction, therefore, did not rest on the marital partition or exchange provision of the Texas Constitution¹⁰⁰ but on the provision that allows spouses to agree in writing that the income from the separate property of one of them will be the owner's separate property.¹⁰¹

Thus, what was said of unconscionability (a statutory standard for testing the validity of a partition or exchange)¹⁰² is irrelevant to such an agreement, and what is said of the burden of proof for a determination that a partition is unenforceable is accurate but beside the point. With respect to the argument that such an agreement negates the community rights of reimbursement for the husband's time and effort in benefiting his separate estate, the court properly concluded that there was no evidence that the husband's separate estate should be relieved of a reimbursement claim. The parties may have intended to achieve that result but, if so, they should have so provided.

B. Rebutting the Community Presumption

The *Scott* decision also offers some examples of the common difficulties in using the tracing doctrine to overcome the community presumption.¹⁰³ Tracing the proceeds of the sale of separate realty and the trade-value of separate personalty into purchases made during marriage demonstrates a partial separate interest in the items purchased.¹⁰⁴ The even more elementary mode of identifying separate property by showing premarital acquisition is illustrated by *Parnell v. Parnell*.¹⁰⁵

When a transfer of property is made to a spouse during marriage, rebuttal of its community character is difficult because the burden of proof is upon the recipient-spouse to show that the acquisition was lucrative. The burden is increased when the instrument of transfer contains a recital of valuable

100. TEX. CONST. art. XVI § 15:

Persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired . . .

Complementary statutory provisions are TEX. FAM. CODE ANN. §§ 5.43, 5.52 (Vernon Supp. 1992).

101. TEX. CONST. art. XVI § 15:

spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by one of them, shall be the separate property of that spouse.

The word "only" was added in 1987 to make it clear that "one" did not mean "both." Its complementary provision is TEX. FAM. CODE ANN. § 5.53 (Vernon Supp. 1992).

102. TEX. FAM. CODE ANN. § 5.45 (Vernon Supp. 1992).

103. See TEX. FAM. CODE ANN. § 5.02 (Vernon Supp. 1992). In *In re Canon*, 130 B.R. 748, 752 (Bankr. N.D. Tex. 1991), an income tax refund received during marriage was presumed to be community property and no evidence was introduced to rebut the presumption.

104. *Scott*, 805 S.W.2d at 837-39.

105. 811 S.W.2d 267, 269 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.).

consideration. In *K.B. v. N.B.*¹⁰⁶ the husband's wholly owned corporation made a conveyance to the husband of realty owned by the corporation before his marriage. There was a recital of consideration and a conflict of evidence as to whether any consideration was paid. The jury nevertheless found against the husband's assertion that the property was his separate estate. The community presumption therefore prevailed.¹⁰⁷

*Pemelton v. Pemelton*¹⁰⁸ presented a somewhat more difficult set of facts. During marriage the wife's parents conveyed realty to her. In accepting the wife's ten promissory notes for the land, the parents made no agreement to look to the wife's separate estate to discharge them. As each note came due, the parents forgave payment. It is not difficult to imagine that the parents' pretransfer intention was in some measure donative, but the structure of the transaction along with the grantors' apparent initial unwillingness to part with the entire property defeated their presumed objective.¹⁰⁹ If they had contracted to look only to the daughter's separate property for payment or had taken non-recourse notes, their objective should have succeeded.¹¹⁰

C. Retirement Benefits

Even before *McCarty v. McCarty*,¹¹¹ some federal statutes allowed the division of federal pension rights by state courts as community property.¹¹² For most purposes of characterization Texas courts¹¹³ and those of the federal Fifth Circuit court of appeals¹¹⁴ have found that the federal Employee Retirement Income Security Act (ERISA)¹¹⁵ does not preempt the field relating to the pensions it regulates. Thus, Texas matrimonial property law applies to pension interests in most instances.¹¹⁶ The federal Ninth Circuit court of appeals, however, has recently ruled that ERISA preempts California law so that the estate of the non-pensioner spouse who predeceases the pensioner spouse has no community interest in the pensioner's pension interest.¹¹⁷ The result is directly contrary to Texas law.¹¹⁸

106. 811 S.W.2d 634 (Tex. App.—San Antonio 1991, writ denied).

107. *Id.* at 642.

108. 809 S.W.2d 642 (Tex. App.—Corpus Christi 1991, writ granted).

109. *Id.* at 647-48.

110. See *Scott*, 805 S.W.2d at 837, and *Jones v. Jones*, 804 S.W.2d 623, 627 (Tex. App.—Texarkana 1991, n.w.h.), in which instances of interspousal gift are resolved as fact questions. The gift to both spouses in *Jones* produced common ownership by each spouse as separate property.

111. 453 U.S. 210 (1981).

112. See 5 U.S.C. § 8345(j)(1) (1988) (for federal Civil Service retirement benefits enacted in 1978); *Naydan v. Naydan*, 800 S.W.2d 637, 639-40 (Tex. App.—Dallas 1990, no writ).

113. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 415, 432 (1991). See, e.g., *Arena v. Arena*, 822 S.W.2d 645 (Tex. App.—Fort Worth 1991, n.w.h.)

114. McKnight, *supra* note 113, at 432.

115. 29 U.S.C. §§ 1001-1461 (1988).

116. See J. Lee Baldwin, *The Doctrine of Preemption as it Applies to ERISA and Community Property Settlements*, 54 TEX. B.J. 18 (1991); See also Robert D. McClure, *Thou Shalt Not Kill (Thy Spouse): A Recent Exception to the ERISA Preemption Doctrine*, 29 J. FAM. L. 129 (1990).

117. *Ablamis v. Roper*, 937 F.2d 1450, 1457 (9th Cir. 1991).

118. *Allard v. Frech*, 754 S.W.2d 112 (Tex. 1988) *cert. denied*, 488 U.S. 1006 (1989), *dis-*

D. Reimbursement

Some uncommon reimbursement questions are presented in *Jones v. Jones*¹¹⁹ which involved the division of property in a 1989 divorce. In 1983 the husband, joined by his wife, made a gratuitous conveyance of his separate property to the husband's son by a prior marriage. The transfer was made with an intent to defraud the husband's and wife's creditors, but since it was the husband's separate property that was transferred, the property was not subject to division in their later divorce.¹²⁰ Before the transfer, community property was used to improve the land, and after the transfer the community discharged mortgage liability on the property and also continued to receive the rents from the property. As to the community expenditures for improvements, the court observed that a community right of reimbursement was not recoverable because the property was "disposed of during the marriage."¹²¹ It is hard to understand this observation unless the court meant that the community right of reimbursement could not be asserted by the wife because of her participation in the fraudulent transfer of the property. If she had not participated in the transfer, the right of reimbursement would not be lost. If a community benefit were rendered to the property after its transfer, the use of community funds for the benefit of property of a third person might be asserted as a constructive fraud¹²² with a consequent right of reimbursement¹²³ but for the effect of the wife's participation in the initial transfer to the third person and the subsequent community enjoyment of the rents from the property. It is implied in *Pemelon v. Pemelon*¹²⁴ that the jury fixed the award of reimbursement and that implication is more clearly indicated in *Pearce v. Pearce*.¹²⁵ The issue of the enhancement of a particular marital estate by another is factual, but the jury's function does not go beyond that of fact-finding in the process of determining reimbursement. It is not appropriate for the jury to make a balancing of benefits as between the marital estates. That determination requires a weighing of equi-

cussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 Sw. L.J. 1, 11 (1990).

119. 804 S.W.2d 623 (Tex. App.—Texarkana 1991, n.w.h.).

120. *Id.* at 624 (parcel no. 2, a lot and a duplex). If the property had been community property, it would not have been recoverable for division because of the wife's participation in the fraudulent transfer. *Id.* at 625 (parcel no. 4, a vacant lot). The court's reliance on *Lechter v. Lechter*, 421 S.W.2d 162, 169 (Tex. Civ. App.—San Antonio 1967, writ dismissed), however, is misplaced. That was a case of an alleged fraudulent transfer by the husband to his wife. On its facts, the conclusion in *Lechter* is contrary to that in *Rivera v. White*, 94 Tex. 538, 63 S.W. 125 (1901). But even in the case of a truly fraudulent transfer by one spouse to the other, some different considerations may be presented from those arising from a transfer by a spouse to a third person. See Joseph W. McKnight, *Liability of Separate and Community Property for Obligations of Spouses to Strangers*, in *CREDITOR'S RIGHTS IN TEXAS* (1st ed. by J. McKnight) 332, 353-56 (1963).

121. 804 S.W.2d at 626.

122. See *Raulston v. Raulston*, 531 S.W.2d 683, 684-85 (Tex. Civ. App.—Texarkana 1975, no writ).

123. See Joseph W. McKnight, *Toward a General Theory of Reimbursement*, 1991 S.M.U. TEXAS FAMILY LAW AND COMMUNITY PROPERTY SEMINAR I, at I-2, I-5 (1991).

124. 809 S.W.2d at 651.

125. 1991 WL 250884 (Tex. App.—El Paso 1991, n.w.h.).

ties and an exercise of discretion on the part of the trial judge.¹²⁶ In a divorce case the judge must also determine the ultimate award of reimbursement in making the division of community property between the spouses.

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

A. Constructive Fraud

In *Stevenson v. Koutzarov*¹²⁷ the husband alleged that his wife and two of her friends defrauded the community estate by conversion of assets, but the facts were so sparse that the nature of the claim was not explained.¹²⁸ In *Massey v. Massey*,¹²⁹ on the other hand, the wife asserted that her husband had committed constructive fraud in disposing of community assets, failing to account for community assets, encumbering them, and incurring liabilities that would deplete them. Some of the amounts alleged were considerable, and the community estate was apparently insolvent at divorce. The husband made no attempt to meet "his burden to establish the fairness of the transactions questioned."¹³⁰ The trial court apparently submitted all the issues of the "fairness" of the husband's dealings to the jury, and the jury answered that constructive fraud had been committed and apparently made a further finding as to amount.¹³¹ The propriety of submitting these issues to the jury is subject to grave doubt. Even if the jury verdict is treated as merely advisory, these matters require judicial determination.

*Putnam Pension Plan v. Stephenson*¹³² is the first appellate case in which one spouse has utilized the provisions of the Uniform Fraudulent Transfer Act¹³³ against the other spouse. In her suit for divorce, the wife sought to set aside a conveyance of community land subject to her husband's sole management as a fraudulent transfer. She utilized the Act to allege that the recipient of the transfer was an "insider" in order to bring her case within the bounds of actual fraud as statutorily defined, thereby avoiding the strictures of constructive fraud. The husband was a co-investor in realty, on behalf of the family, with the family physician. In financial difficulty, the husband borrowed money from the doctor's pension trust and gave a lien on part of the interest in the property. As the husband's financial difficulties increased and after the wife sued for divorce, the husband gave the pension

126. In her dissent in *Magill v. Magill*, 816 S.W. 2d 530, 537 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.), Justice Dunn stressed that establishing a right of reimbursement is now regarded as requiring more in the way of proof than assertion of a claim. *Id.* But when the community estate asserts a right of reimbursement for improvements to a separate homestead and expenses paid therefor, the burden of proof of offsetting benefits for the community is upon the separate property owner.

127. 795 S.W.2d 313 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

128. *Id.* at 320, 322-23.

129. 807 S.W.2d 391 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

130. *Id.* at 403. See Lewis Becker, *Conduct of a Spouse that Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis*, 52 OHIO ST. L.J. 95 (1991).

131. 807 S.W.2d at 402.

132. 805 S.W.2d 16 (Tex. App.—Dallas 1991, n.w.h.).

133. TEX. BUS. & COM. CODE ANN. §§ 24.001-.013 (Vernon 1987).

trust a further lien for an additional loan. Finally, the husband conveyed his interest in the land to the pension trust to satisfy these debts. The wife joined the trust as a party in her suit for divorce and asserted that the transfer was fraudulent because it was concealed and made while the transferor was insolvent. The court held that the physician as administrator of the trust was an "insider" within the terms of the Act.¹³⁴ A transfer to an insider is voidable without proof of actual intent to defraud or inadequacy of consideration. The transfer was set aside and the property was awarded to the wife by the divorce court. The transferee, without security, was left to look to the ex-husband for repayment.¹³⁵

B. Liability

If both spouses incur joint liability for either contractual or tortious acts and wish to seek a discharge of those obligations in bankruptcy, they will ordinarily file jointly under section 302(a) of the Bankruptcy Code.¹³⁶ As a general rule, however, an initial filing by only one spouse cannot later be changed to a joint filing by merely adding the other spouse as a petitioner.¹³⁷ A creditor, however, has been allowed to join a non-filing spouse as a party¹³⁸ in order to anticipate a future assertion by the non-filing spouse¹³⁹ that future acquisitions of jointly managed community property¹⁴⁰ are not subject to satisfaction of a "community claim" against the non-filing spouse. Section 524(b)(2)(A) of the Bankruptcy Code¹⁴¹ provides that an objection to such an argument can be sustained if the non-filing spouse would not have been entitled to a discharge in a Chapter 7 case on the date on which the debtor-spouse's petition was filed. Thus, if the non-filing spouse is jointly liable on a note with the petitioning debtor-spouse and the creditor suspects that there are grounds for which the non-filing spouse would be denied a discharge on the note, the creditor should seek an adjudication in the petitioning creditor's bankruptcy if he foresees seeking satisfaction of a community claim against future acquisitions of jointly managed community property. If a non-filing innocent spouse is jointly liable on a community claim asserted against the debtor spouse, the separate property and solely managed community property of the non-filing spouse are still liable¹⁴².

134. 805 S.W.2d at 19. See also TEX. BUS. & COM. CODE ANN. § 24.002(7) (Vernon 1987) (defining "insider").

135. The court was in error in saying that the transferee could seek payment from both the ex-husband and the ex-wife. See TEX. FAM. CODE ANN. § 4.031 (Vernon Supp. 1992).

136. 11 U.S.C. § 302(a) (1988).

137. *In re Matthews*, 5 Tex. Bankr. Ct. Rep. 443 (Bankr. E.D. Tex. 1991).

138. *In re Braziel*, 127 B.R. 156 (Bankr. W.D. Tex. 1991).

139. 11 U.S.C. § 524(a)(3) (1988).

140. *Id.* § 541(a)(2)(A).

141. *Id.* § 524(b)(2)(A). Under § 524(b)(2)(B) the non-filing spouse's creditor seems to be precluded from later asserting the provisions of § 524(b)(2) if the non-joining spouse seeks the protection of § 524(a)(3) in response to the creditor's attempt to seize a future acquisition of community property for satisfaction of the non-filing spouse's obligation.

142. The protection of 11 U.S.C. § 524(a)(3) is limited to the kinds of property specified in § 541(a)(2), which includes community property subject to the petitioning spouse's sole or joint management.

C. Homestead: Designation and Extent

Since the generous redefinition of the urban homestead in terms of area rather than very limited value in 1983, the similarities of the urban and rural homesteads are far more marked. As before, each serves two primary purposes: a place to live and a place to provide support for the family or the single claimant. In the past the rural homestead (beyond that considered part of the residence) had to be shown to be used for the support of the family or the homestead claimant,¹⁴³ and the residence itself of an urban worker could be rural.¹⁴⁴ Recently, there have been efforts to define these limits more precisely. In *Bradley v. Pacific Southwest Bank*,¹⁴⁵ for example, a bankruptcy court set aside as a rural homestead fifteen acres at the center of a tract of 129.5 acres near Roanoke in Tarrant County. The fifteen acres included the home and its outbuildings. The rest (114.5 acres comprised of 17 acres of hay meadow and 97.5 acres used for grazing) was excluded because the debtor and her husband had tried vigorously (but unsuccessfully) to develop that part of the property for residential or commercial purposes and on numerous occasions had denied that it was part of their homestead. The excluded acreage had been productive of losses for tax purposes but only marginally productive of income. The positive and negative evidence of its appropriation to homestead use was, therefore, fairly evenly balanced. On appeal from the bankruptcy court, the district court did not find the conclusion to exclude the 129.5 acres from the homestead was not clearly erroneous. Although it was not argued in *Bradley* that the area surrounding the residence did not constitute a rural homestead because of its non-use for economic support, that argument has been asserted on several other occasions,¹⁴⁶ most recently in *In re Mitchell*.¹⁴⁷ There, the debtor's principal occupation was the practice of law, and he maintained an office in his family home located on 104 acres in a rural setting beyond the town of Bastrop. Although he had engaged in some farming and ranching there, those endeavors do not appear to have been productive of net income and had been abandoned. The court concluded, however, that the debtor's home and the entire area surrounding it constituted his rural homestead and that no proof is required that the property support the claimant or his family economically.¹⁴⁸ The implication of the court's decision is that such a finding might extend to an entire 200 acres. Thus, the business aspect of the rural home-

143. See *Autry v. Reasor*, 102 Tex. 123, 126-27, 108 S.W. 1162, 1164 (1908); *Brooks v. Chatham*, 57 Tex. 31, 33 (1882); *Lasseter v. Blackwell*, 227 S.W. 944, 944 (Tex. Comm'n App. 1921, judgm't adopted).

144. *Posey v. Bass*, 77 Tex. 512, 514, 14 S.W. 156, 157 (1890); *Lasseter v. Blackwell*, 227 S.W. at 944.

145. 121 B.R. 306 (Bankr. N.D. Tex. 1990).

146. See *In re Spencer*, 109 B.R. 715, 717 (Bankr. W.D. Tex. 1989); *In re Moellendorf*, 3 Tex. Bankr. Ct. Rep. 255 (Bankr. W.D. Tex. 1989); *In re Harrison*, No. 390-34092 (Bankr. N.D. Tex. 1990), cited in *In re Mitchell*, 132 B.R. 553, 555 (Bankr. W.D. Tex. 1991); *In re Revira*, No. 390-35358 (Bankr. N.D. Tex. 1990), cited in *Mitchell*, 132 B.R. at 555.

147. 132 B.R. 553 (Bankr. W.D. Tex. 1991).

148. *Id.* at 568.

stead may be totally subsumed in its residential character, just as the urban homestead of one acre may be totally devoted to a residence and its grounds.

Whether a homestead is rural or urban is a question of fact.¹⁴⁹ Thus, if the property is rural when the homestead is established, it continues as such until the region in which it is situated becomes a village or an adjacent town engulfs it.¹⁵⁰ Even if those changes should occur, the legislature provided in 1989 that the homestead would not be classified as urban until "served by municipal utilities and fire and police protection."¹⁵¹ In *United States v. Blakeman*¹⁵² an order of the probate court had already limited the homestead right of a surviving widow to 100 acres as a "single, adult person"¹⁵³ before the widow sought the protection of the bankruptcy court. Unless agreed by the widow and the adverse claimants, the probate court's unduly restrictive order was based on a misconstruction of the statute which provides for a homestead of 100 acres, with improvements thereon, "for a single adult person [who is] not otherwise entitled to a homestead."¹⁵⁴ A widow or widower, however, is otherwise entitled to a homestead as a surviving family constituent¹⁵⁵ and is therefore entitled to a rural homestead of 200 acres.

The status of a childless divorced spouse not providing a home for any other dependent is different. In that case the former spouse can claim a homestead only as a single adult but not as a family member.¹⁵⁶ If the divorced spouse is, or was, part of a family with a dependent during the marriage, and the dependent remains in the family home after the divorce, the homestead does not lose its family character.¹⁵⁷

It is not uncommon for a divorce court to grant homestead occupancy to an ex-spouse until the youngest child of the marriage attains majority. As between the ex-spouses, the right of exclusive occupancy of the homestead premises thereupon ceases. As to the creditors of the ex-spouse who no longer maintains a homestead right,¹⁵⁸ that ex-spouse's property is subject to

149. See *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).

150. See *Lauchheimer & Sons v. Saunders*, 97 Tex. 137, 140-41, 39 S.W. 750, 751 (1903).

151. TEX. PROP. CODE ANN. § 41.002(c) (Vernon Supp. 1992). To say that this phrase provides the only test for the difference between an urban and a rural homestead would be grossly inaccurate. The third from last sentence in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 415, 426 (1991) is incomplete. The sentence should read: "Thus, if property is rural when the homestead is established, it continues as a rural homestead until served by municipal utilities and fire and police protection even if the characteristics of the area are otherwise urban."

152. 750 F. Supp. 216, 221 (N.D. Tex. 1990).

153. TEX. PROP. CODE ANN. § 41.002(b)(2) (Vernon Supp. 1992).

154. *Id.* A similar error was made in *Hunter v. Clark*, 687 S.W.2d 811, 815 (Tex. App.—San Antonio 1985, no writ).

155. See TEX. CONST. art. XVI, § 52.

156. *Zapp v. Strohmeyer*, 75 Tex. 638, 639, 13 S.W. 9, 10 (1890). See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 36 Sw. L.J. 97, 125 (1982).

157. The family need not consist of a parent and minor child, though that is the most common instance. See *Henry S. Miller Co. v. Shoaf*, 434 S.W.2d 243, 245 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.) (former spouse and her mother).

158. The homestead right of the non-occupant is not necessarily lost, but may be merely

seizure. In *First Huntsville Properties Co. v. Laster*¹⁵⁹ the court awarded the community home to the ex-spouses in unequal, undivided shares, but allowed the ex-wife occupancy until their youngest child attained the age of eighteen. The ex-husband later gave a mortgage on his share. He defaulted on his note and the lender foreclosed the mortgage and bought his interest which was later sold to another purchaser. After the ex-spouses' younger child attained eighteen, the purchaser sought a partition of the property. The ex-wife's resistance was to no avail. "[O]ne's homestead right in property [owned by cotenants] can never rise any higher than the right, title, or interest that [the owner has] in the property attempted to be impressed with a homestead right."¹⁶⁰ Unlike the widow in *United States v. Blakeman*,¹⁶¹ the ex-wife would not be entitled to compensation for her loss of the value of homestead occupancy subsequent to the time provided in the divorce decree because her loss was a consequence of her status as a cotenant. It is an open question whether a purchaser of the husband's interest with notice of the ex-wife's right of occupancy could have a partition resulting in the ex-wife's dispossession prior to the adulthood of the youngest child as provided in the decree.¹⁶²

The business homestead is the urban counterpart of the larger rural area allowed for the support of a family or a single claimant. In two recent cases a business homestead exemption was asserted by a claimant pursuing his livelihood through an independent business entity. In *In re Cooper*¹⁶³ the court concluded that because the property was owned by a partnership in which the debtor held a half interest and was rented to a professional corporation of which the debtor was the sole owner, the ownership interest controlled the results. Because the debtor did not own the property, the exemption claim was unsuccessfully asserted.¹⁶⁴ As a secondary ground for its holding, the court said that rental of the property during the entire period of ownership also constituted a bar to the exemption claim because rental property which is merely productive of income cannot be a business homestead.¹⁶⁵ In *In re John Taylor Company*¹⁶⁶ the Fifth Circuit court of appeals also stated that in such situations the exemption should be denied¹⁶⁷ but held that an ownership interest in property rented to a debtor's business

suspended if the non-occupant does not acquire another homestead. See *Speer & Goodnight v. Sykes*, 102 Tex. 451, 454-55, 119 S.W. 86, 88 (1909).

159. 797 S.W.2d 151 (Tex. App.—Houston [14th Dist.] 1990), *aff'd*, 35 Tex. Sup. Ct. J. 229 (Dec. 14, 1992).

160. *Sayers v. Pyland*, 139 Tex. 57, 64, 161 S.W.2d 769, 773 (1942).

161. 750 F. Supp. 216, 222 (N.D. Tex. 1990).

162. *Cf. Villarreal v. Laredo National Bank*, 677 S.W.2d 600 (Tex. App.—San Antonio 1984, writ *ref'd n.r.e.*) (entire property awarded to husband subject to wife's right to occupancy and husband renewed lien unilaterally).

163. 128 B.R. 632 (Bankr. E.D. Tex. 1991).

164. *Id.* at 636.

165. *Id.* at 636-37 (citing *Texas Commerce Bank—Irving v. McCreary*, 677 S.W.2d 643, 645 (Tex. App.—Dallas 1984, no writ); *Yates v. Home Building & Loan Co.*, 103 S.W.2d 1081, 1085 (Tex. Civ. App.—Beaumont 1937, no writ)).

166. 935 F.2d 75 (5th Cir. 1991).

167. *Id.* at 77 (citing *Nash v. Conaster*, 410 S.W.2d 512, 521-22 (Tex. Civ. App.—Dallas 1966, no writ)).

entity is exempt. The fundamental difference in *John Taylor* was that the debtor himself owned the premises. Whether the property had been used as the debtor's business homestead before it was leased to his corporation was not indicated. In concluding that the debtor was entitled to claim the property as a business homestead,¹⁶⁸ the court relied on two Texas cases. One was a case in which the debtor's property was rented to a partnership of which the debtor was a member with the creditor.¹⁶⁹ Although the partnership was there referred to as an entity, under the applicable law of the time¹⁷⁰ a partnership was not an entity but merely an aggregate of personal interests and each partner therefore maintained at least a one-half interest in the lease. In the other case relied on,¹⁷¹ the debtor's building was used at times by a family corporation to conduct its business and the name of the corporation was placed on the building, but "[the debtor] continued to operate his business individually in the buildings on the lots in question."¹⁷² Both of these authorities are singularly unsupportive of the court's holding that the debtor who leased (and therefore gave exclusive possession of his property to a corporate entity) used the premises as his business homestead.

The court also noted in *John Taylor*¹⁷³ that the debtor was limited to the extent of the homestead exemption in effect in 1979, when the original petition in bankruptcy was filed, rather than the exemption as redefined in 1983. Although the language of the 1983 homestead amendment to the Texas Constitution¹⁷⁴ has been misconstrued to indicate intended retrospective effect,¹⁷⁵ the court stated here that, however interpreted, the Texas constitutional amendment of 1983 might change pre-bankruptcy rights but could not affect post-bankruptcy rights as determined by federal law.¹⁷⁶ Following *John Taylor*, the same point was made in *In re Canion*.¹⁷⁷

If a homestead is sold, the proceeds are exempt for six months¹⁷⁸ so that the homestead owner will have an opportunity to reinvest the proceeds in another homestead. In *In re Evans*¹⁷⁹ the court concluded that once part of the proceeds is reinvested in another homestead, the remainder is no longer exempt during the six-months' period.

Once designation of a homestead is established, the burden of proof is

168. *Id.*

169. *Inman v. Inman*, 80 S.W.2d 1103, 1105 (Tex. Civ. App.—El Paso 1935, no writ).

170. See Byron D. Sher & Alan R. Bromberg, *Texas Partnership Law in the Twentieth Century—Why Texas Should Adopt the Uniform Partnership Act*, 12 Sw. L.J. 263, 264-69 (1958). See also McSwain, *The Current Status of the Texas Business Homestead*, 29 STATE BAR NEWSLETTER, PROBATE AND TRUST LAW 29, 30 (No. 3, April 1991).

171. *Long Bell Lumber Co. v. Miller*, 240 S.W.2d 405, 406 (Tex. Civ. App.—Amarillo 1951, no writ).

172. *Id.*

173. 935 F.2d at 78.

174. TEX. CONST. art. XVI, § 51.

175. See McKnight, *supra* note 15 at 30-31.

176. 935 F.2d at 78.

177. 5 Tex. Bankr. Ct. Rep. 438 (Bankr. S.D. Tex. 1991).

178. TEX. PROP. CODE ANN. § 41.001(c) (Vernon Supp. 1992).

179. 135 B.R. 261, 264 (Bankr. S.D. Tex. 1991).

upon the contestant to show that it was abandoned.¹⁸⁰ In *Caulley v. Caulley*¹⁸¹ the husband and wife had made their urban home in the wife's separate property since their marriage in 1981. In 1983 the couple purchased a farm of 150 acres in the same county. The farm appears to have been community property subject to their joint management. In 1987 a judgment was taken against the husband and an abstract of judgment was filed in the county of his residence. Although it is not indicated whether the husband acted with his wife's consent, he then filed a declaration that the rural property was his homestead, and within a few days the wife sought to declare that the urban residence was not a homestead. The couple nevertheless continued to spend the majority of their time in the urban house, and the trial court ruled that the couple had not effectively abandoned their urban homestead. The appellate courts found adequate evidence to support that conclusion.¹⁸²

In *In re Bowyer*¹⁸³ the Fifth Circuit court of appeals reconsidered what may be done in the way of "legitimate prebankruptcy planning."¹⁸⁴ In July and August of 1987 the debtor and his wife used savings of \$25,000 to make an unsecured payment on a home mortgage and the debtor used \$7,000 more to install central heating and air conditioning in the home. The bankruptcy court found that the debtor did not, at that time, have plans to file for bankruptcy. About fifteen days before filing for bankruptcy in October, the debtor's wife applied another \$24,000 from savings to payment of the home mortgage. A divided panel of the court¹⁸⁵ affirmed the holding of the bankruptcy and district courts that these transfers were not grounds for denial of the debtor's discharge in bankruptcy.¹⁸⁶ The crucial distinction between these facts and those in *In re Reed*¹⁸⁷ was that in *Reed* the debtor intended to defraud his creditors, in addition to other more egregious acts in raising non-exempt funds to invest in exempt property.¹⁸⁸ In effect, the court treated the phrase "intent to hinder, delay, or defraud a creditor"¹⁸⁹ as a unit and did not focus on the words "hinder [or] delay" as constituting a separate ground for denial of a discharge.¹⁹⁰

A voluntary, but fraudulently intentioned, conveyance of homestead prop-

180. *Caulley v. Caulley*, 806 S.W.2d 795, 797 (Tex. 1991); *Sullivan v. Barnett*, 471 S.W.2d 39, 43 (Tex. 1971); *Exocet, Inc. v. Cordes*, 815 S.W.2d 350, 355 (Tex. App.—Austin 1991, n.w.h.).

181. 806 S.W.2d 795 (Tex. 1991).

182. *Id.* at 797.

183. 932 F.2d 1100 (5th Cir. 1991).

184. *Id.* at 1103.

185. Wisdom and David, Circuit Judges; Barksdale, Circuit Judge, dissenting.

186. 932 F.2d at 1102; 11 U.S.C. § 727(a)(2)(A) (1988). In *In re Swift*, a bankruptcy judge commented on a creditor's attack on a debtor's right to a discharge couched in terms of an unproved objection to exemptions under TEX. PROP. CODE ANN. § 42.004(a). 124 B.R. 475, 481-83 (Bankr. W.D. Tex. 1991).

187. 700 F.2d 986 (5th Cir. 1983).

188. 932 F.2d at 1102. See Joseph W. McKnight, *Prefiling Exemption Planning: A National Perspective* in 2 JOSEPH NORTON, MICHAEL ROCHELLE, PETER FRANKLIN, REPRESENTING DEBTORS IN BANKRUPTCY ¶ 3.02 (1988).

189. 11 U.S.C. § 727(a)(2)(A) (1988).

190. Barksdale, Circuit Judge, dissented on this point. 932 F.2d at 1103.

erty prior to bankruptcy bars an assertion of its exempt status if it is retrieved by the bankruptcy trustee.¹⁹¹ In *In re Sherk*¹⁹² a couple's home had been lost by foreclosure of a purchase-money lien in 1987. A loan company then purchased the property from the foreclosing creditor and leased it to the couple with an option to purchase. When the couple defaulted on their lease and failed to exercise their option to purchase, the loan company evicted the couple by a judicial proceeding. In his bankruptcy the husband asserted that the property was his homestead¹⁹³ and his wife joined in their claim. The court said that assertion of a homestead in property that has been foreclosed and sold is without basis.¹⁹⁴ Had the assertion not accompanied other arguments related to the bankruptcy pleadings, the claim would have been frivolous.

D. Liens on Homesteads

Under the Texas Constitution¹⁹⁵ a valid lien may be put on a homestead for purchase money, improvements, and property taxes. In the case of an improvement lien, the contract must comply with certain statutory requirements as well.¹⁹⁶ In *Exocet, Inc. v. Cordes*¹⁹⁷ the court considered whether a lien attaches to a homestead when a creditor abstracts a judgment against the owner. Although the Texas Constitution states that, except for one of the purposes specified, "no . . . other lien on the homestead shall ever be valid,"¹⁹⁸ the Property Code provides when an abstract of judgment is recorded and indexed in accordance with statutory requirements, it "constitutes a lien on the real property of the defendant located in the county."¹⁹⁹ Because homestead property is not statutorily excepted from the operation of this provision, the court held that a judgment lien fixes on homestead property, but the property is exempted from enforcement of the perfected lien.²⁰⁰ This analysis is untenable constitutionally²⁰¹ and precedentially.²⁰² The judgement lien does not attach. It is not merely unenforceable. Since the lien appears to attach and one who merely searches the record does not know whether specific property is a homestead, judicial action is necessary to remove the cloud from the owner's title. No specific simple means of achieving this result is provided by statute. After expiration of a year fol-

191. 11 U.S.C. §§ 548, 550. See McKnight, *supra* note 188, ¶3.03. For a case involving a prepetition voluntary transfer of exempt personalty, see *In re Crozier*, 132 B.R. 224 (Bankr. D.N.H. 1991).

192. 918 F.2d 1170 (5th Cir. 1990).

193. 11 U.S.C. §§ 548, 550.

194. 918 F.2d at 1176.

195. TEX. CONST. art. XVI, § 50.

196. *In re Burnett*, 120 B.R. 839, 841-42 (Bankr. N.D. Tex. 1990).

197. 815 S.W.2d 350 (Tex. App.—Austin 1991, n.w.h.).

198. TEX. CONST. art. XVI, § 50.

199. TEX. PROP. CODE ANN. § 52.001 (Vernon Supp. 1992).

200. 815 S.W.2d at 352. See also TEX. PROP. CODE ANN. § 41.001 (Vernon Supp. 1992).

201. TEX. CONST. art. XVI, § 50.

202. See *Harms v. Ehlers*, 179 S.W.2d 582, 583 (Tex. Civ. App.—Austin 1944, writ ref'd.) (ruling that the homestead character of property precludes the attachment of a judgement lien to the property).

lowing a homestead claimant's bankruptcy, however, a statutory means is provided for expunging a void lien against the homestead.²⁰³ A statutory means of removing the lien should be provided for the non-bankruptcy situation.

One of the most difficult areas of homestead law is that involving representations of the claimant with respect to homestead, or non-homestead, character of property in the course of procuring a loan. In *D'Oench, Duhme & Company v. Federal Deposit Insurance Corp.*²⁰⁴ the United States Supreme Court held that secret agreements made by a failed bank with a borrower could not be relied on by the borrower when a federal agency such as the Federal Deposit Insurance Corporation (FDIC) undertakes to enforce the loan agreement against the borrower.²⁰⁵ In *Patterson v. Federal Deposit Insurance Corporation*²⁰⁶ the borrower gave a lien on land as collateral for a loan and represented in the loan agreement that the land did not constitute her homestead. After the lender-bank failed and the borrower defaulted, the FDIC brought suit to foreclose the lien and moved to preclude the defendant from offering any evidence that the land was her homestead. The defendant argued that the *D'Oench, Duhme* doctrine merely precluded the assertion of an agreement contradicting the loan agreement and did not prejudice her reliance on Texas homestead law. The district court nevertheless granted the plaintiff's motion. The Fifth Circuit court of appeals held that the trial court properly excluded any evidence of an alleged oral agreement on the part of bank officers in connection with the homestead exemption²⁰⁷ but that the lower court had improperly excluded evidence of the borrower's homestead rights under Texas law.²⁰⁸ The court went on to say that, although the FDIC as a holder in due course could ward off personal defenses of the borrower, it was not protected from the assertion of a real defense to liability such as that afforded by the Texas homestead law.²⁰⁹ In response to the FDIC's argument that the borrower was estopped from asserting her homestead by her denial that it was such in the loan agreement, the court said that

203. TEX. PROP. CODE ANN. § 52.022 (Vernon 1984).

204. 315 U.S. 447, 460-61 (1942).

205. The *D'Oench, Duhme* holding is codified in slightly modified form as 12 U.S.C. § 1823(e) (1988):

No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement

(1) shall be in writing,

(2) shall be executed by the bank and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank,

(3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) shall have been, continuously, from the time of its execution, an official record of the bank.

206. 918 F.2d 540 (5th Cir. 1990).

207. *Id.* at 543.

208. *Id.* (citing *In re Howard*, 65 B.R. 498, 503 (W.D. Tex 1986)).

209. *Id.* at 544.

"Texas law is clear that a homestead claimant is not estopped to assert his homestead rights in property on the basis of declarations made to the contrary if, at the time of the declarations, the claimant was in actual use and possession of the property."²¹⁰

*First Interstate Bank of Bedford v. Bland*²¹¹ illustrates this rule. There, the homestead claimant agreed to guarantee a loan which his son sought from a bank. The claimant executed a deed of trust on the homestead property in which he denied that the property was his homestead. The son represented to the bank that the property was his weekend house. In the claimant's suit to preclude foreclosure, the court held that the claimant was not bound by his false representation.²¹² The claimant had only one home, and he resided there. No estoppel principle could operate against the claimant in this situation.

Texas debtors ordinarily choose the Texas homestead exemption in bankruptcy. If they prefer, however, they may choose the federal homestead exemption of \$7,500.²¹³ Thus, if both spouses file for bankruptcy jointly, they are entitled to a combined homestead exemption of \$15,000.²¹⁴ Under section 522(f) of the Bankruptcy Code²¹⁵ debtors are entitled to avoid any judicial lien impairing their claimed homestead exemption. Under this power the debtor in *In re Inman*²¹⁶ sought to avoid a conveyance of his homestead which he had made in satisfaction of an agreed judgment in favor of his creditor. The issue was whether the transfer constituted "a judicial lien" within section 522(f). The court held that the conveyance could not be interpreted as a lien.²¹⁷ A grant of a lien on a homestead to satisfy a judgment is void under Texas law,²¹⁸ but a conveyance of the homestead is valid to discharge a debt.

In *Farrey v. Sanderfoot*²¹⁹ the United States Supreme Court dealt with a fundamental point in the interpretation of section 522(f). In dividing the spouse's joint tenancy homestead, the Wisconsin divorce court awarded the home to the husband, ordered him to pay his wife her interest in it, and put a lien on the home for the amount of that money-judgment. The husband thereupon filed a voluntary petition in bankruptcy and sought the application of section 522(f) to "avoid the fixing of a lien" on his property. The petitioner's full fee interest in the exempt property was indeed impaired by a judicial lien, but probably not the sort of judicial lien the drafters of section 522(f) had in mind.²²⁰ Noting that the lien could not fix on the debtor's

210. *In re Niland*, 825 F.2d 801, 808 (5th Cir. 1987), quoted in *Patterson* at 546-47.

211. 810 S.W.2d 277 (Tex. App.—Fort Worth 1991, n.w.h.).

212. *Id.* at 286-87.

213. 11 U.S.C. § 522(d)(1) (1988).

214. *In re Truan*, 121 B.R. 9, 10 (Bankr. S.D. Tex 1990).

215. 11 U.S.C. § 522(f).

216. 5 Tex. Bankr. Ct. Rep. 197 (Bankr. N.D. Tex. 1991).

217. *Id.* at 199.

218. TEX. CONST. art. XVI, § 50.

219. 111 S. Ct. 1825 (1991).

220. For a discussion of this and the more common type of judicial lien, see *Day v. Day*, 610 S.W.2d 195, 197-99 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). An ordinary judicial

property until the property was actually his, the Court reasoned that if the lien fixed before or simultaneously with the debtor's acquisition of the property, the lien did not fasten to the debtor's property after he acquired it. Hence, because he owned an undivided half of the property during marriage, he did not acquire the conceptually different entire interest in specific property until the fee was awarded to him in the divorce decree.²²¹ It might have been more to the point to say that the divorce court's fixing the lien on the property was a merely formal act in the division of marital property, and because it did not diminish the husband's interest in the property, its effect was nugatory. If this had been a Texas decree dividing a community homestead, the lien could be interpreted as a purchase money mortgage²²² and therefore clearly not avoidable under section 522(f) but for the fact that the lien was fixed judicially.²²³ In *In re Finch*²²⁴ the rationale of *Farrey* was literally applied to a Texas case with similar facts, but the court had some anxious moments in fitting Texas law into the *Farrey* analysis.²²⁵

*Owen v. Owen*²²⁶ was decided by the United States Supreme Court on the same day as *Farrey*. The dispute in *Owen* arose out of a Florida judgment lien fixed on the condominium of an ex-husband after his ex-wife was awarded and recorded a post-divorce money-judgment against him. It was not until after an abstract of judgment lien fixed on the property, however, that Florida law was amended so that the condominium could be claimed as a homestead. After filing for bankruptcy, the husband moved for avoidance of the judicial lien under section 522(f). The Court held that the judicial lien could be eliminated, even though Florida law had construed the homestead exemption as not extending to that part of the property encumbered by a lien before the homestead interest arose.²²⁷ The Court's conclusion was based on the premise that section 522(f) allows the debtor to avoid any "lien impair[ing] an exemption to which [the debtor] would have been entitled but for the lien itself"²²⁸

E. Exempt Personalty

A lien for purchase-money on personal property cannot be set aside under

lien arising from the abstract of judgment of an ex-spouse-creditor was at issue in the companion case, *Owen v. Owen*, 111 S. Ct. 1833 (1991). See also *In re Swift*, 124 B.R. 475, 486-87 (Bankr. W.D. Tex. 1991).

221. Conceptually this analysis does not square with the traditional notion of a joint tenancy under old English law (though perhaps it is consistent with Wisconsin law), because at common law both tenants held *per mi et per tout*. Hence, each held all of the property during the marriage as well as an undivided one-half. This may be a trifle too metaphysical for most tastes, but the analysis of the Court may suffer from the same complaint.

222. See *In re Worth*, 100 B.R. 834 (Bankr. N.D. Tex. 1989), commented on in McKnight, *supra* note 113, at 429-30.

223. See *Swift*, 124 B.R. at 487 (citing *Lettieri v. Lettieri*, 654 S.W.2d 554, 559 (Tex. App.—Fort Worth 1983, writ dismissed).

224. 130 B.R. 753 (Bankr. S.D. Tex. 1991).

225. *Id.* at 755-56.

226. 111 S. Ct. 1833 (1991).

227. *Id.* at 1838.

228. *Id.* at 1836-37.

section 522(f).²²⁹ Two bankruptcy cases²³⁰, decided together, raised this same issue in relation to contracts to purchase exempt household goods. The court concluded that refinancing the purchase contracts did not destroy the purchase-money nature of the contracts, and liens initially fixed by the contracts were, therefore, not subject to avoidance under section 522(f).²³¹

The Court noted in *Owen* that section 522(f) has been applied unevenly "to state exemptions", though the interpretation of federal exemptions has uniformly rejected this approach.²³² The Supreme Court cited *In re McManus*²³³ as a case of different interpretation in relation to state law.²³⁴ There, the Fifth Circuit court of appeals construed the Louisiana personal property exemption statute as making only the unencumbered part of the property exempt. Hence, there was no encumbrance on the exempt property which would allow recourse to section 522(f). In *In re Allen*²³⁵ the same court followed *McManus* to give a similar construction to the Texas personal property exemption statute.²³⁶ About six months before *Owen* was decided, the Texas legislature reworded the Texas statute to overcome that construction, thereby conforming Texas law to the result reached in *Owen*.²³⁷ The draftsman's commentary stated that the language of section 42.001²³⁸ was revised so that bankrupt Texans would be entitled to the benefits of section 522(f) of the Bankruptcy Code. Elsewhere the draftsman also indicated an intent to correct the misinterpretation of the language of section 42.001²³⁹ so that encumbered items of personal property are treated as wholly exempt, though the unencumbered portion of their fair market value is used in computing the increased aggregate limitation of \$60,000 for a family and \$30,000 for a single adult.

To conform the revised personal property exemption statute to the provisions of the Texas Constitution,²⁴⁰ current wages are given unlimited exemption from seizure, but unpaid commissions are exempted in an amount not to exceed one-fourth of the aggregate limitation amounts, that is, \$15,000 for a

229. 11 U.S.C. § 522(f).

230. *In re Palmer, In re Voyles*, 123 B.R. 218 (Bankr. N.D. Tex. 1991).

231. *Id.* at 221-22.

232. 111 S.Ct. at 1836.

233. 681 F.2d 353 (5th Cir. 1982). Justice John Paul Stevens, dissenting in *Owen*, stated that the majority of the Court adopted the position of the dissenting judge in *McManus*. 111 S.Ct. at 1842.

234. 111 S. Ct. at 1836 n.1.

235. 725 F.2d 290 (5th Cir. 1984), noted in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 Sw. L.J. 131, 157 (1984); See also Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*; 41 Sw. L.J. 1, 27 (1987).

236. TEX. PROP. CODE ANN. § 42.002 (Vernon Supp. 1992).

237. In *In re Kelly*, 133 B.R. 811, 813 (Bankr. N.D. Tex. 1991), the court applied the rule in *Owen* to personal property without noting the amendment of the statute.

238. TEX. PROP. CODE ANN. § 42.002 (Vernon Supp. 1992).

239. The draftsman's commentary stated that the new language was meant to correct the misinterpretation of the court in *In re Barnett*, 33 B.R. 70 (Bankr. S.D. Tex. 1983). A summary of the draftsman's commentary appears in STATE BAR [OF TEXAS] SECTION REPORT, FAMILY LAW 41 (Summer 1991).

240. TEX. CONST. art. XVI, § 28.

member of a family and \$7,500 for a single adult.²⁴¹ Professionally prescribed health aids of a debtor or a dependent of a debtor were added to the list of exemptions and put outside the limitation of value.²⁴² The catalogue of exempt personalty was somewhat simplified by restating categories in a more generalized fashion.²⁴³ With respect to wearing apparel, the draftsman meant to simplify construction by adding a specific reference to jewelry (in conformity to the great weight of authority) only to have that subsection further complicated by a committee amendment limiting the jewelry exemption to one-fourth of the aggregate limitation.²⁴⁴ By specifying fair market value as the standard for measuring value, future disputes are obviated, such as that in *In re Swift*²⁴⁵ on the value of a watch. In commenting on the various classes of exempt personalty, the draftsman also pointed out that it was intended that mention of a particular sort of personalty in one category does not exclude a similar sort from qualifying in another category. For example, a vehicle that does not fit within the definition of an exempt vehicle within section 42.001(a)(3)²⁴⁶ may nonetheless be claimed as a tool of trade under section 42.001(a)(4).²⁴⁷

A continuing split of judicial authority has developed as courts attempt to construe the tools-of-trade exemption. One view limits the exemption to those things peculiarly adapted to a trade or business, as opposed to things merely used in the business. Thus, in *Swift*²⁴⁸ the exemption was construed as not covering all office furniture and equipment needed and used by an insurance agent. The more liberal view, however, is that all items "fairly belonging" to a business are exempt.²⁴⁹ It was nevertheless noted in *In re Hernandez*,²⁵⁰ that a wrecked pickup truck is simply unusable as a tool of trade and thus cannot qualify as exempt property.²⁵¹ Furthermore, if the debtor rents his tools to a wholly owned professional association and uses them as an employee of the association, such tools are not exempt for the debtor.²⁵²

The 1991 amendments to chapter 42 of the Property Code moderated the standards for the exemption of the present value of a life insurance policy within the aggregate limitation.²⁵³ The requirement that the policy be in effect for two years is now omitted. Although meant to allow greater flexibility in valuation, the substitution of "present value" for cash surrender

241. TEX. PROP. CODE ANN. § 42.001(d) (Vernon Supp. 1992). This was a committee amendment and was inadvertently inserted in § 42.001(d) rather than § 42.002 because exempt commissions are within the limitation.

242. TEX. PROP. CODE ANN. § 42.001(b)(2) (Vernon Supp. 1992).

243. See, e.g., *id.* § 42.002(a)(10)(D) (domestic fowl).

244. TEX. PROP. CODE ANN. § 42.002(a)(6) (Vernon Supp. 1992).

245. 124 B.R. 475, 481 (Bankr. W.D. Tex. 1991).

246. TEX. PROP. CODE ANN. § 42.001 (a)(3) (Vernon Supp. 1992).

247. *Id.* § 42.001(a)(4).

248. 124 B.R. at 480-81.

249. *Meritz v. Palmer*, 266 F.2d 265, 268-69 (5th Cir. 1959).

250. 131 B.R. 61 (Bankr. W.D. Tex. 1991).

251. *Id.* at 63.

252. *In re Cooper*, 128 B.R. 632, 637 (Bankr. E.D. Tex. 1991).

253. TEX. PROP. CODE ANN. § 42.002(a)(12) (Vernon Supp. 1992).

value for life insurance policies may prove to be unwise.²⁵⁴ The Insurance Code was also amended during the same legislative session to give the "policy proceeds and cash values to be paid or rendered "on a policy of life, health or accident insurance an unlimited exemption from seizure and "all demands in any bankruptcy proceeding of the insured or beneficiary."²⁵⁵ Thus, the broader provisions of the Insurance Code seem to make a debtor's reliance on the Property Code unnecessary, and the beneficiary may be the insured or the estate of the insured. The Insurance Code exemption appears to protect proceeds from seizure whether still in the hands of the insurer or after receipt by the beneficiary. In *In re Hosek*²⁵⁶ the court relied on both the prior and the amended provisions of the Insurance Code to conclude that a claim for uninsured motorist benefits against the debtor-beneficiary's own liability carrier is exempt from seizure.²⁵⁷

In revising chapter 42 of the Property Code, the draftsman did not disturb the provisions of section 42.0021²⁵⁸ enacted in 1987 in response to *In re Goff*,²⁵⁹ in which the Fifth Circuit court of appeals held that ERISA did not provide an exemption which Texas debtors in bankruptcy could elect in addition to their choice in favor of Texas exemptions. In *In re Dyke*²⁶⁰ a two-judge panel of the Fifth Circuit reiterated the conclusion reached in *Goff*²⁶¹ and went on to hold that ERISA does not preempt section 42.0021 but indeed saves it from preemption.²⁶² In *In re Volpe*,²⁶³ decided by the same panel, the court concluded that section 42.0021 as it stood before amendment in 1989 might include more than one individual retirement account (IRA) just as it was amended to specify. In *In re Swift*,²⁶⁴ however, a bankruptcy court held, as the Fifth Circuit had indicated,²⁶⁵ that a Keogh account is not exempt under section 42.0021 if the account is not qualified under the Internal Revenue Code²⁶⁶ as section 42.0021 requires. Furthermore, if such a Keogh account is transformed into an IRA, it is not exempt because the Internal Revenue Code prohibits qualification to an IRA rolled over from a unqualified plan.²⁶⁷

An order under the turnover statute that a person should deliver wages as received was seen by many as a means of circumventing the policy of the constitutional rule against garnishment of wages in the hands of an employer in that the wage earner had no opportunity to use the wages for the purchase

254. See *In re Swift*, 124 B.R. at 486.

255. TEX. INS. CODE ANN. art. 21.22, § 1 (Vernon Supp. 1992).

256. 5 Tex. Bankr. Ct. Rep. 456 (Bankr. W.D. Tex. 1991) (overruling a motion to reconsider 124 B.R. 239 (Bankr. W.D. Tex. 1991)).

257. *Id.* at 457-58.

258. TEX. PROP. CODE ANN. § 42.0021 (Vernon Supp. 1992).

259. 706 F.2d 574 (5th Cir. 1983).

260. 943 F.2d 1435 (5th Cir. 1991).

261. *Id.* at 1443.

262. *Id.* at 1449-50 (citing 29 U.S.C. § 1144(d) (1988)).

263. *In re Volpe*, 943 F.2d 1451 (5th Cir. 1991).

264. 124 B.R. 475 (Bankr. W.D. Tex. 1991).

265. *In re Dyke*, 943 F.2d at 1440 n.13.

266. 124 B.R. at 484.

267. *Id.* at 485.

of necessities before they were taken from him.²⁶⁸ In 1991 the legislature enacted an amendment to the turnover statute whereby judicial orders were precluded from requiring "the turnover of the proceeds of . . . property exempt under any statute" with an exception for meeting child support obligations.²⁶⁹ Once received by the wage earner, however, wages are not exempt property.²⁷⁰ The Texas supreme court noted, however, that it was the intent of the legislature in passing the 1991 amendment to exempt "paychecks" from the operation of the turnover statute as well as retirement checks, IRAs, and other such property exempt under the Bankruptcy Code. "By prohibiting the turnover of the *proceeds* of property exempted under *any* statute, this section necessarily prohibits the turnover of the proceeds of current wages."²⁷¹ The case before the court was one in which an ex-wife with a foreign alimony decree sought satisfaction from her ex-husband by way of a turnover order granted by the lower courts. In reversing the order, the Texas supreme court relied on the 1991 amendment to the turnover statute, which by its terms was meant to have retrospective effect.²⁷² In *Rucker v. Rucker*,²⁷³ however, the Houston Fourteenth District court of appeals made the further point that the burden of proof is upon the claimant to show that particular property ordered to be turned over is exempt property.²⁷⁴

IV. DIVISION ON DIVORCE

A. Reference to a Master

Reference of disputes to a statutory family court master has become routine in metropolitan areas over the past decade and in 1991 the title of this master was changed to associate judge.²⁷⁵ Elsewhere, referral of disputes to a master under Rule 171 has become more common.²⁷⁶ In *Martin v. Martin*²⁷⁷ a master in chancery was appointed to hear evidence and to make findings of fact and recommendations. Objections were made to the master's report, but no objection was made to the court's refusal to hear evidence, though some evidence was ultimately heard. The trial court divided the property on the basis of the findings of the master. On appeal to the Texarkana court of appeals the husband asserted that the property had been improperly divided, but because of the presumption in favor of the court's proper exercise of its discretion, the appellant was unable to make any showing from the record that the division was manifestly unfair. The husband's

268. The view had also been expressed that money on the person of a debtor was not property subject to seizure. See Dwight Olds & Phillip I. Palmer, Jr., *Property Exempt Property*, in CREDITORS' RIGHTS IN TEXAS 23, 58 (J. McKnight, ed. 1963).

269. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(f) (Vernon Supp. 1992).

270. Raborn v. Davis, 795 S.W.2d 716 (Tex. 1990)(per curiam).

271. Caulley v. Caulley, 806 S.W.2d 795, 798 (Tex. 1991) (emphasis by the court) (referring to TEX. CIV. PRAC. & REM. CODE § 31.002 (Vernon Supp. 1992)).

272. *Id.* at 798 n.2.

273. 810 S.W.2d 793 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

274. *Id.* at 795-96.

275. TEX. GOV'T CODE ANN. § 54.019 (Vernon Supp. 1992).

276. TEX. R. CIV. P. 171.

277. 797 S.W.2d 347 (Tex. App.—Texarkana 1990, n.w.h.).

failure to object to the judge's refusal to hear evidence at the *de novo* hearing on the objections to the master's report was fatal to the appeal.

In a mandamus proceeding before the Houston First District court of appeals in a somewhat similar matter²⁷⁸ the court stressed the importance of the master's compliance with section 54.010 of the Government Code²⁷⁹ in giving notice to all parties of the substance of the report and the right of appeal to the judge. Only after the judge's ruling is made on the issues in dispute can recourse be had to a higher court.²⁸⁰ The propriety of the initial appointment of a master in chancery is within the trial court's discretion²⁸¹ and abuse of discretion may now be more difficult to show than it once was. The Houston court also noted²⁸² that Rule 171 does not require a trial court to set a hearing to review the report of a master. Once a report is filed, however, and objections are made to it, the court should proceed as though no reference to a master was made. The Texarkana court in *Martin* commented that the master's report is not admissible in evidence²⁸³ and the master is not an appropriate witness at a *de novo* trial on his report.²⁸⁴ The master's fee is properly fixed as costs of suit awarded in the discretion of the trial court²⁸⁵ but should not include the time spent in making a written report to a party's objection,²⁸⁶ because the master is thereby involved as an adversary.

Once the master's report is submitted, a dissatisfied party's right to a *de novo* trial is unimpaired. He may then request a jury trial, even though no demand for a jury trial was previously made.²⁸⁷ Nor is the right to a new trial affected by any failure to object to the initial referral to a master.²⁸⁸

B. Interlocutory Orders

In *Shankles v. Shankles*²⁸⁹ the court held that a petition for divorce may be filed before the petitioner's residence requirement²⁹⁰ is met. Once the period of residence is completed, the petition may be amended to show satisfaction of this prerequisite to divorce. In *Oak v. Oak*²⁹¹ a petition for divorce was filed prior to the petitioner having lived in Texas for six months, though satisfaction of the residence requirement was alleged. The respon-

278. *Waddell v. Huckabee*, 807 S.W.2d 455 (Tex. App.—Houston [1st Dist.], orig. proceeding), *approved sub nom.* *Waddell v. First Court of Appeals*, 813 S.W.2d 503 (Tex. 1991).

279. TEX. GOV'T. CODE ANN. § 54.010 (Vernon 1988).

280. 807 S.W.2d at 458.

281. *See id.* at 458-59.

282. *Id.* at 459.

283. 797 S.W.2d at 350.

284. *Id.* at 352.

285. *Id.*

286. *Id.*

287. *Minnich v. Jones*, 799 S.W.2d 327, 329 (Tex. App.—Texarkana 1990, n.w.h.).

288. *Vaughan v. Vaughan*, 805 S.W.2d 913, 914 (Tex. App.—Corpus Christi 1991, writ denied).

289. 445 S.W.2d 803, 805 (Tex. Civ. App.—Waco 1969, no writ).

290. TEX. FAM. CODE ANN. § 3.21 (Vernon 1975). *See Liepelt v. Oliveira*, 818 S.W.2d 75, 78 (Tex. App.—Corpus Christi 1991, n.w.h.).

291. 814 S.W.2d 834 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

dent, whose residence requirement was also unsatisfied, responded with a general denial but did not attack the petitioner's lack of compliance with the prescribed period of residence. A hearing was held about three weeks after the filing of the petition, and the petitioner was temporarily restrained from changing the beneficiary designation of any life insurance policy. More than six months after the petitioner established his residence in Texas, a temporary injunction was issued to the same effect. In defiance of the order, the petitioner nonetheless changed the beneficiary designation of a life insurance policy but died before any further action was had in the divorce proceeding. The probate court, in which the petitioner's estate was being administered, held that the change of beneficiary designation was ineffective, and that conclusion was sustained on appeal.²⁹² The period of actual residence had cured the factual insufficiency of the uncontested pleading of residence.

An interlocutory foreign order was before the court in *Myers v. Ribble*.²⁹³ The wife had filed suit in Texas to enforce a Florida decree providing for a money-judgment against her husband. After the husband failed to respond, the trial court issued an order of recognition of the foreign judgment.²⁹⁴ In his appeal the husband showed that in making the decree the Florida court had retained jurisdiction to determine attorney's fees and costs. The appellate court held that the Florida decree was therefore interlocutory and was not subject to enforcement.²⁹⁵

In *Dancy v. Daggett*²⁹⁶ the divorce court refused to grant a second motion for continuance filed by the respondent's attorney, who was engaged in another hearing, and proceeded to conduct a temporary hearing in the absence of the attorney. The respondent then filed a motion for rehearing and, on its denial, sought a bill of review from the appellate court. Although the appellate court strongly disapproved the trial court's rulings, it felt that it lacked the power to issue the writ of mandamus.²⁹⁷ The Texas supreme court disagreed and granted the writ of mandamus to compel the divorce court to continue the hearing.²⁹⁸ The court stated that the denial of the continuance violated local rules and deprived the respondent of representation at the hearing.²⁹⁹

*Ex parte Pryor*³⁰⁰ involved a divorce proceeding in which the trial court ordered the husband to deliver certain executed instruments to his wife and on his failure to do so found him in contempt and committed him to jail. The husband sought a writ of habeas corpus at the time his motion for a new trial was pending. He asserted that the lack of a final order in the divorce

292. *Id.* at 838-39.

293. 796 S.W.2d 222 (Tex. App.—Dallas 1990, n.w.h.).

294. Merely filing the foreign judgment with the clerk of a Texas court is required by TEX. CIV. PRAC. & REM. CODE § 35.003 (a),(b) (Vernon 1986).

295. 796 S.W. at 224.

296. 809 S.W.2d 629 (Tex. App.—Houston [14th Dist.] orig. proceeding), *overruled*, 815 S.W.2d 548 (Tex. 1991).

297. *Id.* at 630.

298. 815 S.W.2d 548, 549 (Tex. 1991) (per curiam).

299. *Id.*

300. 800 S.W.2d 511 (Tex. 1990).

proceeding was a bar to his commitment because the court could modify its order within thirty days. The Texas supreme court said that there is no such bar to the exercise of a trial court's inherent power to achieve obedience to its order.³⁰¹

C. *Agreements Incident to Divorce*

The provisions of Family Code section 3.631(a)³⁰² encourage spouses to enter into a written agreement for the division of their property on divorce but protect either party by allowing repudiation prior to rendition of the divorce. The fact that an agreement contains a provision for contractual alimony makes the agreement no less enforceable.³⁰³ If it is assumed that such an agreement must be supported by consideration, adequate consideration is found in the alimony recipient's acquiescence in the terms of the agreement for property division.³⁰⁴ In *Rogers v. Rogers*³⁰⁵ the parties entered into a written settlement agreement contingent on a satisfactory arrangement of security for monthly payments to be made by the husband to the wife after the divorce. Looking to the attorneys to prepare appropriate documents, the court approved this agreement and granted the divorce. The wife's attorney prepared a draft settlement agreement and the husband's attorney tendered what purported to be the appropriate guarantee of payment, but the wife's counsel rejected the proposed guarantee as insufficient. The court nevertheless entered judgment and later overruled the wife's motion for a new trial. The wife's appeal was limited to the issue of insufficient security and her failure to accede to it.³⁰⁶ The appellate court concluded that the question of security was a material term in the agreement and that failure of both parties to agree to it made the agreement incomplete and unenforceable.³⁰⁷ The trial court, therefore, could not enter a final judgment on the strength of a contingent agreement.³⁰⁸

In *Boyett v. Boyett*,³⁰⁹ however, the ex-husband did not perceive his error in agreeing to a term of the settlement until well after the decree had become final and he was therefore bound by the agreement. In his suit for reformation the ex-husband was unable to show a mutual mistake. He asserted that the agreement inadvertently specified that his ex-wife was entitled to one-half of the full future value of his retirement rather than one-half of his present accrued benefits. The agreement as approved referred to present accrued benefits, but the dollar amount specified for those benefits was the amount of future entitlement on retirement. The husband was forty-one years old at the time of the divorce. The court nonetheless held that the ex-

301. *Id.* at 512.

302. TEX. FAM. CODE ANN. § 3.631(a) (Vernon Supp. 1992).

303. *Birdwell v. Birdwell*, 819 S.W.2d 223 (Tex. App.—Fort Worth 1991, writ requested).

304. *Id.* at 228.

305. 806 S.W.2d 886 (Tex. App.—Corpus Christi 1991, n.w.h.).

306. *Id.* at 887.

307. *Id.* (citing *Leal v. Cortez*, 569 S.W.2d 536 (Tex. Civ. App.—Corpus Christi 1978, no writ)).

308. *Id.* at 888 (citing *Miller v. Miller*, 721 S.W.2d 842, 844 (Tex. 1986)).

309. 799 S.W.2d 360 (Tex. App.—Houston [14th Dist.] 1990, no writ).

husband failed to prove that the parties had agreed to limit the ex-wife's entitlement to the value of present accrued benefits, even though the agreement also recited that the award to the ex-wife was "in recognition of the existence of marital rights in retirement benefits as defined in *Berry v. Berry*."³¹⁰

In *Boyett* the Dallas court of appeals went on to observe that "child-support agreements require different consideration from property settlement agreements."³¹¹ Finality is critical in matters of property whereas the best interest of children is controlling in connection with their support.³¹² Hence, the contract is no bar to a judicial order to increase payments for child support. The court stated, however, that when a property settlement agreement requires payment of child support and that amount is later reduced by court order, the payee under the agreement can recover the difference in a suit for breach of contract.³¹³ This inconsistent result suggests that the latter conclusion is unsound. In neither case should breach of contract be assertable in connection with child support.

D. Making the Division

In *Baccus v. Baccus*³¹⁴ both parties appeared before the court in June 1987 and orally agreed to a division of property, though they could not agree on payment of tax liability. The judge approved the agreement, but it was not reduced to writing. By the time the parties again appeared before the court in September 1988, the court found that each party had repudiated the agreement. The court therefore divided the property on the basis of its present value and directed the husband to pay federal tax liabilities. On appeal, the husband argued that the 1987 agreement somehow fixed the value of the husband's retirement benefits for purposes of division. The appellate court put the agreement aside because the agreement was not in writing and had been repudiated.

In another case before the same court³¹⁵ the dispute centered on the method for calculating the community interest in a spouse's pension benefits. The couple had been married over eleven years of the husband's forty-one years of employment at the date of divorce. The court employed the *Taggart*³¹⁶ formula, as refined in *May v. May*,³¹⁷ to define the community interest by applying the ratio of the number of years of marriage to the number of years of service under the plan, multiplied by the value of the benefit at the date of divorce. On appeal the wife asserted that the trial court should have employed the accrued benefit mode of valuing the community interest, so

310. 647 S.W.2d 945, 947 (Tex. 1983).

311. *Hill v. Hill*, 819 S.W.2d 570, 572 (Tex. App.—Dallas 1991, writ denied).

312. *Id.*

313. *Id.* at 571 (citing *Ruhe v. Rowland*, 706 S.W.2d 709, 710 (Tex. App.—Dallas 1986, no writ)).

314. 808 S.W.2d 694 (Tex. App.—Beaumont 1991, n.w.h.).

315. *Humble v. Humble*, 805 S.W.2d 558 (Tex. App.—Beaumont 1991, writ denied).

316. *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977).

317. 716 S.W.2d 705 (Tex. App.—Corpus Christi 1986, no writ).

that the court should simply subtract the amount to which the pensioner would have been entitled on the date of marriage from the amount to which he was entitled at the date of divorce. The appellate court concluded that the apportionment approach is appropriate to do "substantial justice"³¹⁸ in light of the fact that there was not enough evidence in the record to make an accrued benefit computation.³¹⁹ The wife argued that whatever approach is used to determine the community interest in such cases, the divorce court abuses its discretion if a division is equal and not made in accordance with equities of the parties. The appellate court rejected this argument, saying that "[it] is not an abuse of discretion for a trial court to make an equal division of the property, even where equities balance in favor of the wife."³²⁰

In *Knowles v. Knowles*³²¹ the ex-wife asserted that a 1975 divorce decree had erroneously awarded to her ex-husband her interest in military retirement benefits. The appellate court concluded that, apart from the doctrine of res judicata which precludes questioning the unambiguous 1975 agreed judgment, the 1990 amendment³²² to the federal law that a state court may not treat retired pay as property for purposes of division on divorce applies to prior decrees and therefore does not allow the result sought by the wife.³²³ In *Irving Fireman's Relief & Retirement Fund v. Sears*³²⁴ a state public retirement fund resisted an order of a divorce court to make direct payments of retirement benefits to the ex-wife of a pensioner. The appellate court held that the provision of the 1989 Texas statute³²⁵ that precludes assignment of public pension benefits and protects them from the pensioner's creditors does not affect the power of a court to order direct payment of a community interest to a non-pensioner. The result was the same under the prior statute which was replaced in 1989.³²⁶

In *Massey v. Massey*³²⁷ the husband attacked the imposition of what was described as an "owelty judgment", that is, an order to pay a monetary amount in order to reach a fair apportionment of community assets when division in kind would not achieve that purpose. Justice Stephens, speaking for the court, offered a useful amplification of the decision of the Dallas court in *Belz v. Belz*,³²⁸ in which he participated. In response to the argument that *Belz* stands for the proposition that a money-judgment is generally inappropriate in a suit for divorce, the judge observed that a money-judgment to equalize the division of the community property on divorce is proper but the money-judgment in *Belz* was set aside for other reasons. An

318. 805 S.W.2d at 562 (quoting *Dessommes v. Dessommes*, 505 S.W.2d 673, 681 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.)).

319. *Id.* at 562.

320. *Id.* at 563 (citing *Stafford v. Stafford*, 726 S.W.2d 14 (Tex. 1987)).

321. 811 S.W.2d 709 (Tex. App.—Tyler 1991, n.w.h.).

322. 10 U.S.C. § 1408(c)(1) (1988).

323. 811 S.W.2d at 711.

324. 803 S.W.2d 747 (Tex. App.—Dallas 1990, no writ).

325. TEX. REV. CIV. STAT. ANN. art. 6243e, § 5 (Vernon Supp. 1992).

326. 803 S.W.2d at 749-50 (citing *Collida v. Collida*, 546 S.W.2d 708 (Tex. App.—Beaumont 1977, writ denied)).

327. 807 S.W.2d 391, 401-04 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.).

328. 667 S.W.2d 240, 245 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

order that a party discharge a specific obligation, such as payment of taxes,³²⁹ may be used for the same purpose.³³⁰

In *Reed v. Reed*³³¹ the El Paso court of appeals saw a somewhat related situation differently. At divorce, the husband held three interest-bearing notes owed to the community estate. Two of the notes were secured; one was not. The divorce court awarded the wife the right to receive all or a portion of the principal and interest of the three notes with recourse against the husband for the amounts unpaid. Apparently, this was the court's means of forcing the husband to collect the notes. The husband complained, however, that the recourse provision of the award amounted to an award of alimony. The court also concluded that the recourse rights were new rights not previously in existence and that making the husband a guarantor amounts to an award of alimony because his obligation was not tied to the payment, but rather to the non-payment, of the notes.³³² Although the facts in *Reed* are strikingly similar to those of *Ex parte Yates*,³³³ which was not directly relied on by the court, the imposition of the husband's obligation to pay on default of the notes merely amounted to an award of a money-payment to equalize the division of community shares. The money-judgment awarded in *Massey* was also a new obligation of the husband. In *Massey* the order that the husband pay the wife a cash amount was justified by the greater value of assets awarded to him. Presumably an analogous situation was before the court in *Reed*. The notes were evidentially valued at their face amount. Rather than awarding the notes to the wife and ordering her husband to guarantee them, the court should have awarded the notes to the husband and ordered him to pay his wife an amount commensurate to their value.³³⁴ The El Paso court and other courts asserting similar views seem to be expressing their disapproval of money-judgments awards. That point of view, however, should be expressed forthrightly.

The fundamental rule laid down in *Eggemeyer*³³⁵ and *Cameron*³³⁶ is that separate property of a spouse may not be divested by a divorce court. The most common breach of this rule occurs as a result of mischaracterization of separate property as community. In *Jacobs*³³⁷ the Texas supreme court made it clear that except in cases of an insubstantial amount, breach of this

329. As in *Baccus v. Baccus*, 808 S.W.2d 694, 700-702 (Tex. App.—Beaumont 1991, n.w.h.). There, the appellate court appears to have felt that the husband's handling of tax matters was culpable. Thus, ordering him to pay outstanding taxes brought fault into play in making the division.

330. For recent treatment of taxes and divorce see John A. Miller, *Federal Income Taxation and Community Property Law: The Case for Divorce*, 44 SW. L.J. 1087 (1990); David S. Dolowitz, *Taxation: The Impact of Tax Laws Upon Divorce*, 11 FAIRSHARE 2, 9 (no. 7, July 1991), 5 (no. 8, Aug. 1991).

331. 813 S.W.2d 716 (Tex. App.—El Paso 1991, n.w.h.).

332. *Id.* at 718-19.

333. 387 S.W.2d 377 (Tex. 1965).

334. The court in *Humble*, 805 S.W.2d at 563, said that a court is not required to fix a specific value of assets whose division is not subject to material dispute.

335. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 142 (Tex. 1977) (as to realty).

336. *Cameron v. Cameron*, 641 S.W.2d 210, 220 (Tex. 1982) (as to personalty).

337. *Jacobs v. Jacobs*, 687 S.W.2d 731 (Tex. 1985).

rule requires reversal. As Justice Dunn points out in her dissent in *Magill v. Magill*,³³⁸ the majority of the court in its refusal to reverse by imposing its own assessment of an equitable division misstated the rule³³⁹ rather than focusing on the insubstantiality of the amount.

Although separate property of a spouse is not divisible by the court as an incident of the divorce settlement, a divorce court as a court of general jurisdiction may nonetheless deal with separate property interests at the same time. Thus, the divorce court dealt with a fraudulent transfer of separate property in *Jones v. Jones*³⁴⁰ and made a partition of separate interests in realty in *Halamka v. Halamka*.³⁴¹ More commonly, a divorce court imposes a lien on separate property as security for payment of a money judgment rendered to equalize division of the community estate or to satisfy a claim for reimbursement. The complaint is then made that the lien constitutes a forbidden division of separate property. There is no significant dispute that a lien may be fixed on separate property, even separate homestead property,³⁴² to secure compensation for benefits received by that property, but in spite of substantial authority to the contrary,³⁴³ the view is still sometimes expressed that a lien should not be fixed on separate property except as security for benefits received by that property.³⁴⁴ A justification of the contrary view is that such a lien does not constitute a taking of separate property except by the voluntary allowance of the owner because foreclosure occurs only when the owner deliberately ignores the court's order to make the payment that the lien secures.³⁴⁵ The Houston First District appellate court has justified such a lien by terming it "equitable" and stating that such a lien is not subject to foreclosure.³⁴⁶ This terminology and its consequence are misleading. The phrase "equitable lien" is ordinarily employed in the process of asserting a lien for reimbursement by making the argument that equity imposes a lien, or charge, on property which receives a benefit to secure compensation for that benefit. But once the court goes a step further and imposes a lien by judgment, that lien may be foreclosed. If the judgment is recorded in the county where the realty is located, third persons thereby

338. 816 S.W.2d 530, 536-37 (Tex. App.—Houston [1st Dist.] 1991, writ requested).

339. *Id.* at 533.

340. 804 S.W.2d 623, 625 (Tex. App.—Texarkana 1991, n.w.h.).

341. 799 S.W.2d 351, 354 (Tex. App.—Texarkana 1990, no writ).

342. See *Magill v. Magill*, 816 S.W.2d 530, 535, 537 (Tex. App.—Houston [1st Dist.] 1991, writ requested).

343. *Mullins v. Mullins*, 785 S.W.2d 5, 11-12 (Tex. App.—Fort Worth 1990, no writ); *Hirsch v. Hirsch*, 770 S.W.2d 924, 927 (Tex. App.—El Paso 1989, no writ); *Dewey v. Dewey*, 745 S.W.2d 514, 519 (Tex. App.—Corpus Christi 1988, writ denied); *In re Jackson*, 506 S.W.2d 261, 267 (Tex. Civ. App.—Amarillo 1974, writ denied); *Reaney v. Reaney*, 505 S.W.2d 338, 340 (Tex. Civ. App.—Dallas 1974; no writ); *Weeks v. Weeks*, 471 S.W.2d 454, 455 (Tex. Civ. App.—Beaumont 1971, writ denied).

344. See *Johnson v. Johnson*, 804 S.W.2d 296, 299-300 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

345. See Joseph W. McKnight, *Division of Texas Marital Property on Divorce*, ST. MARY'S L.J. 413, 446-47 (1976).

346. *Shields v. Shields*, No. 01-90-00141-CV (unpublished) (Tex. App.—Houston [1st Dist.] 1991, n.w.h.). "An equitable lien merely insures the payment of a debt out of the proceeds of any future sale of the property." *Id.* op. at 24.

acquire constructive notice of the lien. Putting such a lien on personalty is meaningless, however, and the Texas supreme court said in *Jensen v. Jensen*³⁴⁷ that the court should award a money judgment for benefits rendered to separate property.

An award of attorney's fees is an integral part of the process of division of community property on divorce.³⁴⁸ Although a plea for general relief is sufficient to authorize an award of attorney's fees directly to an attorney,³⁴⁹ better practice supports greater specificity in naming the attorney.³⁵⁰ Although it is improper for an attorney to sue his own client for a fee in a divorce proceeding,³⁵¹ a party's prior attorney frequently intervenes to assert such a claim. Service of notice of such an intervention must be had on the former client unless she responds to the intervention.³⁵²

E. Appeal

After a default judgment for divorce has been granted to the petitioner, the respondent's motion for new trial must allege a meritorious defense and establish the facts relied on by affidavit.³⁵³ Since those prerequisites were not met, the trial court in *Liepelt v. Oliveira*³⁵⁴ properly held a hearing on the respondent's motion and divided the community estate. In *Butler v. Butler*³⁵⁵ the trial court entered a post-answer default judgment and the respondent appealed by writ of error. His writ failed, however, because the invalidity of the judgment was not disclosed by the record. The appellant's principal argument was that he failed to get notice of the trial setting, but the record did not show this alleged fact. Because notice of a trial setting need not be included in the transcript (as was the case in *Butler*), its absence was not error on the face of the record.³⁵⁶ A cost bond must be timely filed for an appeal. In *Eichelberger v. Hayton*³⁵⁷ the court was careful to distinguish the dispensing with a bond in disputes involving spouses³⁵⁸ and the requirement of a bond in cases involving ex-spouses.³⁵⁹ Thus, an injunction granted without the prerequisite bond in the latter type of case is void. A sequel to the *Massey* case involved a claim for arrears of temporary spousal support pending appeal.³⁶⁰ The appellate court held that the trial court's order under section 3.58(h)(1) of the Family Code³⁶¹ will support a money judg-

347. 665 S.W.2d 107, 110 (Tex. 1984).

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

349. *Kirk v. Kirk*, 805 S.W.2d 929, 932 (Tex. App.—Fort Worth 1991, writ denied).

350. *Id.* at 931-32.

351. See McKnight, *supra* note 15, at 44.

352. *Mallia v. Bousquet*, 813 S.W.2d 628, 630 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

353. *Liepelt v. Oliveira*, 818 S.W.2d 75, 77 (Tex. App.—Corpus Christi 1991, n.w.h.).

354. *Id.* at 77.

355. 808 S.W.2d 128 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

356. *Id.* at 129.

357. 814 S.W.2d 179, 182 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

358. TEX. R. CIV. P. 693a.

359. TEX. R. CIV. P. 694.

360. *Massey v. Massey*, 813 S.W.2d 605 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

361. TEX. FAM. CODE ANN. § 3.58(h)(1) (Vernon Supp. 1992).

ment under section 3.74(b)³⁶² in the absence of any order of the appellate court superseding the order of the trial court.³⁶³ The court pointed out that in his principal appeal the appellant might have appealed the award of spousal support, but, because of his failure to do so, he could not complain that the trial court's order to pay was not a final order.³⁶⁴

Another appeal of a post divorce dispute³⁶⁵ turned on the timeliness of filing a cost bond for appeal. The judgment appealed from was entered in October 1989. The appeal bond was filed in June 1990. Although there was a nunc pro tunc judgment signed in May 1990 to correct a clerical error, the latter judgment did not extend the time for perfecting the appeal.³⁶⁶

F. Post-Divorce Disputes

*Phillips v. Parrish*³⁶⁷ dealt with a 1976 divorce decree incorporating a property settlement agreement which did not mention pension benefits specifically but provided that the husband have "any and all personal property and effects in [his] possession." As in other cases involving similar decretal language, a pension interest was not construed as coming within the description.³⁶⁸ A residuary clause in the agreement, however, provided that community property not mentioned specifically should belong to the parties equally. Matters of contractual interpretation apart, there was apparently no contest as to the amount of the base pension awarded to the ex-wife. The ex-husband merely contested her entitlement to cost of living increases in his pension as well as "bridge benefits" which supplemented the amount of monthly benefits payable from the date of retirement through age sixty-two when Social Security benefits commence. In accordance with the decision in *Grier v. Grier*³⁶⁹ the ex-wife was entitled to an interest in those benefits.³⁷⁰

Subsequent changes in the law or sharpening of prior legal concepts do not allow the courts to reapply the law to alter prior judgments. In *Haworth v. Haworth*³⁷¹ the husband sought clarification of a 1980 divorce decree dividing his private pension rights to correct an award of a separate property portion of his benefits as defined in *Berry v. Berry*.³⁷² If the division had been regarded as erroneous, it could have been rectified on appeal, but without an appeal the judgment had to stand under the principle of res judicata. A somewhat similar attack was made on a 1979 decree in *Elliott v. Elliott*.³⁷³ The ex-husband sought to overturn an order antedating the Uniformed Services Former Spouses Protection Act (USFSPA) with respect to military re-

362. *Id.* § 3.74(b).

363. 813 S.W.2d at 606 (citing TEX. FAM. CODE ANN. § 3.58(i)).

364. *Id.*

365. *Holder v. Holder*, 808 S.W.2d 197 (Tex. App.—El Paso 1991, n.w.h.).

366. *Id.* at 198.

367. 814 S.W.2d 501 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

368. *Id.* at 504.

369. 731 S.W.2d 931, 933 (Tex. 1987).

370. 814 S.W.2d at 505.

371. 795 S.W.2d 388 (Tex. App.—Houston [14th Dist.] 1990, no writ).

372. 647 S.W.2d 945, 947 (Tex. 1983).

373. 797 S.W.2d 388 (Tex. App.—Austin 1990, no writ).

tirement benefits. His plea met the same response. The decree was res judicata though its division of "gross military retirement benefits" went far beyond the limits prescribed by USFSPA and could have been attacked on appeal.³⁷⁴ The court also stated that in a proceeding to clarify a divorce decrees under Family Code section 3.71³⁷⁵ an affirmative plea of res judicata is not required under the motion-practice prevailing in such instances.³⁷⁶ Good practice, nevertheless, suggests strict adherence to the Rules of Civil Procedure as Family Code section 3.70(b) provides.³⁷⁷

In *Ware v. Ware*³⁷⁸ an argument of res judicata was interposed to a post-divorce suit for partition of realty which the former spouses had been ordered to sell at an amount specified in their divorce decree. The decree had not specified a remedy if the property could not be sold for the amount specified. The principle of res judicata was, therefore, inapplicable, and an order to sell the property on other terms in order to divide the proceeds was accordingly appropriate. In *Rittgers v. Rittgers*,³⁷⁹ on the other hand, the ex-spouses had reached an oral agreement, which under the circumstances was unenforceable, for the purchase of one spouse's share of undivided realty by the other. Again, a partition of the property to resolve a dispute unanticipated by the divorce decree was an appropriate remedy.³⁸⁰ The court also noted that an award of attorney's fees to an appellee in such an instance must be predicated on the failure of the appellant's appeal.³⁸¹

In another matter³⁸² that had involved a prior appeal,³⁸³ the court considered the original decree providing for an equal, in kind division of community furniture as the parties should agree and a further order for appointment of a receiver to make the division if they could not agree. The ex-wife asserted that the initial order for equal division of the furniture was not a final but an interlocutory order, an issue inferentially resolved in the previous appeal.³⁸⁴ The Dallas appellate court concluded that the ex-wife had prosecuted this appeal for delay and without sufficient cause and sanctioned her by awarding damages to the ex-husband in the amount of ten times the total taxable costs.³⁸⁵ The Dallas court also applied sanctions in response to another frivolous appeal,³⁸⁶ as evidenced by appellant-counsel's lack of preparation to meet the well established authorities cited by the appellee to sustain the trial court's judgment. In reaching the conclusion that

374. *Id.* at 390-91. See Daniel L. Driscoll, *Mansell v. Mansell: How It Changed the Definition of Marital Property for the Military Spouse*, 30 J. FAM. L. 97 (1991).

375. TEX. FAM. CODE ANN. § 3.71 (Vernon Supp. 1992).

376. 797 S.W.2d at 391-92.

377. TEX. FAM. CODE ANN. § 3.70(b) (Vernon Supp. 1992).

378. 809 S.W.2d 569 (Tex. App.—San Antonio 1991, n.w.h.).

379. 802 S.W.2d 109 (Tex. App.—Corpus Christi 1990, n.w.h.).

380. *Id.* at 113-14.

381. *Id.* at 115.

382. *Young v. Young*, 810 S.W.2d 850 (Tex. App.—Dallas 1991, n.w.h.).

383. *Young v. Young*, 765 S.W.2d 440 (Tex. App.—Dallas 1988, no writ).

384. 810 S.W.2d at 852.

385. *Id.*

386. *Naydan v. Naydan*, 800 S.W.2d 637, 643-44 (Tex. App.—Dallas 1990, n.w.h.).

the appeal had been "taken for delay,"³⁸⁷ the court found that the appellant's counsel could not have had any reasonable grounds for reversal in the light of existing precedents which he deliberately ignored.³⁸⁸ The appellate court therefore assessed damages of ten percent of the trial court's monetary judgment against the appellant.³⁸⁹

*In re Ward*³⁹⁰ was a simpler sort of dispute though rooted in a decree of 1974. The ex-wife brought suit for enforcement of an order that her former husband pay a portion of his monthly military retirement benefits to her. Payments had been in arrears since 1976. Applying the ten-year statute for validity of judgments³⁹¹ as though it were a statute of limitation, the court held that the statute runs on each benefit as it becomes due, thus leaving payments received during the last ten years unaffected.

In *Nix v. Nix*³⁹² the parties were divorced in 1971. In 1986 the ex-wife brought suit against her former husband for conversion and fraud in connection with his failure to comply with a property settlement agreement reached in conjunction with the divorce decree. On his own motion, the district judge in whose court the matter was commenced transferred the case to the county court having jurisdiction of family law cases and matters in controversy not exceeding \$50,000. Both parties stipulated that more than \$100,000 was in controversy, and both filed a plea to the jurisdiction of the county court.³⁹³ In an appeal from a contrary ruling by the county court, the Corpus Christi court of appeals concluded that the amount in issue not only exceeded the court's jurisdiction but the dispute was not "a family law case or proceeding".³⁹⁴ The suit was merely for a breach of contract as well as conversion and fraud.

G. Effect of Bankruptcy

About eight years before the ex-husband filed for bankruptcy in *In re Robinson*,³⁹⁵ he had been divorced. Prior to the entry of the divorce decree the couple had entered into a settlement agreement by which the wife agreed that the husband would take most of the assets of the marriage and custody of their only child, and the husband agreed to make an initial lump sum payment, another at the end of ten years, and monthly support payments to the wife. In his federal income tax return for 1982, 1983, and 1984 the ex-husband deducted the monthly payments as alimony, but in 1985 he ceased making the payments. After filing for bankruptcy, the ex-husband claimed that his obligation was based on a division of property and was therefore

387. TEX. R. CIV. P. 84.

388. 800 S.W.2d at 643, citing *Beckham v. City Wide Air Conditioning Co.*, 695 S.W.2d 660, 663 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

389. 800 S.W.2d at 644.

390. 806 S.W.2d 276 (Tex. App.—Amarillo 1991, n.w.h.).

391. TEX. CIV. PRAC. & REM. CODE § 31.006 (Vernon 1985).

392. 797 S.W.2d 64 (Tex. App.—Corpus Christi 1990, n.w.h.).

393. *Id.* at 65.

394. *Id.*

395. 122 B.R. 502 (Bankr. W.D. Tex. 1990).

dischargeable. His ex-wife argued that it was for her support and not dischargeable. The bankruptcy court stated that "the primary issue in determining whether the obligation is for support and maintenance or part of a property division is the intent of the parties."³⁹⁶ In this instance, however, the evidence was too sparse for a very meaningful application of the usual standard.³⁹⁷ On its face the agreement itself indicated both objectives. The court attached some significance to the fact that the wife received very little property at the time of divorce and that the wife lacked the skill to support herself at the standard of living she had enjoyed during the marriage. In concluding that the agreement was for support and a property division,³⁹⁸ the court attached particular importance to the fact that the ex-husband had treated the payments under the agreement as alimony on his own tax returns; thus, he "should be estopped from now asserting [that] these payments were [for] mere property settlement."³⁹⁹

In *In re Davidson*⁴⁰⁰ similar facts were somewhat better developed in favor of the ex-wife. Referring to *Robinson* and the ground in the decision as "quasi estoppel",⁴⁰¹ the court concluded that the bankrupt debtor's obligation to his ex-wife was not dischargeable. Relying on the principle of quasi estoppel, the court said it was unnecessary to consider the intent of the parties when they made the agreement.⁴⁰² The court also stressed the detrimental reliance of the ex-wife on the ex-husband's handling of tax liability under the agreement.⁴⁰³ In the light of a further provision in the agreement that either party would be entitled to attorney's fees to handle default of an obligation, the court ruled that the ex-wife was entitled to reasonable attorney's fees in connection with the bankruptcy proceeding.⁴⁰⁴

396. *Id.* at 505 (citing *In re Billingsley*, 93 B.R. 476, 477 (Bankr. N.D. Tex.(1987)).

397. 122 B.R. at 505 (where the standards are enumerated).

398. *Id.* at 506.

399. *Id.*

400. 947 F.2d 1294 (5th Cir. 1991).

401. *Id.* at 1297.

402. *Id.* n.6.

403. In *Robinson* there was no evidence as to how the ex-wife handled her tax liability. 122 B.R. at 504-05.

404. 947 F.2d at 1297-98.

