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# FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight\*

## I. STATUS

**MARRIAGE LICENSE.** Section 1.51 of the Family Code, with some exceptions, forbids the county clerk from issuing a marriage license to an applicant under eighteen years of age.<sup>1</sup> The Code also provides, however, that a person who has been married has “the power and capacity of an adult.”<sup>2</sup> The Attorney General has given an opinion that the clerk may not issue a license to a person under eighteen, regardless of that person’s prior marital status.<sup>3</sup> A person who has acquired adulthood through marriage should not lose that status on divorce, particularly with respect to contracting another marriage. Section 1.51 should, therefore, be amended to rectify this oversight.

*Informal Marriage.* A federal court sitting in another jurisdiction considered the validity of a Texas informal marriage.<sup>4</sup> The parties as husband and wife executed a deed to a house, in which conveyance they waived all their homestead rights. The court held that this act was direct evidence of an informal marriage, reasoning that the deed contained all the necessary elements of proof.<sup>5</sup> First, execution as husband and wife indicated an agreement to be married. Second, sale of a house referred to as a homestead was proof of cohabitation. Third, the deed itself was a representation to others that the couple were husband and wife.<sup>6</sup>

Section 1.91(b) of the Family Code provides that if cohabitation and holding out as husband and wife are proved, an agreement of the couple to be married may be inferred.<sup>7</sup> This inference should not be entertained except when no credible evidence exists of an agreement to be married or not to be married; if testimony of an agreement is in evidence, the court should not

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1. TEX. FAM. CODE ANN. § 1.51 (Vernon Supp. 1986).

2. *Id.* § 4.03 (Vernon 1975).

3. Op. Tex. Att’y Gen. No. JM-359 (1985).

4. *Compton v. Davis Oil Co.*, 607 F. Supp. 1221 (D. Wyo. 1985).

5. *Id.* at 1230. The necessary elements for an informal marriage are (1) an agreement presently to become husband and wife, (2) a living together as such, and (3) a holding out of each other as husband and wife. TEX. FAM. CODE ANN. § 1.91(a)(2) (Vernon 1975).

6. 607 F. Supp. at 1230.

7. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1975); see *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 166 (Tex. 1981).

employ the inference but should make a finding on the basis of the evidence presented.<sup>8</sup> In an instance when one of the parties testifies that no agreement to marry existed and the other party does not deny this, the first element seems clearly lacking. The Fort Worth Court of Appeals nevertheless seems to have approved the trial court's inference in such a case.<sup>9</sup>

*Interspousal Testimony.* Section 38.11 of the Code of Criminal Procedure defines the marital-communication privilege by providing, with some exceptions, that neither spouse may testify against the other during the marriage.<sup>10</sup> An alleged spouse by informal marriage, however, is competent to testify against an accused in Texas if the accused offers no evidence of the informal marriage at trial.<sup>11</sup> The showing necessary to establish an informal marriage in a criminal trial is substantially equivalent to that necessary in the civil context.<sup>12</sup> In *Brooks v. State*<sup>13</sup> the court of criminal appeals held that the issue of the existence of an informal marriage between a defendant and a witness was properly submitted to the jury. The defendant had appealed the trial court's refusal to instruct the jury to disregard the testimony of a woman he claimed as his common-law wife. Although the defendant and the witness had lived together for six months, the witness gave conflicting testimony as to whether she considered herself to be the defendant's wife.<sup>14</sup> The trial court allowed her to testify and instructed the jury to disregard the testimony if they found that an informal marriage existed. The court of criminal appeals noted that the jury should be instructed not to consider testimony only when the evidence clearly shows that an informal marriage existed.<sup>15</sup> Here the testimony itself presented a fact question as to the existence of the informal marriage.<sup>16</sup> Hence the court held that the jury was properly allowed to evaluate the testimony.<sup>17</sup>

In *January v. State*<sup>18</sup> the trial court, after hearing testimony out of the presence of the jury, held as a matter of law that the defendant and his alleged spouse had not entered into a common-law marriage and thus allowed her to testify before the jury. The trial court, however, failed to instruct the jury on the elements of the marital-communication privilege contained in section 38.11.<sup>19</sup> The defendant raised the lack of instruction on

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8. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 34 Sw. L.J. 115, 115 (1980); cf. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 36 Sw. L.J. 97, 97-98 (1982).

9. See *Carson v. Kee*, 677 S.W.2d 283, 285 (Tex. App.—Fort Worth, 1984, no writ).

10. TEX. CRIM. PROC. CODE ANN. § 38.11 (Vernon Supp. 1986).

11. *Salayandia v. State*, 651 S.W.2d 825, 827 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd).

12. See *Hightower v. State*, 629 S.W.2d 920, 924 (Tex. Crim. App. 1981); *Bodde v. State*, 568 S.W.2d 344, 352 (Tex. Crim. App. 1978).

13. 686 S.W.2d 952 (Tex. Crim. App. 1985).

14. The elements of an informal marriage are contained in TEX. FAM. CODE ANN. § 1.91 (Vernon 1975) and are set forth *supra* note 5.

15. 686 S.W.2d at 954.

16. *Id.*

17. *Id.*

18. 678 S.W.2d 243 (Tex. App.—Corpus Christi 1984, no writ).

19. TEX. CRIM. PROC. CODE ANN. § 38.11 (Vernon Supp. 1986).

appeal. While acknowledging that in the event of conflicting evidence the existence of an informal marriage is usually submitted to the jury, the Corpus Christi court refused to address the defendant's contention because his counsel did not submit a requested charge on common-law marriage and did not object sufficiently to the trial court's charge. Although the defendant's counsel noted his displeasure with the court's handling of the common-law marriage issue,<sup>20</sup> the court of appeals held that the defendant's objection was not specific enough to inform the trial court of the nature of the complaint and that the defendant failed to tell the court that he wished to have the jury charged on the common-law marriage issue.<sup>21</sup>

*Alienation of Affection.* In *Greenway v. Greenway*<sup>22</sup> an ex-wife sued her husband's subsequent wife for alienation of affection. The trial court entered a summary judgment for the defendant and the ex-wife appealed. The husband had made statements to his estranged wife that he was having an affair with the defendant and that he wanted to marry her. The court of appeals held that the husband's statements to his wife were admissible to show that the husband's affections had been transferred from his wife to the defendant before the husband and wife were divorced.<sup>23</sup> This evidence, considered with the fact that the husband married the defendant one month after the divorce, created a reasonable inference that the husband was involved with the defendant prior to leaving his wife.<sup>24</sup> Thus, disputed facts were in issue, and the court reversed the summary judgment in favor of the defendant.<sup>25</sup>

*Criminal Nonsupport.* In *Lowry v. State*<sup>26</sup> the court of criminal appeals ruled that the affirmative defense provision of the criminal nonsupport statute<sup>27</sup> is unconstitutional under the due process clause of the United States Constitution.<sup>28</sup> The offending provision made it an affirmative defense to criminal nonsupport that the former spouse could not provide the support.<sup>29</sup> The court held that requiring a defendant to disprove his ability to provide support shifted to the defendant the burden of disproving an element of the offense, thus violating the principle of due process of law.<sup>30</sup>

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20. When asked by the trial court whether he had any particular objection, the defendant's counsel responded "only that of the common law." The trial court asked, "of what?" and the response was, "on that common law marriage." 678 S.W.2d 246-47.

21. *Id.* at 247.

22. 693 S.W.2d 600 (Tex. App.—Houston [14th Dist.] 1985, no writ).

23. *Id.* at 602.

24. *Id.*

25. *Id.* The court expressed some reservations about the affidavits that the ex-wife presented in support of her action. The affidavits contained hearsay, conclusions, and material not based on personal knowledge. *Id.* at 601. See TEX. R. CIV. P. 166-A(e).

26. 692 S.W.2d 86 (Tex. Crim. App. 1985).

27. The statute provides that "An individual commits an offense if he intentionally or knowingly fails to provide support that he can provide and that he was legally obligated to provide for his children younger than 18 years, or for his spouse who is in needy circumstances." TEX. PENAL CODE ANN. § 25.05(a) (Vernon 1975).

28. 692 S.W.2d at 88; see U.S. CONST. amend. XIV, § 1.

29. TEX. PENAL CODE ANN. § 25.05(f) (Vernon 1975).

30. 692 S.W.2d at 87. Since the state must prove the defendant's ability to provide support, requiring the defendant to prove his inability to provide support as an affirmative defense

*Loss of Consortium.* Evidence of prior marital discord is properly admissible by a defendant to rebut a loss-of-consortium claim.<sup>31</sup> In *Pool v. Ford Motor Co.*<sup>32</sup> the husband sought damages for an alleged defective product that had caused him injury, and his wife made a claim for loss of past and future consortium due to her husband's injuries. The defendant responded with evidence that the husband had filed suit for divorce and that the couple had been and were presently separated. The trial court refused to admit the evidence and ultimately ordered remittitur of the damages for the loss-of-future-consortium claim. The Texarkana court held that the evidence offered by the defendant directly responded to the plaintiff's proof of material elements of the loss-of-consortium claim (both past and future),<sup>33</sup> but that the excluded evidence, if admitted, would not have resulted in unfair prejudice.<sup>34</sup> The Texas Supreme Court held that exclusion of the evidence was harmless as to the loss of past consortium because evidence of estrangement was before the jury.<sup>35</sup> The court also said that the evidence of contemplated divorce would have been relevant to the loss of future consortium, but that the recovery on that ground had been remitted.<sup>36</sup>

A spouse's right to maintain a cause of action for loss of consortium arising from the other spouse's injuries is derivative of the tortfeasor's liability to the injured spouse.<sup>37</sup> Thus, if the injured spouse's cause of action is barred by the Texas Workers' Compensation Act,<sup>38</sup> the complaining spouse's action under the Act is also barred.<sup>39</sup> In *Reed Tool Co. v. Copelin*<sup>40</sup> the Texas Supreme Court held that the wife's common-law cause of action for intentional impairment of consortium was not barred by the Act because it does not exempt employers from common-law liability for intentional injuries.<sup>41</sup> On an appeal after remand<sup>42</sup> a Houston court of appeals held that intent to maintain an unsafe workplace could supply the necessary intent to support the wife's claim and to avoid the bar imposed by the Workers' Compensation Act.<sup>43</sup> Intent to cause a particular consequence is not limited to those results which the employer desires but may also include those which he

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deprives him of due process. See *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975); *In re Winship*, 397 U.S. 358, 368 (1970).

31. *Pool v. Ford Motor Co.*, 29 Tex. Sup. Ct. J. 301, 305-06 (April 2, 1986), *aff'g in part and rev'g in part* 688 S.W.2d 879 (Tex. App.—Texarkana 1985).

32. 29 Tex. Sup. Ct. J. 301 (April 2, 1986).

33. 688 S.W.2d at 882-83.

34. *Id.* at 883; see TEX. R. EVID. 403.

35. 29 Tex. Sup. Ct. J. at 305-06.

36. *Id.* at 306.

37. See *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 738-39 (Tex. 1980); *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978).

38. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).

39. *Reed Tool Co.*, 610 S.W.2d at 739.

40. 610 S.W.2d 736, 739 (Tex. 1980).

41. See *Middleton v. Texas Power and Light Co.*, 108 Tex. 96, 108, 185 S.W. 556, 560 (1916).

42. *Copelin v. Reed Tool Co.*, 679 S.W.2d 605, 606 (Tex. App.—Houston [1st Dist.] 1984, no writ).

43. *Id.* at 608.

knows are certain, or substantially certain, to result from his act.<sup>44</sup> The employer is liable for the unintended consequences of his intentional invasion of the employee's legally protected interest.<sup>45</sup> The court of appeals stated that a finding by the jury that the employer maintained an unsafe workplace supplied the intent necessary to maintain the wife's cause of action, and thus the trial court's grant of summary judgment for the employer was in error.<sup>46</sup>

## II. CHARACTERIZATION

*Community Presumption.* In *Whorrall v. Whorrall*<sup>47</sup> the Austin Court of Appeals addressed the presumption of community ownership that arises when real property is acquired during marriage. A couple purchased a house two weeks after their marriage with contributions from each spouse's separate funds. The husband subsequently filed for divorce and division of the community estate and then appealed the trial court's finding that the wife owned a separate interest in the house in proportion to her initial contribution toward the purchase.<sup>48</sup> First, the husband argued the presumption that property acquired during marriage belongs to the community estate.<sup>49</sup> The court held that the wife satisfactorily rebutted this presumption,<sup>50</sup> stating that a spouse may overcome this presumption by adequately and properly tracing the separate funds used in the purchase of the property<sup>51</sup> and noting that the wife made a down payment on the house from funds that she possessed before the marriage.<sup>52</sup> The husband then asserted that when title to real property acquired during marriage is taken in the name of both spouses, a presumption arises that one spouse intends to make a gift to the other of one-half of his separate contribution.<sup>53</sup> This presumption may be overcome by evidence clearly showing an absence of donative intent.<sup>54</sup> The wife testified that she made the down payment from her separate funds with the understanding that her husband would pay the remaining mortgage. The court, therefore, concluded that the wife did not intend to make a gift of one-half of the down payment.<sup>55</sup> Finally, the husband argued that when title to property acquired during marriage is taken in the names of both husband and wife, they presumptively agree that the property will belong to the com-

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44. *Bennight v. Western Auto Supply Co.*, 670 S.W.2d 373, 377 (Tex. App.—Austin 1984, no writ).

45. *Id.*

46. 679 S.W.2d at 608.

47. 691 S.W.2d 32 (Tex. App.—Austin 1985, writ dismissed).

48. This finding was based on the percentage of the purchase price that Mrs. Whorrall contributed as a down payment. *Id.* at 34.

49. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975); see *Brownlee v. Brownlee*, 573 S.W.2d 878, 879 (Tex. Civ. App.—El Paso 1978, no writ); *Poulter v. Poulter*, 565 S.W.2d 107, 110 (Tex. Civ. App.—Tyler 1978, no writ).

50. 691 S.W.2d at 35.

51. *Id.* (citing *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Bilek v. Tupa*, 549 S.W.2d 217, 220 (Tex. Civ. App.—Corpus Christi 1977, writ refused n.r.e.)).

52. *Id.*

53. See *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975).

54. *Cockerham*, 527 S.W.2d at 168.

55. 691 S.W.2d at 35.

munity. No such presumption exists, of course, in spite of some careless dicta cited by the husband.<sup>56</sup> Without commenting on the husband's argument, the appeals court stated that the conflicting testimony on the couple's agreement as to ownership of the house presented a question of credibility that should be left to the fact finder.<sup>57</sup> Thus, the court upheld the trial court's characterization of the ownership interest in the house.<sup>58</sup>

In *Kiel v. Brinkman*<sup>59</sup> the husband's parents, unable to pay the mortgage on a house, conveyed the property to their married son with the understanding that the son would pay the mortgage and hold the parents harmless in that regard. Upon the son's divorce the judgment did not dispose of the property, and the son later sought an adjudication to quiet title to it. The ex-wife contended that the property was not a gift because the parents conveyed it in consideration of the son's payment of the debt. The court ruled, however, that the ex-wife had made no showing that the parents intended to convey the land specifically in exchange for their son's assumption of the debt and concluded that the land was the son's separate property.<sup>60</sup> The result seems clearly contrary to an objective analysis of the transaction. The parents may have made a gift of their equity in the house, but the assumption of the mortgage along with the son's agreement to exonerate his parents from liability constituted a community purchase.

The ex-husband in *Taylor v. Taylor*<sup>61</sup> appealed the finding that certain real property was characterized as the ex-wife's separate property, when the ex-wife bought the property with income distributions from a trust for her benefit created by her parents. The trust corpus consisted of a ladies' dress shop, and the trust agreement provided that the trustee had discretion to retain the income and profits of the store for expansion of the business. The court, therefore, held that the income and profits from the store were "not only a part of the corpus of the trust estate, but were the principal assets of the trust."<sup>62</sup> Thus, the accumulated income distributed from the trust to the wife was her separate property, as was the property that she purchased with the distributions.<sup>63</sup>

*Tracing and Commingling.* In *Cook v. Cook*<sup>64</sup> the wife at the inception of the marriage owned a house and a car. She exchanged the house in the purchase of the parties' homestead and traded the car in buying a pickup truck. The court concluded that since her separate property amounted to

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56. See *Gonzalez v. Guajardo de Gonzalez*, 541 S.W.2d 865, 868 (Tex. Civ. App.—Waco 1976, no writ); *Robbins v. Robbins*, 519 S.W.2d 507, 510 (Tex. Civ. App.—Fort Worth 1975, no writ).

57. 691 S.W.2d at 36; see *Benoit v. Wilson*, 239 S.W.2d 792, 796-97 (Tex. 1951).

58. *Id.*

59. 668 S.W.2d 926 (Tex. App.—Houston [14th Dist.] 1984, no writ).

60. *Id.* at 929-30. The trial court found that the husband in part had used community earnings to pay off a loan of money used to discharge the debt on the property. *Id.* at 928. The court did not address the issue of reimbursement for the community contribution.

61. 680 S.W.2d 645 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.).

62. *Id.* at 649.

63. *Id.* at 650.

64. 679 S.W.2d 581 (Tex. App.—San Antonio 1984, no writ).

forty-three percent of the purchase price of the home and twenty-eight percent of the purchase price of the truck, on dissolution of the marriage she should receive as separate property the same percentage of the items purchased.<sup>65</sup> Holding that much of the property had been mischaracterized as community, the appellate court found an unjustified unequal division of the property and reversed and remanded for a redivision of the marital estate.<sup>66</sup>

The presumption under section 5.02 of the Family Code that all property on hand at the dissolution of marriage is community property<sup>67</sup> may be rebutted by tracing and clearly identifying the property claimed as separate.<sup>68</sup> *Smith v. Smith*<sup>69</sup> was a dispute as to the deceased husband's estate. Prior to his death the husband had sold all his separate property and deposited the proceeds into an account that contained community funds. The court held that by establishing the sales price of the separate property the claimants did not trace it when the proceeds were not on hand in a commingled or segregated account; thus, the presumption of community ownership was controlling.<sup>70</sup> This was a case in which the plaintiffs should have made an alternative claim for reimbursement. Contrary to the usually expressed view, maintenance of a balance of the amount of the claimed reimbursement in an account from which reimbursement is claimed should be irrelevant to such a claim. Reimbursement is not a tracing operation but establishment of a debt. Hence, the status of a fund into which reimbursable funds have been placed is beside the point.

*Interspousal Partitions.* In instances when ambiguity exists as to their intention to partition their property, spouses' efforts to produce a joint tenancy from community property have encountered pronounced judicial resistance,<sup>71</sup> and the apparent hostility of the courts to the notion of creating a joint tenancy by partitioning community property seems generally unwarranted.<sup>72</sup> Judicial reluctance to recognize the process has been motivated in

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65. *Id.* at 583-84. The court refused to consider improperly introduced evidence of a community interest in a profit-sharing account. *Id.* at 584.

66. *Id.* at 585-86.

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

68. See *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973).

69. 694 S.W.2d 426 (Tex. App.—Tyler 1985, writ ref'd n.r.e.).

70. *Id.* at 433. A finding that property was once separate and a valuation of that property does not accomplish a proper tracing and identification. See *id.* The claimants did not plead or argue for reimbursement.

71. See *Maples v. Nimitz*, 615 S.W.2d 690, 693-95 (Tex. 1981); *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966); *Hilley v. Hilley*, 161 Tex. 569, 574, 342 S.W.2d 565, 568 (1961).

72. A large part of the confusion surrounding interspousal partitions stems from the unusual set of facts that first presented the issue to the Texas Supreme Court. In *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961), the spouses directed a broker to purchase shares of stock with community funds. The husband further instructed the broker that the stock certificates should be issued in the spouses' names as joint tenants. There was no suggestion that either spouse intended to make a gift to the other. Although a long-standing rule precluded spouses from changing the character of community property to separate property by mere agreement, the Texas Constitution had been amended in 1948 to allow partition of community property to create separate property of each. The Hilleys, however, had not stated that they were entering



some degree by a concern that spouses may unwittingly forfeit community property rights in an attempt to achieve a right of survivorship.<sup>73</sup> The Texas Supreme Court has, therefore, required that the intention of the parties to enter into a partition of community property be made explicit.<sup>74</sup>

In the most recent instance, the San Antonio court showed excessive resistance to the spouses' efforts to create joint tenancies with apparent aid of their bankers. Over the years 1974 to 1981 the husband and wife in *Jameson v. Bain*<sup>75</sup> had deposited community funds into several joint accounts with the right of survivorship. For four of the accounts, which were opened during the years 1974 to 1978, the spouses signed a partition agreement on the back of the account card *after* executing a joint tenancy agreement with respect to each account. For accounts that were opened in 1981 the parties executed a joint tenancy agreement but did not sign a partition agreement. When the husband died, the wife withdrew the funds from all of the accounts and claimed them as her separate property. The executor of the husband's estate then brought suit for a declaration that all funds were community property, and the trial court so found.<sup>76</sup> On the wife's appeal the San Antonio Court of Appeals held that a joint tenancy had not been created in any of the accounts because a partition of the community funds was not accomplished prior to the joint tenancy agreement.<sup>77</sup> In this respect the court followed *Williams v. McKnight*,<sup>78</sup> in which the supreme court in 1966

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into a partition, although the intention could have been easily inferred. Although the court was prepared to assume that the instructions given to the broker in the presence of both spouses and the issuance and acceptance of the certificates met the requirement for a written survivorship agreement, the majority of the court was not willing to allow the extinction of the community property and its transmutation into a species of separate property by mere inference. *See id.* at 574-75, 342 S.W.2d at 568.

73. *See* *Maple v. Nimitz*, 615 S.W.2d 690, 695 (Tex. 1981). Whether the courts should countenance such agreements when both spouses probably do not appreciate all the legal consequences of their act is a legitimate question to ask, because a joint tenancy created by a partition of community property is a species of separate property. By their partition the spouses lose all the rights that community ownership entails. First, the creditors of either spouse can probably reach only half of joint tenancy property, although some jurisdictions would not allow any of it to be reached except by joint creditors of both spouses. Second, the right of survivorship inherent in the joint tenancy excludes testamentary disposition by either spouse and also precludes the first decedent's heirs from taking by intestacy. Third, because a joint tenancy is a species of separate property, it cannot be divided other than equally on divorce. Fourth, the parties cannot reconvert separate property into community property. Although these are valid concerns, this is only one of thousands of instances when citizens do not, and cannot, appreciate all the legal ramifications of their acts. Moreover, requiring spouses to make an explicit partition before creating a joint tenancy will not supply this knowledge. *See generally* Report of Comm. on Estate Planning and Drafting: Inter Vivos Transfers and Property Ownership, Probate and Trust Division, *Severing Joint Property Interests*, 16 REAL PROP. & TR. J. 435, 441-46 (1981).

74. *See* *Maples v. Nimitz*, 615 S.W.2d 690, 695 (Tex. 1981); *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966). In *Williams* the court went a step further to say that community property must be transmuted into separate property prior to making the joint tenancy agreement, 402 S.W.2d at 507. The court said that this process was required by *Hilley*, which did not so state.

75. 693 S.W.2d 676 (Tex. App.—San Antonio 1985, no writ).

76. *Id.* at 678.

77. *Id.* at 679.

78. 402 S.W.2d 505, 507 (Tex. 1966).

stated that *Hilley v. Hilley*<sup>79</sup> had already laid down the rule of prior partition in 1961. *Hilley*, however, pronounced no such rule,<sup>80</sup> and nothing in the constitution or statutes supports or ever supported such a conclusion. Although the court reiterated this unjustified assertion in *Maples v. Nimitz*,<sup>81</sup> the supreme court there alluded to the constitutional amendment of 1980 in a way that indicated that the whole issue might be reexamined.<sup>82</sup>

Just how the Texas Supreme Court arrived at its apparent conclusion that only explicit partitions are valid is difficult to perceive. In any dispute in which one of the spouses has died and only the survivor is available to testify, the admissible evidence of mutual intent is almost inevitably very limited. But if two people have entered into a survivorship agreement, the trier-of-fact should reasonably exercise some inference as to their intent toward achieving the stated objective. Somewhat imprecisely, but nonetheless clearly, the legislature has sought to supply this element of proof through a series of statutes amending the Probate Code and the Savings and Loan Act.<sup>83</sup> Because these statutory efforts have not satisfied the courts, the constitution should perhaps be amended to provide specifically for the creation of a right of survivorship in community property.

As to the pre-1980 accounts in *Jameson* the San Antonio court not only held that the first-executed joint tenancy agreements were ineffective but also that the partition agreements were invalid. Even if spouses fail to create a joint tenancy by not completing a partition first, there is no reason why the partition itself does not convert the community property into separate property. In the case of the 1981 accounts, the spouses merely agreed to create joint tenancies of their community property and neglected to make an explicit partition. Under the more permissive spirit of the 1980 constitutional amendment, however, an agreement to create a joint tenancy should be upheld if an intention to partition can be properly inferred from the spouses' object of achieving survivorship.<sup>84</sup> The principal stumbling block seems to be the two-step procedure laid down in *Williams v. McKnight*,<sup>85</sup> which was decided in 1966 before any part of the Family Code was enacted and before the constitution was amended. The underlying law and the changing conditions of society require a new approach to the entire problem. The law need not impede spouses from creating joint tenancies from their community property absent a prima facie showing of fraud demanding a close scrutiny of their apparent intent.

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79. 161 Tex. 569, 342 S.W.2d 565 (1961).

80. The court merely said in *Hilley* that a proper partition could be achieved in that way, not that partitions were required to be made in that way. See *id.* at 579, 342 S.W.2d at 571.

81. 615 S.W.2d 690, 695 (Tex. 1981).

82. See *id.* at 694-95.

83. For the most recent amendment see Act of June 8, 1981, ch. 319, §§ 1-2, 1981 Tex. Gen. Laws 895, 895-96.

84. See TEX. CONST. art. XVI, § 50; TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1986). The law was amended to enable spouses and those intending to marry to deal effectively with the character of their future acquisitions. Although in *Jameson* the court did not discuss the issue of whether the amendment eliminates the requirement of a prior partition, the court expressly rejected the proposition. 693 S.W.2d at 679.

85. 402 S.W.2d at 508.

*Joint Accounts.* Defining the incidents of mere joint accounts requires examination of the particular terms of their institution. Establishment of a joint account does not in and of itself give rise to a survivorship agreement.<sup>86</sup> Chapter XI of the Probate Code sets forth the requirements for creating a right of survivorship.<sup>87</sup> There must be a written agreement, signed by the decedent, that makes his interest survive to the other party.<sup>88</sup> The decedent's intent is controlling and must be ascertained from the agreement.<sup>89</sup> In addition, the account must be made to survive to the remaining party by the terms of the agreement.<sup>90</sup> Although no specific language is required for creating a right of survivorship, the courts have held that the agreement must vest ownership in the surviving party if the agreement creates a joint tenancy.<sup>91</sup> A mere right of survivorship can be the consequences of a third-party beneficiary contract.

*Retirement Benefits.* *Whorrall v. Whorrall*<sup>92</sup> in part involved the disposition of a special payment that a former employer conferred upon the husband at retirement. To qualify as a community interest such a payment must be an earned property right or based upon prior service during marriage.<sup>93</sup> The husband insisted that the payment was a supplementary retirement benefit based upon prior service to his employer. He did not urge that the payment was a gratuity. He argued only that the portion of the payment earned during marriage belonged to the community. A personnel manager for the husband's employer testified that the husband's productivity had declined in recent years and that company management wished to terminate his position. The manager also testified that the husband appeared willing to retire upon receiving the special payment. The court concluded from this testimony that the employer offered the payment to the husband as an incentive to retire from his unproductive position.<sup>94</sup> Further testimony established that this type of payment was purely discretionary and was not made on an employee-wide scale. The court concluded that the payment did not qualify as a retirement benefit and thus was entirely community property.<sup>95</sup>

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86. *Chopin v. InterFirst Bank Dallas*, 694 S.W.2d 79 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

87. *Id.* at 83.

88. TEX. PROB. CODE ANN. § 439(a) (Vernon 1980).

89. Extrinsic evidence may not be admitted to prove the decedent's intent. *Sheffield v. Estate of Dozier*, 643 S.W.2d 197, 198 (Tex. App.—El Paso 1982, writ ref'd n.r.e.).

90. *Chopin*, 694 S.W.2d at 84.

91. See *Krueger v. Williams*, 163 Tex. 545, 551, 359 S.W.2d 48, 51-52 (1962) ("payable to the survivor" does not vest ownership); *Carnes v. Meador*, 533 S.W.2d 365, 369 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (checking account with the language "or to the survivor" held insufficient to create survivorship right).

92. 691 S.W.2d 32 (Tex. App.—Austin 1985, writ dism'd).

93. See *Cearley v. Cearley*, 544 S.W.2d 661, 665 (Tex. 1976) (payment represented deferred compensation earned during each month of employment); *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970) (payment on earned property right accrued over years of employment).

94. 691 S.W.2d at 38.

95. *Id.* Failure to report the payment on the proper retirement-withholding form operated as further proof that the payment was not a retirement benefit. *Id.*

In *Hardin v. Hardin*<sup>96</sup> the court characterized a trust set up by the Texas Dental Association as the husband's separate property because the trust constituted a gift.<sup>97</sup> The husband had been a consulting attorney to the Association for thirty-three years. After he retired, as an expression of its appreciation, the Association set up a trust for him from which he was allowed to receive payments for five years. The court reasoned that payment of benefits under the trust secured no benefit to the employer because the attorney had already retired at the time of the creation of the trust.<sup>98</sup> The benefits, therefore, constituted a gift.<sup>99</sup>

The husband in *Vines v. Vines*<sup>100</sup> contended on divorce that since his military retirement benefits vested upon his retirement in 1970, the benefits were deemed to be separate property under *McCarty v. McCarty*.<sup>101</sup> That case can be interpreted as holding that the Court intended military benefits to be a species of gratuity to military personnel.<sup>102</sup> The court, however, interpreted the Uniformed Services Former Spouses' Protection Act (USFSPA)<sup>103</sup> as a reversal of *McCarty* and affirmed the trial court's award of thirty percent of the military pension to the wife.<sup>104</sup>

*Life Insurance Proceeds.* When the surviving spouse is named as beneficiary of a policy on a spouse's life, Texas courts have long treated the designation as a gift to the beneficiary and thus an exception to the general rule that proceeds of life insurance purchased with community funds are community property.<sup>105</sup> In *Dent v. Dent*<sup>106</sup> the Fort Worth Court of Appeals refused to extend the exception to proceeds of a community policy on the life of a third person although the policy named one of the spouses as beneficiary.<sup>107</sup> In *Dent* an insurance policy on the life of the husband's father was purchased during the marriage with community funds. The father died prior to the couple's divorce leaving the husband as beneficiary. On appeal the wife contested the divorce court's characterization of the proceeds as the husband's separate property. The court of appeals reversed the lower court's decision, thus denying the husband's claim to the proceeds as his separate property. The trial court's holding would have amounted to approval of self-dealing on

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96. 681 S.W.2d 241 (Tex. App.—San Antonio 1984, no writ).

97. *Id.* at 243.

98. *Id.*

99. *Id.* The court further noted that although other retirement benefits paid to the husband were community property, the divorce court had discretion to award those benefits to the person who earned them. *Id.*

100. 683 S.W.2d 117 (Tex. App.—San Antonio 1984, no writ).

101. 453 U.S. 210 (1981).

102. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 36 Sw. L.J. 97, 109-10 (1982). For discussion of *McCarty* see *infra* notes 410-21 and accompanying text.

103. 10 U.S.C. § 1408 (1982). The USFSPA allows a court to treat pension benefits either as separate or community, depending on state law. See *id.* § 1408(c).

104. 683 S.W.2d at 118.

105. See *Brown v. Lee*, 371 S.W.2d 694, 696 (Tex. 1963).

106. 689 S.W.2d 521 (Tex. App.—Fort Worth 1985, no writ).

107. *Id.* at 522.

the part of the husband who contracted for the policy.<sup>108</sup>

### III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

*Disposition of Jointly-Managed Community Property.* In *Dalton v. Don J. Jackson, Inc.*<sup>109</sup> the Austin Court of Appeals held that a husband may not make a unilateral conveyance of his one-half interest in jointly-managed community property. A husband and wife signed an exclusive listing agreement with a real estate agent to sell community property subject to their joint management. A buyer submitted an offer to the agent and the husband accepted in writing. The wife died before signing the contract. When the husband refused to close the sale, the buyer sought specific performance of the contract to sell the entire property. The trial court ordered conveyance of the husband's one-half interest in the realty. On appeal the husband argued that section 5.22(c) of the Family Code forbids, as a unilateral partition, the sale of jointly-managed community property without joinder of both spouses.<sup>110</sup> In holding for the husband the court of appeals rejected the buyer's assertion that disposition of the case was controlled by *Williams v. Portland State Bank*.<sup>111</sup> In *Williams* the Texarkana court relied upon section 5.22(c) in holding that a husband, in executing a deed of trust to jointly-managed community property without joinder of his wife, created a valid lien upon his one-half interest in the property.<sup>112</sup> The Austin court noted that *Williams* had been criticized for subjecting community property to several, rather than joint, disposition and thus for allowing one spouse to achieve an involuntary partition of a community asset.<sup>113</sup> The court, therefore, concluded that the holding in *Williams* was contrary to section 5.22(c).<sup>114</sup> Hence, the court refused to follow *Williams* and reversed the trial court's order of specific performance.<sup>115</sup>

*Liability of Spouses to Third Persons.* In 1971 two husbands bought stock from the plaintiff and executed a promissory note as partial payment.

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108. *Id.* Operation of a presumption in favor of the surviving spouse was essential to the husband's claim, because he lacked authority to give his wife's interest to himself. See *Martin v. Moran*, 32 S.W. 904, 906 (Tex. Civ. App. 1895, no writ).

109. 691 S.W.2d 765 (Tex. App.—Austin 1985, no writ).

110. *Id.* at 766. TEX. FAM. CODE ANN. § 5.22(c) (Vernon 1975) provides generally that community property that is not subject to a spouse's sole management under § 5.22(a) is subject to the joint management of the spouses. See *id.* § 5.22(a). In *In re Wolfe*, 51 Bankr. 900 (Bankr. W.D. Tex. 1985), the court did not perceive the relevance of either § 5.22(a) or (c) in sustaining the validity of a security agreement covering household goods that the husband entered into alone while not in physical possession of the goods. *Id.* at 903-04. Following *In re Allen*, 725 F.2d 290 (5th Cir. 1984), the court also denied the spouses their right of lien avoidance under the Bankruptcy Code, 11 U.S.C. § 522(f) (1982). 51 Bankr. at 901-03.

111. 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ *dism'd*).

112. *Id.* at 127.

113. 691 S.W.2d at 767. See Dorsaneo, *Compulsory Joinder of Parties in Texas*, 14 Hous. L. REV. 346, 364 (1977) (questioning precedential value of *Williams*); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 89 (1975) (if a joint act is required for disposition of an interest, suit based on the acts of one spouse will not segregate that spouse's interest for purposes of judgment against only one spouse).

114. 691 S.W.2d at 768.

115. *Id.*

Neither of the makers' wives joined in the note. In 1981 the makers defaulted on the note and both were thereafter divorced. One of the husbands later became bankrupt. The payee pursued recovery against the other ex-husband and both ex-wives. The action against the ex-wives was based on the proposition that they were liable for community debts.<sup>116</sup> The jury found that the seller agreed to look only to the husbands for satisfaction of the debt and that neither wife impliedly assented to the debt. Thus, the supreme court held that the wives were not liable.<sup>117</sup>

In *Greve v. Cox*<sup>118</sup> the husband signed a real estate contract for the husband and wife as buyers. Earnest money was deposited with a title company, and the husband applied for a loan. After a second look at the property, the wife decided not to sign the contract. Contending that no binding contract existed, the couple sued the title company for return of the earnest money. The trial court awarded the money to the seller. The Dallas court held that the absence of the wife's signature did not affect the rights, duties, and liabilities of the husband and the seller under the contract.<sup>119</sup> A completed contract is shown by the four corners of the contract.<sup>120</sup> By the contract's terms the seller had the right to retain the cash deposit as liquidated damages.<sup>121</sup>

*Fraudulent Transfers.* Section 3.57 of the Family Code<sup>122</sup> provides that if a spouse transfers community property after the filing of a petition for divorce, the transfer is void with respect to the other spouse if the transfer was made with intent to injure the non-transferring spouse, and the person dealing with the transferor had notice of the intent to injure.<sup>123</sup> In *Sloan v. Sloan*<sup>124</sup> the couple separated in 1972, and the husband lived with another woman prior to the suit for divorce. A house was purchased in the name of both the husband and his companion, although all of the initial payment and all subsequent payments were made by the companion. After filing for divorce the husband transferred his property interest to his companion. The divorce court found the transfer void and awarded the husband and wife each a one-half undivided interest in the property. The appellate court reversed the judgment of the trial court as to the house and found that it was not commu-

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116. An overgeneralization of the holdings in *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975), and *Gleich v. Bongio*, 128 Tex. 606, 610, 99 S.W.2d 881, 883 (1937), was cited in support of this assertion.

117. *Williamson v. Dunlap*, 693 S.W.2d 373, 374 (Tex. 1985), *aff'g* 683 S.W.2d 544 (Tex. App.—Austin 1984); *cf. In re Jeter*, 48 Bankr. 404, 409 (Bankr. N.D. Tex. 1985) (bank's granting extension of time for payments on indebtedness jointly made by both spouses did not constitute bank's waiver of claim against wife).

118. 683 S.W.2d 535 (Tex. App.—Dallas 1984, no writ).

119. *Id.* at 536 (citing *Lefevere v. Sears*, 629 S.W.2d 768, 770 (Tex. Civ. App.—El Paso 1981, no writ); *Cowman v. Allen Monuments, Inc.*, 500 S.W.2d 223, 227 (Tex. Civ. App.—Texarkana 1973, writ *dism'd*)).

120. *Id.*

121. *Id.* at 537.

122. TEX. FAM. CODE ANN. § 3.57 (Vernon Supp. 1986).

123. *Id.*

124. 683 S.W.2d 751 (Tex. App.—Houston [14th Dist.] 1984, no writ).

nity property.<sup>125</sup> Even if the community presumption was applicable to characterize the husband's apparent interest in the property, in order to set aside the transfer under section 3.57 the wife had the burden of proving that her husband intended to defraud her and that the transferor knew of that intent.<sup>126</sup> The wife failed to provide evidence to meet this burden.<sup>127</sup> This was clearly a case of the husband's holding on a resulting trust for his friend and hence his conveyance to her could not have been a fraud on the community estate.

*Disposition of Solely-Managed Community Property: Constructive Fraud.* On filing for divorce the wife obtained an order from the court restraining her husband from changing the beneficiary designation of any life insurance policy.<sup>128</sup> A few days later the husband nevertheless changed the beneficiary of a policy on his life from his wife to his daughter of a previous marriage. The ex-husband died a few months after the couple was divorced. The ex-wife brought suit for the proceeds of the policy, but the court's opinion nowhere indicates the disposition of the policy in the divorce decree, apart from stating that it was subject to the sole control of the decedent. An implication may be drawn from the opinion of the court that the insurance policy was not disposed of by the divorce court.<sup>129</sup> The court nevertheless treated the change of beneficiary designation of the husband as a marital act dealing with community property and regarded his violation of the court order in doing so as irrelevant.<sup>130</sup> The court held that the appellant failed to show that the new beneficiary had any notice of intent of the insured to harm his wife within section 3.57<sup>131</sup> and that the amount by which the new beneficiary was benefited was fair in light of the size of the community estate.<sup>132</sup> The court further held that assets of the ex-husband's estate were sufficient to reimburse the ex-wife for any loss she had properly sustained and that her right of first recourse was against his estate rather than against the beneficiary.<sup>133</sup>

*Homestead: Nature of the Interest.* In *Johnson v. First Southern Properties*<sup>134</sup> the plaintiff purchased a condominium subject to covenants that the owner pay his share of common expenses of administration and maintenance

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125. *Id.* at 753. The statute, of course, applies only to community property. See TEX. FAM. CODE ANN. § 3.57 (Vernon Supp. 1986). The court considered evidence both that the house was not community property and that the wife had failed to meet her burden of proof under section 3.57. See 683 S.W.2d at 752-53.

126. 683 S.W.2d at 752-53; see TEX. FAM. CODE ANN. § 3.57 (Vernon Supp. 1986).

127. 683 S.W.2d at 753.

128. *Estate of Korzekwa v. Prudential Ins. Co.*, 669 S.W.2d 775 (Tex. App.—San Antonio 1984, writ dismissed).

129. See *id.* at 776-77.

130. *Id.* at 778.

131. TEX. FAM. CODE ANN. § 3.57 (Vernon Supp. 1986). The court expresses the opinion that the sole remedy for violation of the order was a motion for contempt, and that remedy was not sought. 669 S.W.2d at 778.

132. 669 S.W.2d at 777-78.

133. *Id.* at 778.

134. 687 S.W.2d 399 (Tex. App.—Houston [14th Dist.] 1985, writ refused n.r.e.).

and that the homeowners' council have a lien on each apartment for any unpaid assessments. The council was authorized to enforce the lien through nonjudicial foreclosure. The owner failed to make his monthly maintenance payments, and his condominium was foreclosed and sold to the defendant. In a proceeding to set aside the sale the plaintiff argued that his homestead rights were violated because the lien did not fall within any of the exceptions to the ban on forced sales of homesteads.<sup>135</sup> In rejecting the owner's argument the appellate court concluded that a lien arose at the time of purchase and hence before the owner established his homestead.<sup>136</sup> Thus, the court reached the disquieting conclusion that in that interval between acquisition and occupancy the owner could waive his homestead claim prospectively so that a lien could fix on the premises for non-payment of future expenses of upkeep.<sup>137</sup> "[T]he assessment lien constituted a valid preexisting debt which would overcome the homestead claim."<sup>138</sup>

A surviving spouse's right to use or occupy property as a homestead after the death of the other spouse<sup>139</sup> is presumed until a party presents affirmative proof of waiver of the right.<sup>140</sup> In *Hunter v. Clark*<sup>141</sup> a premarital agreement provided that the property presently owned by each of the parties would remain the separate property of that person and that the owner would have unrestricted power to control, manage, and dispose of the separate property during the marriage. The couple resided in the wife's separate house until the wife's death. The wife devised the house to her son, who claimed a right of exclusive occupancy as against the widower. The court looked to *Williams v. Williams*<sup>142</sup> to determine whether the premarital agreement waived the husband's homestead right.<sup>143</sup> The *Williams* agreement stated that each spouse's property would be free from any claim of the other spouse that might arise as a result of the marriage.<sup>144</sup> The agreement in the case at bar contained no such language.<sup>145</sup> Hence, the husband's right to continue to use and occupy the house was presumed until the son could present affirmative proof of waiver of the homestead right.<sup>146</sup> The court

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135. The Texas Constitution permits exceptions to the homestead exemption for (1) purchase money, (2) payment of taxes, and (3) work and material used for improvements. TEX. CONST. art. XVI, § 50; see also TEX. PROP. CODE ANN. § 41.001(b) (Vernon Supp. 1986) (setting forth the exceptions with more specificity).

136. 687 S.W.2d at 401.

137. *Id.*

138. *Id.* at 402. Although the court did not cite *Williams v. Williams*, 569 S.W.2d 876 (Tex. 1978), that case supports the proposition that a surviving spouse's homestead right may be waived prior to occupancy. See *id.* at 870.

139. TEX. CONST. art. XVI, § 52.

140. *Hunter v. Clark*, 687 S.W.2d 811, 817 (Tex. App.—San Antonio 1985, no writ).

141. *Id.*

142. 569 S.W.2d 876 (Tex. 1978).

143. 687 S.W.2d at 816.

144. *Williams*, 569 S.W.2d at 868.

145. 687 S.W.2d at 816.

146. *Id.* at 817. The court quotes section 5.45 of the Family Code in support of its holding. *Id.* This section puts the burden of showing the validity of a marital agreement upon the proponent of the agreement. TEX. FAM. CODE ANN. § 5.45 (Vernon Supp. 1986). The court does not disclose whether it grounded the presumption that a surviving spouse has the home-



concluded that the son had not presented the requisite proof.<sup>147</sup>

In *Ripley v. Stephens*<sup>148</sup> the husband owned, as his separate property, the house which he and his wife claimed as their homestead for purposes of the exemption from school ad valorem taxes for persons over age sixty-five.<sup>149</sup> The husband, however, was under the age of sixty-five, whereas the wife was over that age. Section 11.13 of the Tax Code provides for the school tax exemption on a residential homestead owned by any person over age sixty-five.<sup>150</sup> Although the wife qualified for the exemption *in abstracto*, only the owner of the residence may claim the exemption.<sup>151</sup> The husband was under the requisite age, and hence neither the husband nor the wife could advance the claim.<sup>152</sup>

*Homestead: Designation and Extent.* By legislative act<sup>153</sup> in 1983 as authorized by constitutional amendment<sup>154</sup> in 1983 the definition of the urban homestead was changed to one acre of land. Both the constitutional amendment and the statute provide that the new definition is retroactive,<sup>155</sup> thereby perpetuating all existing urban homesteads of not more than one acre. For awhile the interpretation of the retroactivity provision will remain in dispute, though there can be no serious doubt that the new definition applies to all debts arising after the effective date of the legislative change. For debts arising under the old law, however, doubts may persist for some time to come.

Three federal courts<sup>156</sup> sitting in Texas have tackled the question with somewhat questionable results. In *In re Barnhart*<sup>157</sup> a bankruptcy court of the northern district considered the applicability of the amended definition to debts arising prior to the change and concluded that the definition was retroactive.<sup>158</sup> In this instance the court's discussion was at a federal constitutional level: whether a state can validly affect pre-existing debts by extending its exemption laws. The attack on retroactivity was mounted under

stead right at issue on this section of the code, the Texas Constitution, or some other rule of law. See 687 S.W.2d at 817.

147. 687 S.W.2d at 817. The husband's assertion of a homestead tax exemption in favor of a home he owned but did not live in during the marriage did not affect his assertion that the wife's house was the couple's homestead. *Id.* at 815-16.

148. 686 S.W.2d 757 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

149. See TEX. CONST. art. VIII, § 1-b (authorizing legislature to allow exemption from ad valorem taxation for persons 65 years of age or older).

150. TEX. TAX CODE ANN. § 11.13 (Vernon Supp. 1986).

151. 686 S.W.2d at 759.

152. *Id.*

153. Act of June 19, 1983, ch. 976, § 1, 1983 Tex. Gen. Laws 5309, 5309-10, replaced by Act of June 15, 1985, ch. 840, § 1, 1985 Tex. Sess. Law Serv. 6209, 6210 (Vernon).

154. Tex. H.R.J. Res. 105, 68th Leg., 1983 Tex. Gen. Laws 6724, 6724-25; see TEX. CONST. art. XVI, § 51.

155. See Tex. H.R.J. Res. 105, 68th Leg., § 2, 1983 Tex. Gen. Laws 6724, 6724; TEX. PROP. CODE ANN. § 41.002(c) (Vernon Supp. 1986).

156. *In re Starns*, 52 Bankr. 405 (S.D. Tex. 1985); *In re Niland*, 50 Bankr. 468 (Bankr. N.D. Tex. 1985); *In re Barnhart*, 47 Bankr. 277 (Bankr. N.D. Tex. 1985).

157. 47 Bankr. 277 (Bankr. N.D. Tex. 1985).

158. *Id.* at 280-81.

the contract clause of the federal Constitution.<sup>159</sup> Under late nineteenth century decisions of the United States Supreme Court such changes in state laws have been declared ineffective to cover contractual debts antedating the amendment.<sup>160</sup> But in 1933 the Court upheld a Minnesota statute that, in a time of severe economic crisis, established a moratorium on payment of certain secured debts and so allowed the state police-power to prevail over the contract clause.<sup>161</sup> In *Barnhart* the court relied on this later authority to make the changed definition retroactive to cover pre-amendment debts.<sup>162</sup> The argument is dubious at best. The Texas economic crisis of 1983, if there was one, was certainly not of the magnitude of that to which the Minnesota police-power responded. A more outrageous application of the retroactively redefined urban homestead was in *In re Niland*,<sup>163</sup> however. Without any discussion of its possible invalidity another bankruptcy court gave effect to the 1983 legislation to invalidate a non-judicial foreclosure sale that occurred in August 1983, prior to the adoption of the constitutional amendment and the effective date of its implementing legislation.<sup>164</sup>

A federal district court for the southern district considered a different facet of the retroactivity problem in *In re Starns*.<sup>165</sup> There the debtor claimed an urban residential homestead exemption of a 2.26-acre tract in the town of Midway. He alleged that the tract had a value of \$10,000 or less at the time of homestead designation. A corporate creditor who had taken its 1982 contractual indebtedness to judgment sought an order from the court to lift the bankruptcy stay so that the creditor could foreclose its judgment lien in state court against the debtor's non-exempt property. The law in effect when the debtor contracted with his creditor defined the urban homestead exemption as land worth \$10,000, without improvements,<sup>166</sup> and thus would have exempted the entire tract. The debtor argued that retroactive application of the new rule<sup>167</sup> would violate principles of due process. Indeed, the general purpose of the change was to expand homestead protection in light of the diminishing value of the exemption relative to the market,<sup>168</sup> but if retroactive in its application its effect in this instance would be to

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159. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1.

160. See *Edwards v. Kearzey*, 96 U.S. 595, 607 (1877); *Gunn v. Barry*, 82 U.S. (15 Wall.) 610, 623-24 (1872).

161. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434-35 (1933); see also *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250-51 (1978) (contract clause violation); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 32 (1977) (contract clause violation); cf. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 194 (1983) (no contract clause violation); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 419 (1983) (no contract clause violation).

162. *In re Barnhart*, 47 Bankr. 277, 280-81 (Bankr. N.D. Tex. 1985).

163. 50 Bankr. 468 (Bankr. N.D. Tex. 1985).

164. *Id.* at 478.

165. 52 Bankr. 405 (S.D. Tex. 1985).

166. See Act of June 18, 1969, ch. 841, § 1, 1969 Tex. Gen. Laws 2518, 2518-19.

167. See TEX. PROP. CODE ANN. § 41.002(c) (Vernon Supp. 1986).

168. *In re Barnhart*, 47 Bankr. 277, 283 (Bankr. N.D. Tex. 1985). The *Starns* court notes another plausible, but fanciful, purpose of the amendment as described by commentators who were not privy to the deliberations. See 52 Bankr. at 413 n.18.

reduce the exemption. The court noted the inconsistency between the purpose of the amendment and its application in the case before it but nevertheless held that the debtor had not overcome the presumption of constitutionality of legislative acts.<sup>169</sup> In lifting the stay imposed on the creditor the court left the manner of determining the particular exempt acreage to the state court in the foreclosure proceeding.<sup>170</sup>

The so-called retroactivity provision in the constitutional amendment was a hastily conceived and somewhat clumsy drafting device to perpetuate existing urban homesteads defined in terms of value rather than area. Its interpretation should be evenhandedly applied. If the retroactive effect of the amendment cannot reach the enforcement of contractual obligations entered into under the old law, a correlative interpretation of the provision in the interest of debtors should also be applied. But retroactivity should also be avoided. Thus, for debtors and creditors alike it should relate back no further than the day on which the constitutional amendment took effect.<sup>171</sup>

As the court points out in *Starns*,<sup>172</sup> the urban business homestead and the urban residential homestead together make up the urban homestead, however defined. For reasons that are not altogether clear the debtor also claimed a .78 acre tract also located in Midway. The debtor had valued the alleged business homestead property at \$30,000, but its value at the time of asserted designation is not indicated. Without focusing on the absurdity of this exemption claim, which apparently could not qualify under either old or new exemption law, the court simply pointed out that its use was merely ancillary to the business activities<sup>173</sup> carried on at leased premises eleven miles away and thus could not come within the definition of business homestead property as enunciated in *Ford v. Aetna Insurance Co.*<sup>174</sup>

The facts of *In re Clafin*<sup>175</sup> are so nicely balanced that choosing between the merits of the parties' positions is enormously difficult. The question was whether a divorced mother with custody of minor children loses her homestead as a matter of law when she remarries and moves her family to the residence of her new husband, despite an agreement between the spouses that her prior home would continue to be the family homestead until she acquired a new home. The mother had resided with her children in her

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169. 52 Bankr. at 413 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955)).

170. *Id.* at 412. In *In re Rowe*, No. 284-20097, slip op. at 8 (Bankr. N.D. Tex., March 14, 1985), the court held that the one-acre exemption applied to an existing homestead as against claims asserted by the trustee in a bankruptcy proceeding filed after the effective date of the statute setting the one-acre exemption. The court, however, left for the decision of state courts any claim of judgment creditors whose liens had been filed prior to the statute's enactment. *Id.*, slip op. at 8-9.

171. This seems to have been the interpretation adopted in *Rowe*. See *supra* note 170.

172. 52 Bankr. at 408 n.5.

173. *Id.* at 415.

174. 424 S.W.2d 612, 615-16 (Tex. 1968); see *Haynes v. Vermillion*, 242 S.W.2d 444, 446 (Tex. Civ. App.—Fort Worth 1951, writ *ref'd n.r.e.*). Under the *Ford* test, the business homestead extends to property used for the operation of the business that is necessary to such business and not merely used in aid thereof. 424 S.W.2d at 615-16.

175. 761 F.2d 1088 (5th Cir. 1985).

separate homestead in Houston. She then moved to Austin to pursue a professional career, and there she lived with a man whom she later married. After the marriage the wife's children, who had apparently lived elsewhere for several months, joined the spouses, and the family continued to live in the husband's separate house in Austin. The family later moved to an apartment in Austin, although the husband retained his home. The spouses testified that they had agreed that either the Houston property would serve as the homestead for the family or would be sold and the homestead transferred to a new property to be acquired by the wife in Austin. The wife contracted to purchase a home in Austin but did not sell the Houston property, and the family did not move to the new property. In the wife's subsequent bankruptcy proceeding she claimed the Houston property as her homestead. The bankruptcy court concluded that the Houston premises were vacated only temporarily and remained the family's homestead. The court, therefore, set aside the Houston property to the wife as her homestead, and a lien creditor appealed.

The Fifth Circuit court held that the wife as a member of a new family had failed to establish the Houston property as the family homestead.<sup>176</sup> In so holding the appellate court apparently regarded the couple's agreement as irrelevant on the grounds that the new family never occupied the Houston premises and that the agreement constituted nothing more than a vague, contingent plan to move to Houston.<sup>177</sup> The court relied heavily on the 1972 Texas Supreme Court holding in *Burk Royalty Co. v. Riley*<sup>178</sup> for the conclusion that the wife's intent was irrelevant in light of the new family's actual use and occupancy of the husband's home in Austin.<sup>179</sup> Hence, the family's occupancy of the husband's home amounted to an abandonment of the Houston property's homestead character as a matter of law.

The resolution of the problem is indeed difficult and depends very much on which facts are emphasized. The appellate court regarded the establishment of the new family as a fact of great significance along with the fact that the new family's actual place of residence was in Austin.<sup>180</sup> The bankruptcy court, however, put controlling emphasis on the initial establishment of the Houston property as the homestead of the old family and the rule that its homestead character is not lost until abandonment is proved.<sup>181</sup> If the

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176. *Id.* at 1093.

177. *Id.* at 1091.

178. 475 S.W.2d 566, 567 (Tex. 1972); see *In re Cumpton*, 30 Bankr. 49, 51 (Bankr. N.D. Tex. 1983).

179. 761 F.2d at 1091.

180. *Id.* at 1091-92.

181. *Id.* at 1092. The Fifth Circuit commented that abandonment need not determine the resolution of the issue but noted that acquisition of a new homestead establishes as a matter of law the abandonment of the old homestead. *Id.* at 1092 n.3 (citing *In re Cumpton*, 30 Bankr. 49, 51 (Bankr. N.D. Tex. 1983); *Norman v. First State Bank & Trust*, 557 S.W.2d 797, 801 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.)). But a fundamental issue is whether a new homestead was established. See *In re Byrd*, 39 Bankr. 374, 377 (Bankr. W.D. La. 1984) (temporary move from Texas to Louisiana does not constitute abandonment of the Texas homestead).

couple's agreement was entered into before the move to Austin,<sup>182</sup> much can be said for the bankruptcy court's conclusion that the Houston premises were vacated only temporarily and hence remained the family's homestead. The call is very close, but if the spouse's agreement was made prior to any actual occupancy of the husband's home by the couple as husband and wife, the bankruptcy court's holding seems the better one.

A homestead is not abandoned when the claimant simply lives elsewhere temporarily and rents the home to tenants.<sup>183</sup> As the time away from the home progresses, however, it becomes factually more likely that a court will view non-occupancy as an abandonment. In proving abandonment a contestant need not show the claimant's acquisition of a new homestead, but when non-occupancy is factually coupled with a change of the claimant's marital status and the family continues to reside away from the original home, the argument for abandonment becomes stronger. The federal appellate court seems to have found this argument persuasive. On the other hand, while in Houston the mother was not merely maintaining a homestead as a single adult as the appellate court stated<sup>184</sup> but was maintaining a family homestead as the head of a family with three minor children, who continued to live with her in Austin after her remarriage. The bankruptcy court was not persuaded that the mere addition of a new husband to the family and the temporary occupancy of his home altered the mother's ability to claim the Houston homestead.

*Homestead: Filing and Enforcing Liens.* The Fifth Circuit court in *In re Daves*<sup>185</sup> held that a debtor's oral promise did not satisfy the formal constitutional and statutory requirements for creating a lien on homestead property, albeit under the circumstances a lien could properly fix on the homestead.<sup>186</sup> The debtor had obtained a series of unsecured loans for improvements on both his residence and business homestead. These loans were made in partial reliance on the debtor's promise to assign to the lender an existing recorded mechanic's lien for improvements. A subsequent release of the mechanic's lien made the debtor's compliance impossible. In response to the creditor's claim the bankruptcy court imposed an equitable lien in favor of the lender against both the properties based upon the debtor's agree-

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182. The mother seems to have moved to Austin without the children, but the facts supply no indication that she did not retain the Houston home for homestead purposes as she was entitled to do. See *Renaldo v. Bank of San Antonio*, 630 S.W.2d 638, 640 (Tex. 1982), in which the court stated that a divorced father could maintain a homestead for his child of whom he was merely the possessory conservator. See also *In re Barnett*, 33 Bankr. 70, 71-72 (Bankr. N.D. Tex. 1983) (divorced father with child support obligations entitled to real and personal property exemptions for a family).

183. See TEX. CONST. art. XVI, § 51; TEX. PROP. CODE ANN. § 41.003 (Vernon Supp. 1986); see also *In re Root*, No. 281-00035, slip op. at 2 (Bankr. N.D. Tex., June 29, 1981) (holding that rental of a portion of the claimant's residence did not reduce the homestead protection accorded the entire lot).

184. 761 F.2d at 1090, 1092.

185. 770 F.2d 1363 (5th Cir. 1985).

186. *Id.* at 1369.

ment to provide a valid lien.<sup>187</sup>

The federal appellate court held that no equitable lien could be impressed on the homestead because the creditor had not complied with the requirements of the constitutional and statutory provisions as to form.<sup>188</sup> Those provisions clearly require joinder of the wife in the creation of a lien for homestead improvements.<sup>189</sup> The wife made no representations to the lender with respect to placing a lien on the homestead. Thus, the court held that no lien was created under Texas law.<sup>190</sup> The court also rejected the lender's attempt to analogize a mechanic's lien to a vendor's lien, which arises by implication of law to secure payments of the purchase money.<sup>191</sup> The lender argued that the debtor's statements that he would place a valid mechanic's lien on the homestead property for the cost of improvement thereto gave rise to an equitable lien. The appeals court contrasted the statutory language authorizing homestead liens for improvement<sup>192</sup> and those securing purchase-money<sup>193</sup> and noted that the latter do not require formalities as strict as the former.<sup>194</sup> Under the circumstances no equitable lien could be imposed to the extent that monies were lent to make improvements on the homestead property.<sup>195</sup>

In *United States v. Chapman*<sup>196</sup> the United States had taken a judgment for unpaid excise taxes owed by the husband alone. The United States then sought to enforce a tax lien on residential property, occupied by the husband and wife, though title to the property was in the name of the taxpayer's daughter. The taxpayer had conveyed his home to his son, who later transferred it to the daughter. The family continued to live there, and several years later the daughter exchanged that house for the present home in which the couple lived.

The federal district court found that the transfers were made with intent to defraud the Internal Revenue Service from collecting taxes due and that the children took the property knowing of the parents' fraudulent intent. Thus, under Texas law the transfer was void as to the United States and subject to seizure and sale for satisfaction of the tax lien.<sup>197</sup> The taxpayer

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187. *Id.* at 1366.

188. *Id.* at 1369. The constitutional and statutory requirements for obtaining a lien for improvements against a homestead are: (1) a written contract, (2) signed by both spouses, and (3) recorded in the county where the homestead is situated. TEX. CONST. art. XVI, § 50; TEX. PROP. CODE ANN. § 53.059 (Vernon 1984).

189. *See supra* note 188.

190. 770 F.2d at 1369; *see also* *Great Eastern Life Ins. Co. v. Jones*, 526 S.W.2d 268, 269-70 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (note and deed of trust for improvements on homestead did not create lien because common-law wife did not sign either instrument); *Tezel & Cotter v. Roark*, 301 S.W.2d 179, 181 (Tex. Civ. App.—San Antonio 1957, writ ref'd) (no lien against homestead because the wife did not sign the contract).

191. 770 F.2d at 1370.

192. *See* TEX. PROP. CODE ANN. § 53.059 (Vernon 1984).

193. *See id.* § 41.001(b) (Vernon Supp. 1986).

194. 770 F.2d at 1370.

195. The court remanded for consideration of whether the lender had an implied vendor's lien on the business homestead property. *Id.* at 1370-71.

196. 756 F.2d 1237 (5th Cir. 1985).

197. *Id.* at 1240-41; *see* TEX. BUS. & COM. CODE ANN. §§ 24.02, 24.03 (Vernon 1968).

and his wife argued that the house was their homestead and that the wife was entitled to compensation from the proceeds of sale for her homestead interest.

The lower court found that neither of the parents had claimed the house as a homestead and that both had sworn that they occupied it as tenants of their daughter. Relying on the Texas Supreme Court's decision in *Stevens v. Cobern*,<sup>198</sup> the appellate court added that Texas law would probably not allow a homestead claim for a grantor who fraudulently conveyed the property to another because the fraudulent conveyance would be valid between the parties to the deed.<sup>199</sup> The court distinguished the contrary conclusion in the almost identical federal district court case of *United States v. Wilson*<sup>200</sup> on the ground that the claimants in that case did not disclaim any intent to occupy the premises as a homestead.<sup>201</sup> The court also stressed the fact that in this case the claimants had never had legal title to the house in which they lived.<sup>202</sup>

A federal tax lien is enforceable against the homestead<sup>203</sup> and is unimpaired by the debtor's transfer of the interest on divorce.<sup>204</sup> In *Harris v. United States*<sup>205</sup> the Internal Revenue Service had acquired a tax lien against the husband. In a subsequent divorce the homestead was awarded to the wife. She later sold the residence, and the Service claimed an interest in the proceeds in satisfaction of its lien. The trial court held that the United States had a valid tax lien against the homestead. On her appeal, the ex-wife argued that her homestead interest was superior to the tax lien and, alternatively, that the trial court incorrectly valued her interest in the homestead.

The Fifth Circuit court affirmed the district court's holding that the transfer of the ex-husband's homestead rights on divorce did not affect the validity of the existing tax lien.<sup>206</sup> The court agreed with the trial court's conclusion that a division of property on divorce is not a sale,<sup>207</sup> which would preclude the validity of the lien under the Internal Revenue Code.<sup>208</sup>

In valuing the ex-wife's homestead interest the court applied<sup>209</sup> the method of valuation suggested by the Supreme Court in *United States v. Rodgers*.<sup>210</sup> There the Court held that a nondebtor spouse must be compen-

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198. 213 S.W. 925 (Tex. 1919).

199. 756 F.2d at 1243-44 (citing *Texas Sand Co. v. Shield*, 381 S.W.2d 48, 55 (Tex. 1964)).

200. 500 F. Supp. 831 (N.D. Tex. 1980).

201. 756 F.2d at 1244; see *Wilson*, 500 F. Supp. at 833.

202. 756 F.2d at 1243-44.

203. *United States v. Rodgers*, 461 U.S. 677, 690-98 (1983). This is so even if the Texas homestead right is an estate in land, and not merely an exemption, and vests in each spouse an interest similar to an undivided life estate. *Id.* at 686.

204. *Harris v. United States*, 764 F.2d 1126, 1129 (5th Cir. 1985).

205. 764 F.2d 1126 (5th Cir. 1985).

206. *Id.* at 1129. The court appears to assume that the lien had fixed on the property prior to the divorce. See *id.* If the lien fixed subsequently, the divorce court's partition should have protected the wife's rights.

207. *Id.*

208. I.R.C. § 6323 (1982).

209. 764 F.2d at 1131. The district court used a six percent rate to value the ex-wife's estate. *Id.* at 1130.

210. 461 U.S. 677 (1985).

sated for the loss of a homestead interest when a lien for taxes due from the other spouse is enforced.<sup>211</sup> The illustration used in *Rodgers* to demonstrate the valuation of a homestead interest assumed the existence of a surviving nondebtor spouse.<sup>212</sup> In the more typical situation, as was the case initially in *Harris*, both spouses have a homestead interest in their home.<sup>213</sup> In addition, each spouse owns a contingent future possessory homestead interest subject to survivorship.<sup>214</sup> Finally, each spouse owns a remainder interest in a community home.<sup>215</sup> Only the nondebtor spouse's homestead interest is compensable upon foreclosure.<sup>216</sup> The court held that the Service was entitled to the husband's homestead interest as well as the husband's remainder interest in the property,<sup>217</sup> and that the lower court should have used actuarial tables to compute the interests of both ex-spouses in the property.<sup>218</sup>

In accordance with its opinion in *Harris* the Fifth Circuit court in *United States v. Molina*<sup>219</sup> reversed the lower court's valuation of a nondebtor spouse's homestead interest.<sup>220</sup> There the Internal Revenue Service foreclosed a tax lien against the spouses' homestead. The district court properly concluded that the wife's homestead interest was compensable under *United States v. Rodgers*<sup>221</sup> but incorrectly valued the spouses' interest as though it were claimed by the wife alone, rather than by both spouses.<sup>222</sup> The appellate court relied on its opinion in *Harris*<sup>223</sup> to require that when both spouses own the homestead, the estate must be valued using tables which account for the concurrent use of the property.<sup>224</sup>

The constitutional protection of the homestead has been improperly extended to the use of embezzled funds to pay for improvements to a previously existing homestead. In *Curtis Sharp Custom Homes, Inc. v. Glover*<sup>225</sup> a court fixed an equitable lien on the wife's undivided one-half interest in the homestead in favor of her defrauded employer. The judgment was not appealed, but in a subsequent suit to foreclose the lien the trial court granted summary judgment in favor of the husband and wife. The Dallas Court of Appeals affirmed the judgment, holding that the equitable lien imposed against a previously acquired homestead was unenforceable as a violation of

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211. *Id.* at 698 (citing I.R.C. § 7403 (1982)).

212. *Id.*

213. 764 F.2d at 1131.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. 764 F.2d 1132 (5th Cir. 1985). For a discussion of the lower court's disposition of *Molina* see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 39 Sw. L.J. 1, 22 (1985).

220. 764 F.2d at 1133.

221. 461 U.S. 677 (1983).

222. 764 F.2d at 1133. See *United States v. Molina*, 584 F. Supp. 1011, 1014 (S.D. Tex. 1984), *rev'd*, 764 F.2d 1132, 1133 (5th Cir. 1985).

223. *Harris v. United States*, 764 F.2d 1126, 1131 (5th Cir. 1985).

224. 764 F.2d at 1133.

225. 701 S.W.2d 24 (Tex. App.—Dallas 1985, writ *ref'd n.r.e.*).



constitutional homestead protection,<sup>226</sup> relying on *Barnett v. Eureka Paving Co.*<sup>227</sup> The court distinguished those cases that imposed a constructive trust on embezzled funds that were applied to a subsequently declared homestead.<sup>228</sup> In those cases, the court reasoned, a trust was imposed on the later-acquired property *ab initio*, and homestead designation did not protect the stolen funds.<sup>229</sup> The court simply ignored contrary authority more nearly in point.<sup>230</sup> In dissent Justice Akin argued the sounder approach that the wife's wrongdoing prevented the employer from complying with the constitutional provisions for imposing a lien on a homestead. By refusing to uphold the imposition of this lien, the dissent contended, the majority extended constitutional protection to the thief who uses stolen funds to improve his homestead.<sup>231</sup>

*Exempt Personalty.* Under the 1984 amendment to Bankruptcy Code section 522(m), stacking of state and federal exemptions is no longer permitted to married couples.<sup>232</sup> Hence, one debtor-spouse may not claim federal exemptions while the other spouse claims property exempt under state law.<sup>233</sup> In a case decided before the amendment took effect, the bankruptcy court allowed debtor-spouses to claim property as exempt under the different exemption systems.<sup>234</sup> In *In re Tillerson*<sup>235</sup> both debtor-spouses claimed as exempt part of an insurance policy on the life of the husband. The wife, who was the named beneficiary of the policy, claimed the federal exemptions under section 522(d)<sup>236</sup> on a portion of the cash surrender value of the policy, and the husband claimed a state exemption for the remaining value of the policy. The trustee objected to the claimed exemptions, contending that the policy's cash value could be exempted only under one exemption system.

The bankruptcy court denied the trustee's challenge.<sup>237</sup> The court considered Texas courts' liberality in allowing exemptions and the fact that the debtors' petition was filed prior to the effective date of the amendment.<sup>238</sup> The court further held that a joint filing by the insured husband and beneficiary-wife did not prevent the husband from claiming the policy as exempt

226. *Id.* at 28; see TEX. CONST. art. XVI, § 50.

227. 234 S.W. 1081 (Tex. Comm'n App. 1921, holding approved).

228. *First State Bank v. Zelesky*, 262 S.W. 190, 192 (Tex. Civ. App.—Galveston 1924, no writ) (constructive trust applied to embezzled funds used to purchase home); *Smith v. Green*, 234 S.W. 1006, 1008 (Tex. Civ. App.—Amarillo 1922, writ ref'd) (partnership funds used to improve homestead that was later exchanged for another was subject to constructive trust).

229. 701 S.W.2d at 25-26.

230. See *In re Hunter*, No. BK-4-350, slip op. at 14 (N.D. Tex., Apr. 7, 1967); *Baucum v. Texam Oil Corp.* 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).

231. 701 S.W.2d at 29 (Akin, J., dissenting).

232. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 306, 98 Stat. 333, 353.

233. See 11 U.S.C.A. §§ 522(b), 522(m) (West 1979 & Pam. Supp. 1986).

234. *In re Tillerson*, 49 Bankr. 11, 12-13 (Bankr. N.D. Tex. 1984).

235. 49 Bankr. 11 (Bankr. N.D. Tex. 1984).

236. 11 U.S.C. § 522(d) (1982).

237. 49 Bankr. at 13.

238. *Id.* at 12. The amendment became effective for cases filed 90 days after July 10, 1984, the date of enactment. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 553(a), 98 Stat. 333, 392.

under state law.<sup>239</sup> In so holding the court noted that the state exemption is designed to protect the family, and that from its inception the Texas rule in favor of the life-insurance exemption has provided that a policy which names a family member as beneficiary is exempt.<sup>240</sup> The court found no Texas case holding that a wife before the bankruptcy court is not a member of her husband's family.<sup>241</sup> The court, therefore, allowed the claimed exemptions.<sup>242</sup> Noticeably absent from the court's opinion is a determination of the wife's ability to claim the policy when her existing creditors could not have reached her interest therein and she lacked any management powers over that policy. If the policy was community property solely managed by the husband, the wife's non-tortious creditors could not reach it for the satisfaction of her debts and, therefore, the wife could not claim the policy as exempt *in abstracto*.<sup>243</sup>

In *Perkins v. Perkins*<sup>244</sup> the El Paso Court of Appeals held that civil service retirement benefits are not exempt from garnishment.<sup>245</sup> The court relied solely on its reasoning in *United States v. Fleming*.<sup>246</sup> In *Fleming* the court held that military retirement benefits are the debtor's property and not "current wages" within the constitutional prohibition.<sup>247</sup>

In *In re Rowe* the court drew a distinction between items of "normal household use" and "luxury items which were acquired for speculative or investment purposes."<sup>248</sup> The former could be claimed as exempt under the Bankruptcy Code<sup>249</sup> and the Property Code,<sup>250</sup> whereas the latter could not.<sup>251</sup> The court also reiterated the holding in *In re Wahl*<sup>252</sup> that the item limitation of \$200 under section 522(d)(3) applies to individual items of table silver because "each particular knife, fork or spoon is a separate item, although the items are the same pattern and constitute a 'set' of silverware."<sup>253</sup>

239. 49 Bankr. at 12. The court cites *In re Cannady*, 653 F.2d 210, 213 (5th Cir. 1981), as authority for allowing a spouse to claim federal exemptions even though the other spouse has claimed a family exemption under state law. 49 Bankr. at 12.

240. 49 Bankr. at 12 (citing TEX. PROP. CODE ANN. § 42.002(7) (Vernon 1984)).

241. *Id.* at 13. Hence the court was free to find that the wife was a member of the insured's family under the facts in issue. *Id.*

242. *Id.*

243. See 11 U.S.C. § 522(d) (1982); TEX. FAM. CODE ANN. § 5.22 (Vernon 1975). *But see In re Barnes*, 14 Bankr. 788, 790 (Bankr. N.D. Tex. 1981) (husband not limited to exempting his community half of the wife's income tax refund when a joint petition is filed and the refund is community property under the sole management of the wife).

244. 690 S.W.2d 706 (Tex. App.—El Paso 1985, writ ref'd n.r.e.).

245. *Id.* at 708.

246. 565 S.W.2d 87 (Tex. Civ. App.—El Paso 1978, no writ).

247. *Id.* at 88-89; see TEX. CONST. art. XVI, § 28. If the wages are still in the hands of the employer, they are exempt. If the employee has received the wages, they are not exempt. See *id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 63.004 (Vernon Pam. 1986).

248. *In re Rowe*, No. 284-20097, slip op. at 19-20 (Bankr. N.D. Tex., March 14, 1985).

249. 11 U.S.C.A. § 522(d)(3) (West Pam. Supp. 1986).

250. TEX. PROP. CODE ANN. § 42.002(1) (Vernon 1980) ("home furnishings").

251. No. 284-20097, slip op. at 19-20.

252. 14 Bankr. 153, 156 (Bankr. E.D. Wis. 1981).

253. No. 284-20097, slip op. at 22.

## IV. DIVISION ON DIVORCE

*Property Settlement Agreements.* In February of 1980 a couple entered into a "Property Settlement and Support Agreement,"<sup>254</sup> in which they declared that they intended to separate. In the agreement the husband declared himself trustee of all his future military retirement pay for the benefit of his wife and child. The agreement set aside the homestead and particular personal property to the wife and other personal property to the husband. The parties further agreed that a divorce court should approve and incorporate the agreement in a divorce decree. The couple then separated, but later reconciled briefly, and it was not until January of 1982 that the husband sued for divorce.<sup>255</sup> At a hearing in April of 1982 the court, apparently constrained by the *McCarty* decision,<sup>256</sup> concluded that the agreement was not "just and right" under section 3.631 of the Family Code<sup>257</sup> and awarded all the husband's military retirement pay to the husband.<sup>258</sup> On appeal the ex-wife argued that the agreement constituted a marital partition<sup>259</sup> under Family Code section 5.42<sup>260</sup> and was, therefore, not subject to review by the divorce court.<sup>261</sup> The San Antonio court held that, by virtue of the fact that the trial court ruled on the fairness of the agreement, the judge implicitly treated the agreement as an agreement incident to divorce and not as a partition, which

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254. *Patino v. Patino*, 687 S.W.2d 799, 800-01 (Tex. App.—San Antonio 1985, no writ).

255. *Id.*

256. *McCarty v. McCarty*, 453 U.S. 210, 233 (1981) (holding that nondisability military retirement benefits are not divisible as community property by state courts). For discussion of *McCarty* and subsequent legislation removing its restrictions, see *infra* notes 410-21 and accompanying text.

257. The Family Code provides:

Agreement Incident to Divorce or Annulment

(a) To promote amicable settlement of disputes on the divorce or annulment of a marriage, the parties may enter into a written agreement concerning the division of all property and liabilities of the parties and maintenance of either of them. . . .

(b) In a proceeding for divorce or annulment, the terms of the agreement are binding on the court unless it finds that the agreement is not just and right. . . .

TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1986).

A judge's approval of such an agreement is not always apparent. In *K.D.B. v. C.B.B.*, 688 S.W.2d 684 (Tex. App.—Tyler 1985, no writ), the divorce decree expressly incorporated a portion of the parties' agreement regarding the property division but failed to incorporate provisions regarding conservatorship and support. In lieu of those latter provisions the decree ordered the wife to pay child support in accordance with the trial judge's own formula. *Id.* at 686. The court of appeals held that the action of the trial court in ordering the payment of child support amounted to a disapproval of the parties' entire agreement. *Id.* at 687.

For a discussion of an ambiguous provision in a property settlement agreement dealing with a life insurance policy, see *Estate of Welker v. Welker*, 683 S.W.2d 211, 213 (Tex. App.—Fort Worth 1985, no writ) (reversal necessary when fact issue arose as to whom decedent intended to maintain as beneficiary under agreement).

258. 687 S.W.2d at 801.

259. The Texas Constitution permits spouses to partition or exchange community property and change its character to separate property. TEX. CONST. art. XVI, § 15. The Family Code similarly repeats the constitutional authority with legislative embellishment. TEX. FAM. CODE ANN. §§ 5.42, .44, .45 (Vernon Supp. 1986).

260. TEX. FAM. CODE ANN. § 5.42 (Vernon Supp. 1986).

261. 687 S.W.2d at 801.

would not require his approval.<sup>262</sup> The court, therefore, affirmed that portion of the judgment which set aside the separation agreement.<sup>263</sup>

On its facts *Patino v. Patino* is a case in which the separation agreement clearly anticipated a divorce, but the proceeding that ultimately ensued two years later may not have been the divorce suit anticipated by the agreement. The court did not address this issue since the controversy was narrowed by the ex-wife's contention that the agreement was a marital partition and not a property settlement agreement as the appellate court ultimately concluded.<sup>264</sup>

If a couple enters into an unconditional marital partition of their community property as constitutionally provided<sup>265</sup> and one party later files for divorce, the partition is not properly subject to repudiation under section 3.631<sup>266</sup> unless an opponent to the partition can show that the agreement was entered into in anticipation of divorce.<sup>267</sup> Whether a partition constitutes such an agreement is a matter of fact subject to determination by a divorce court.<sup>268</sup> Any partition is, of course, also subject to attack under section 5.45,<sup>269</sup> but if the proponent of the partition satisfies the court that the agreement was entered into without fraud, duress, or overreaching, its terms are not subject to review under section 3.631 unless the court also finds that the parties anticipated a divorce and the partition was meant as a property settlement agreement.<sup>270</sup> Time is a vital factor in the resolution of this issue. If a petition for divorce has been filed prior to the execution of the partition or if the petition is filed immediately after its execution, a party may cogently argue a factual nexus between the agreement and the petition for divorce. But as the lapse of time after the consummation of the partition progresses, it becomes less likely that a court will treat the partition as an agreement made in anticipation of divorce if it is not so identified by the parties. The contents and tone of the partition may also insulate it from any assertion that it was made in anticipation of divorce.

In 1981, shortly after the United States Supreme Court decided the *McCarty* case,<sup>271</sup> a couple entered into a property settlement agreement in which they agreed that the husband-serviceman would have all of his military retirement benefits. The agreement was incorporated in the divorce decree. In 1983 the ex-wife filed a petition for a bill of review in which she

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262. *Id.* at 802.

263. *Id.* at 803.

264. *Id.* at 801-02.

265. TEX. CONST. art. XVI, § 15.

266. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1986).

267. *Id.*

268. *See Patino*, 687 S.W.2d at 802.

269. Section 5.45 provides that the proponent of an agreement or partition has the burden to prove, by clear and convincing evidence, that the other party gave informed consent and that the transaction was free of fraud, duress, or overreaching. TEX. FAM. CODE ANN. § 5.45 (Vernon Supp. 1986).

270. *See* TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1986).

271. *McCarty v. McCarty*, 453 U.S. 210 (1981). For specific discussion of military retirement benefits in the context of property division on divorce, see *infra* notes 410-53 and accompanying text.

asserted that the subsequent enactment of the Uniformed Services Former Spouses' Protection Act<sup>272</sup> discharged the basis of the agreement and thus made the decree subject to being set aside. The court of appeals disagreed, holding that the compromise agreement was binding on the parties and could not be set aside by bill of review.<sup>273</sup> The court cited<sup>274</sup> a prior decision<sup>275</sup> in which it had held that a change in judicial interpretation or view of applicable law after the entering of a final judgment does not provide a basis for bill of review.<sup>276</sup> The court further agreed with the ex-husband that a party is not prevented under Texas case law from bargaining away his separate property and noted that in the present case the agreement was voluntary and bargained for.<sup>277</sup>

In *Cluck v. Cluck*<sup>278</sup> the ex-wife sought enforcement of payments from her ex-husband due her under the parties' divorce decree. At a hearing on the ex-wife's motion in aid of collection of the judgment the parties entered into a settlement agreement, under which the ex-husband agreed to a new schedule of payments in satisfaction of the original decree, and the ex-wife released a judgment lien under that decree. The agreement was entered as the judgment of the court. The ex-wife later filed another motion for collection of the judgment, but this relief was denied; the trial court entered judgment incorporating the settlement agreement as binding in lieu of the original divorce decree.<sup>279</sup> On appeal the San Antonio court held that the agreed judgment was binding and enforceable, and entry of the final written order precluded further proceedings to enforce or collect sums allegedly due under the original divorce decree.<sup>280</sup> In rejecting the contention of the ex-wife that the lower court was without authority to modify the divorce decree, the appellate court stated that the order appealed from merely confirmed the settlement agreement and in no way modified the original decree.<sup>281</sup>

Texas decisions<sup>282</sup> conflict to some degree on the issue of raising contrac-

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272. 10 U.S.C. § 1408 (1982).

273. *Walker v. Walker*, 691 S.W.2d 102, 106 (Tex. App.—San Antonio 1985, no writ).

274. *Id.* at 104-05.

275. *Smith v. Manger*, 449 S.W.2d 347 (Tex. Civ. App.—San Antonio 1970, no writ).

276. *Id.* at 349.

277. 691 S.W.2d at 105.

278. 699 S.W.2d 246 (Tex. App.—San Antonio 1985, writ requested). Earlier disposition of *Cluck* is discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 Sw. L.J. 131, 166-67 (1984).

279. 699 S.W.2d at 248.

280. *Id.* at 250.

281. *Id.* at 251.

282. See, e.g., *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979) (although rules relating to the interpretation of contracts apply, an agreed judgment is accorded the same degree of finality as a contested final judgment); *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967) (a property settlement agreement incorporated in a decree—and apparently beyond the power of the court to decree—has whatever legal force the law of contracts will give it); *Colquette v. Forbes*, 680 S.W.2d 536, 538 (Tex. App.—Austin 1984, no writ) (a property settlement agreement that is incorporated into a divorce decree is treated as a contract, quoting *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984)); *Conner v. Bean*, 630 S.W.2d 697, 699-700 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (contract defenses which attack the validity of an agreement incorporated in a decree are barred as collateral attacks on a final decree of divorce); *Sorrels v. Sorrels*, 592 S.W.2d 692, 697 (Tex. Civ. App.—Amarillo 1979,

tual defenses to attack judgments that incorporate property settlement agreements. In 1979 the Texas Supreme Court in *Ex parte Gorena*<sup>283</sup> forbade the raising of contractual defenses in suits to enforce agreed judgments on the ground that such defenses constituted impermissible collateral attacks on prior judgments.<sup>284</sup> The court expressly disapproved<sup>285</sup> of the analysis in *Ex parte Jones*,<sup>286</sup> in which it had held that the law of contracts governs the enforcement of agreed judgments.<sup>287</sup> In 1984, however, the supreme court held in *McGoodwin v. McGoodwin*<sup>288</sup> that construction of a marital property agreement, though incorporated in a divorce decree, is governed by the law of contracts.<sup>289</sup>

In *Miller v. Miller*<sup>290</sup> the Dallas Court of Appeals resorted to the law of contracts in order to resolve an ambiguity in an agreed judgment.<sup>291</sup> The parties entered into a property settlement agreement, which expressly disposed of certain corporate stock but which failed to dispose of certain other stock. The agreement nevertheless contained a general provision disposing of personal property in the possession of the ex-husband, and the ex-husband argued that the omitted stock passed under this provision.<sup>292</sup> The court of appeals, however, reasoned on the analogy of rules governing contract interpretation that the resolution of an ambiguity in an agreed judgment depends on the intention of the parties as disclosed by the judgment and surrounding circumstances, and such a resolution permits the admission of extrinsic evidence.<sup>293</sup> The court then noted that the decree expressly disposed of all shares of stock except those in dispute and that both parties testified that they did not intend that the decree should include that stock.<sup>294</sup> The court,

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writ ref'd n.r.e.) (in an action to recover payments under a property settlement agreement incorporated in a decree, an ex-spouse is permitted to establish defenses of waiver, limitations, and payment); *Peddicord v. Peddicord*, 522 S.W.2d 266, 267 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (to allow a defendant to raise contractual defenses to a property settlement agreement incorporated in a decree would be to allow a collateral attack on that judgment); *Martinez v. Guajardo*, 464 S.W.2d 944, 946-47 (Tex. Civ. App.—San Antonio 1971, no writ) (a provision of a property settlement agreement incorporated into a judgment is interpreted by the laws relating to contracts, rather than laws relating to judgments).

283. 595 S.W.2d 841 (Tex. 1979).

284. *Id.* at 844. In *Gorena* the ex-husband was jailed for contempt for failing to make payments due his ex-wife under the divorce decree. *Id.* at 843. The ex-husband argued that the trial court was without power to hold him in contempt because the agreed judgment was enforceable only as a contract. *Id.* at 844. The court rejected the contention. *Id.*

285. *Id.* at 844-45.

286. 163 Tex. 513, 358 S.W.2d 370 (1962).

287. *Id.* at 520, 358 S.W.2d at 375.

288. 671 S.W.2d 880 (Tex. 1984).

289. *Id.* at 882. Hence the court concluded that under the facts before it a divorce decree approving a property settlement agreement by which one spouse is allowed to purchase the other spouse's interest in particular realty establishes a vendor's lien in favor of the seller. *Id.* The *McGoodwin* decision is discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 39 Sw. L.J. 1, 26 (1985).

290. 700 S.W.2d 941 (Tex. App.—Dallas 1985, no writ).

291. *Id.* at 951 (citing *Hutchings v. Bates*, 406 S.W.2d 419, 420 (Tex. 1966); *Ex parte Jones*, 163 Tex. 513, 520, 358 S.W.2d 370, 375 (1962)).

292. *Id.* at 950.

293. *Id.* at 951.

294. *Id.*

therefore, concluded that the divorce decree did not dispose of the stock.<sup>295</sup>

In *Herbert v. Herbert*<sup>296</sup> the Fort Worth court has attempted to reconcile these conflicting approaches. There the court of appeals held that in suits to enforce agreed judgments the parties may raise contract defenses in determining the measure of damages, but they may not do so if the effect would be to abrogate the final judgment.<sup>297</sup> In *Herbert* the property division of the parties in the divorce decree was based entirely upon a property settlement agreement. The agreement awarded the ex-husband certain personal items in the possession of the ex-wife and awarded the ex-wife half of the ex-husband's military retirement pay. On the ex-wife's failure to surrender some of the personalty, the ex-husband refused to send half of the retirement pay to her. The ex-wife, therefore, sought enforcement of the agreement, and the ex-husband urged failure of consideration and breach of contract.<sup>298</sup> The trial court found that the ex-wife had not substantially complied with the property settlement agreement and that she was, therefore, not entitled to recover any portion of her ex-husband's retirement pay.<sup>299</sup>

The court of appeals first noted that Texas cases were in conflict on the issue of allowing contractual defenses to the enforcement of agreed judgments.<sup>300</sup> After concluding that the trial court had improperly refused to submit to the jury tendered issues on specific performance and damages for breach,<sup>301</sup> the court said that contract defenses may be used only to determine the appropriate measure of damages, and in so holding the court said that it acted in accordance with the policies of protecting the finality and validity of agreed judgments.<sup>302</sup>

The holding of the court is loosely worded and its meaning is unclear. First, if the court meant that parties to an enforcement proceeding may plead and prove contractual defenses, its holding squarely conflicts with *Ex parte Gorena*.<sup>303</sup> Second, the court's statement that an agreed judgment is to be enforced as a contract<sup>304</sup> fails to take account of certain recently enacted provisions of the Family Code,<sup>305</sup> which set forth specific procedures for enforcement of property divisions. Third, when the court states that parties may not raise contract defenses if the effect would be "to abrogate totally the

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295. *Id.* The ex-husband further sought to claim the stock under an alleged oral partition agreement entered into after the parties' separation but before their divorce. *Id.* The Family Code requires that such agreements be in writing and subscribed by the parties. TEX. FAM. CODE ANN. § 5.44 (Vernon Supp. 1986). The court refused to recognize an exception to these requirements for agreements made after permanent separation. 700 S.W.2d at 951-52.

296. 694 S.W.2d 646 (Tex. App.—Fort Worth 1985, no writ).

297. *Id.* at 649-50.

298. *Id.* at 647-48.

299. *Id.* at 648.

300. *Id.* at 649.

301. *Id.* at 650.

302. *Id.*

303. 595 S.W.2d 841 (Tex. 1979). *Gorena* is discussed *supra* notes 283-87 and accompanying text.

304. 694 S.W.2d at 649.

305. TEX. FAM. CODE ANN. §§ 3.70-.77 (Vernon Supp. 1986).

final judgment,"<sup>306</sup> it implies that it would tolerate a partial abrogation of a final judgment, which is nonsense.

*Fiduciary Duty Affecting Division.* A couple was engaged to be married after a long and close relationship.<sup>307</sup> After the man had signed the offer to purchase a house, the couple agreed between themselves to "buy the residence jointly, use the property as their mutual marital homestead, borrow funds sufficient to purchase said property, using their collective borrowing power and credit reputation, and jointly repay such indebtedness from funds they would later earn."<sup>308</sup> Before the closing the man told the attorney to make the deed solely in his name, and the man alone signed the note and deed of trust. He did not tell his prospective wife of these changes but did tell her that she would not need to attend the closing. The couple resided in the house during their marriage and until their separation. The couple made substantial improvements on the house with community funds and community labor. No dispute arose that required them to consider the issue of ownership. On divorce the court imposed a constructive trust on the property so that the husband held an undivided one-half interest in the property for his wife's benefit.

On the husband's appeal the Austin court upheld the imposition of the constructive trust.<sup>309</sup> The court noted that the lower court had viewed the constructive trust as an enforcement of the parties' agreement, which occurred within a confidential and fiduciary relationship existing prior to the marriage.<sup>310</sup> In upholding the lower court's finding that a fiduciary relationship existed, the appellate court noted that the parties had been seeing each other for seven years, that they were living together and were engaged, and that they had agreed to purchase the property jointly.<sup>311</sup>

In *Johnston v. Mabrey*<sup>312</sup> the ex-husband bought a home after divorce, giving a down payment and a note for the remainder of the purchase price. The ex-wife began living with him while they were still unmarried. The ex-husband then executed a deed of the home to his ex-wife, who gave him a check for his down payment and this amount was used to renovate the house. The parties subsequently remarried. Several years later the wife commenced a proceeding for divorce and claimed the house as her separate property. The husband asserted that the property had been conveyed to her as trustee for both of the parties and in the alternative sought reimbursement for improvements. The trial court impressed a constructive trust on the house and ordered a sale so that the proceeds might be divided equally.

On appeal the wife claimed that no confidential relationship existed to support the constructive trust. The court stated that a confidential relation-

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306. 694 S.W.2d at 649-50.

307. *Andrews v. Andrews*, 677 S.W.2d 171, 172 (Tex. App.—Austin 1984, no writ).

308. *Id.*

309. *Id.* at 174.

310. *Id.* at 173.

311. *Id.* at 174.

312. 677 S.W.2d 236 (Tex. App.—Corpus Christi 1984, no writ).



ship may arise from moral, social, domestic, or personal relationships.<sup>313</sup> Without recitation of particular facts the court held that evidence established the existence of a confidential relationship.<sup>314</sup> The constructive trust was, therefore, upheld.<sup>315</sup>

In *Miller v. Miller*<sup>316</sup> the husband and others formed an electronics corporation. After the husband had acquired stock in the corporation he presented a shareholders' agreement to his wife for her signature. The agreement that the wife signed required in part that, in the event of divorce, the wife offer to sell her shares to her husband. Following their divorce the wife sought rescission of the agreement. The jury found that on the date of the agreement the prospects of the corporation were promising, that a confidential relationship existed between the parties, and that the agreement was not fair to the wife.<sup>317</sup> The trial court ruled that the divorce decree did not dispose of the stock and that the parties, therefore, held the stock as tenants in common. The trial court further ruled that the agreement was valid and ordered the ex-wife to sell her shares to the ex-husband.

The court of appeals upheld the jury's findings relating to the confidential relationship<sup>318</sup> and concluded that the husband had failed to discharge his burden of proving the fairness of the agreement.<sup>319</sup> The court adopted a rule imposing a fiduciary duty on a corporate officer or director to disclose knowledge of special matters relating to the business.<sup>320</sup> The husband, therefore, had a fiduciary duty to deal fairly with his wife in acquiring rights in the stock.<sup>321</sup> Citing numerous Texas decisions<sup>322</sup> the court cast the burden of proving fairness upon the husband.<sup>323</sup> The court considered three factors to determine the fairness of the agreement: (1) whether the fiduciary made full disclosure, (2) whether the other party had independent advice, and (3) the adequacy of the consideration.<sup>324</sup> Undisputed evidence established the lack of disclosure and independent advice.<sup>325</sup> With respect to the third factor, the court held that the husband had failed to discharge his burden by failing to prove that he did not gain any benefit from the agreement at

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313. *Id.* at 240 (citing *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1963)).

314. *See id.* at 240-41.

315. *Id.* at 241.

316. 700 S.W.2d 941 (Tex. App.—Dallas 1984, no writ).

317. *Id.* at 944.

318. *Id.* at 949. The opinion does not disclose whether this jury finding was based on the director-stockholder relationship or the husband-wife relationship. The appellate court appears to base its decision on both relationships. *See id.* at 945.

319. *Id.* at 949.

320. *Id.* at 946 (citing *Strong v. Repide*, 213 U.S. 419, 431-34 (1909); *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 159 P.2d 958, 970 (1945)).

321. *Id.*

322. *See Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508-09 (Tex. 1980); *Archer v. Griffith*, 390 S.W.2d 735, 739-40 (Tex. 1964); *Johnson v. Peckham*, 132 Tex. 148, 151-52, 120 S.W.2d 786, 787-88 (1938); *Ginther v. Taub*, 570 S.W.2d 516, 525 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

323. 700 S.W.2d at 946.

324. *Id.* at 947.

325. *Id.*

his wife's expense.<sup>326</sup> The court, therefore, concluded that the trial court erred in denying the wife rescission of the agreement.<sup>327</sup>

A fundamental question must be asked concerning *Miller*. Did the fiduciary relationship arise primarily from the marital relationship, that of community management, or that of corporate management? The court appears to base its holding on the relationships in both the marital and business context, although the latter is given greater discussion in the court's opinion.

*Dividing All the Property.* In *Odom v. Odom*<sup>328</sup> the parties were divorced in 1967 under an orally-rendered divorce decree which failed to provide for a property division. No written judgment was entered. In 1978 the ex-wife obtained a judgment that purported to set aside the earlier decree and awarded her "that portion of the retirement benefits to which she would be entitled had the marriage continued until 1978."<sup>329</sup> In 1982 the ex-wife sued for a partition of the retirement benefits pursuant to the latter judgment, and the ex-husband filed a bill of review to set aside the 1978 judgment. The trial court entered judgment partitioning the benefits in accordance with findings that the parties were divorced in 1967 and that the 1978 judgment was void.<sup>330</sup>

On appeal the San Antonio court affirmed the lower court's judgment, holding that the marriage was properly dissolved in 1967 and that the trial court correctly used the date of the 1967 judgment in calculating the community interest in the benefits.<sup>331</sup> The court noted that if a property division is severed from the divorce for separate trial, the decree becomes interlocutory until the property is divided.<sup>332</sup> The court further noted, however, that if a divorce decree merely fails to provide for division of property, the former spouses become tenants in common with a right of partition.<sup>333</sup> The record contained nothing to indicate that the division of the parties' community property had been severed from the divorce for separate trial.<sup>334</sup> The court, therefore, concluded that the 1967 decree rendered the parties tenants in common of their former community property and that the trial court prop-

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326. *Id.* at 947-48.

327. *Id.* at 949. With difficulty the court disposed of the wife's admission at trial that, even if she had been apprised of key facts regarding the agreement, she would have signed it anyway. *See id.* at 948-49. The ex-husband contended that the testimony negated both the materiality of the undisclosed facts and the causal relationship between the non-disclosure and the damage to the wife. With respect to the first contention the court held that the husband had failed to prove that knowledge of the facts would not have prevented the wife's signing, and with respect to the second contention that the wife's testimony could not stand as an admission that the breach of duty had no effect on her signing. *Id.*

328. 683 S.W.2d 135 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

329. *Id.* at 136.

330. *Id.*

331. *Id.* at 137.

332. *Id.* (citing *Vautrain v. Vautrain*, 646 S.W.2d 309, 315-16 (Tex. App.—Fort Worth 1983, writ dismissed); *Underhill v. Underhill*, 614 S.W.2d 178, 181 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.)).

333. *Id.* (citing *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970); *Taylor v. Catalon*, 140 Tex. 38, 41-42, 166 S.W.2d 102, 104 (1943)).

334. *Id.*

erly employed the date of the earlier decree in calculating the community interest in the benefits.<sup>335</sup>

The court's analysis has serious flaws. First, no judgment was ever entered in the 1967 suit.<sup>336</sup> Although the divorce appears to have been granted orally, the entry of a judgment was nonetheless required. In *Dunn v. Dunn*,<sup>337</sup> relied upon by the court in *Odom*, the issue before the court was whether a judgment could be entered pursuant to a prior oral rendition after the death of one of the parties.<sup>338</sup> There the court dealt only with the question of whether the surviving wife was entitled to have her motion to dismiss sustained prior to entry of the written judgment. In contrast neither party in *Odom* appears to have been concerned to complete the 1967 proceedings. Second, the trial court did not merely fail to divide some of the property; none of the property was divided in 1967. Hence, a final judgment could not be entered in the 1967 suit, and it should have been treated as a nullity.

*Property Not Subject to Division.* In *Taylor v. Taylor*<sup>339</sup> the ex-husband borrowed money for his own use or at his direction from an account containing funds belonging to his minor children. On divorce the trial court concluded that it did not have jurisdiction to order the ex-husband to repay the money.<sup>340</sup> On appeal the court reversed and remanded that portion of the lower court decision.<sup>341</sup> The court noted the presumption to the effect that a debt created by a spouse during marriage is an obligation of the community.<sup>342</sup> The court went on to say that pursuant to section 3.63(a) of the Family Code<sup>343</sup> a trial court has authority to order the payment or disposition of community debts in its division of the community estate.<sup>344</sup> The court, therefore, concluded that the trial court had jurisdiction to order the repayment of the ex-husband's debt.<sup>345</sup>

A trial court in its discretion is permitted to award one party an interest in a partnership, but not in specific partnership property when the other ex-spouse and a third party are partners.<sup>346</sup> Thus, in *Jones v. Jones*<sup>347</sup> the trial

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335. *Id.*

336. *Id.* at 136.

337. 430 S.W.2d 830 (Tex. 1969).

338. *See id.* at 831-32.

339. 680 S.W.2d 645 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.).

340. *Id.* at 647-48.

341. *Id.* at 650.

342. *Id.* at 648 (citing *Mortenson v. Trammell*, 604 S.W.2d 269, 275 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)).

343. Section 3.63(a) provides that "In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp. 1986).

344. 680 S.W.2d at 648.

345. *Id.* Joined with the suit for divorce was, of course, a separate suit to protect the interest of the minor children of the marriage. If the husband had squandered their money, they were capable of appealing an adverse ruling. Why their representative failed to assert their interest is not revealed.

346. *Jones v. Jones*, 699 S.W.2d 583, 586 (Tex. App.—Texarkana 1985, no writ).

347. *Id.*

court erred in awarding the wife money in a partnership checking account maintained by the husband and a third person and requiring the husband to encumber his interest in the partnership with an obligation to pay the wife a money judgment.<sup>348</sup> Such awards were not within the discretion of the trial court despite the fact that the husband's interest in the partnership was part of the community estate.<sup>349</sup>

In *Whorrall v. Whorrall*<sup>350</sup> the trial court determined that the husband owned as his separate property .009 of the parties' home as a result of a small initial contribution of his separate property toward the purchase of the home. The court nevertheless awarded the wife all of the husband's separate interest in the home along with all of the community interest in that property.<sup>351</sup> The Austin Court of Appeals held that a trial court has no authority to divest a spouse of a fee interest of separate realty, although requiring the wife to maintain a tenancy in common with a .009 interest was economically unrealistic and impracticable.<sup>352</sup> The court, therefore, concluded that the divestiture was not harmless error and plainly caused the rendition of an improper judgment.<sup>353</sup>

*Division on Remand.* An appellate court remanded a division of property to a divorce court, and the former wife sought discovery relating to acquisitions of the former husband after the decree of divorce. The court quashed her notice to take a deposition, and the ex-wife brought a proceeding for a writ of mandamus to force the trial court to accede to her request. The writ was denied.<sup>354</sup> The couple was already divorced, the remand did not have the effect of extending their marital status for purposes of property division, and the facts sought for discovery were, therefore, irrelevant to the remanded proceeding.<sup>355</sup>

*Reimbursement.* In *Anderson v. Gilliland*<sup>356</sup> a community mortgage was used to finance a significant part of residential construction on the wife's separate property. After the husband's death, his heir claimed that the community was due reimbursement for the enhanced value of the improvements, less half of the mortgage still owing. The court of appeals held that when both cost and enhanced value have been proved, the lesser of the two is the proper measure of reimbursement to the community.<sup>357</sup> The lesser amount

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348. *Id.*

349. *Id.*

350. 691 S.W.2d 32 (Tex. App.—Austin 1985, writ dismissed). A portion of the opinion discusses questions of characterization and is treated *supra* notes 47-58, 92-95 and accompanying text.

351. 691 S.W.2d at 34.

352. *Id.* at 36-37.

353. *Id.* at 37.

354. *Gordon v. Blackmon*, 675 S.W.2d 790, 794 (Tex. App.—Corpus Christi 1984, no writ).

355. *Id.* at 793-94.

356. 684 S.W.2d 673 (Tex. 1985).

357. 677 S.W.2d 105, 107 (Tex. App.—Dallas 1984), *aff'd in part and rev'd in part*, 684 S.W.2d 673 (Tex. 1985).

in this instance was cost. The Texas Supreme Court, however, held that measuring reimbursement by cost alone would enrich the benefited estate at the expense of the contributing estate, and the measure of the lesser of cost or enhancement would consistently give the benefited estate the best of all situations.<sup>358</sup> The court termed this result inequitable and, therefore, held that a claim for reimbursement should be measured by enhancement in value.<sup>359</sup> The court thus awarded one-half of the enhanced value to the decedent's estate, less one-half the mortgage remaining unpaid.<sup>360</sup>

On careful consideration the argument based on inequity seems misconceived. Receipt of benefits by a separate estate at the expense of the community estate can occur in three commonly-experienced ways. The non-owner spouse may use the community for the benefit of the other spouse's separate property, a spouse may use community property for the benefit of his own estate with the knowledge of the other spouse, or a spouse may so benefit his separate estate without knowledge of the other spouse. The last case is least common, and when it occurs in a fraudulent context a post-divorce action for damages may be available.<sup>361</sup> The other two situations are more commonly encountered: the community estate is used by a spouse for the benefit of the separate property of either spouse with full knowledge of the other spouse. Hypothetically, each spouse is, therefore, in the position to suggest that the advancement should be made with payment of interest. In my judgment such a suggestion by the "lending spouse" is almost certain to be met with outrage on the part of the other. Hence, for the law to award the value of enhancement in the separate property to which the advancement contributed is equally outrageous. Thus, the law seems prepared to impose terms to which spouses in ordinary conditions would not have agreed.

In *Anderson* the Texas Supreme Court relied in part<sup>362</sup> on the 1983 decision of the Fort Worth court in *Cook v. Cook*<sup>363</sup> in concluding that enhancement in value in the measure of reimbursement for community funds expended to improve separate property.<sup>364</sup> In *Cook* the husband had purchased real property prior to marriage.<sup>365</sup> During the marriage community funds were spent on improving the property. On remand the trial court, in accordance with *Anderson*, again ordered reimbursement measured by enhancement in value, and the ex-husband appealed to the Fort Worth court a second time. On this appeal the husband contested the trial court's measure of reimbursement, distinguishing *Anderson* on the basis that the present appeal concerned the division of marital property on divorce, whereas *Ander-*

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358. *Id.* at 675.

359. *Id.*

360. *Id.* For a preliminary discussion of *Anderson* see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 39 Sw. L.J. 1, 11-13 (1985).

361. See Logan v. Barge, 568 S.W.2d 863, 870-71 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

362. 684 S.W.2d at 675.

363. 665 S.W.2d 161 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.), *aff'd on remand*, 693 S.W.2d 785 (Tex. App.—Fort Worth 1985, no writ).

364. 684 S.W.2d at 674-75.

365. *Cook v. Cook*, 693 S.W.2d 785, 785 (Tex. App.—Fort Worth 1985, no writ).

son involved the probate of a will.<sup>366</sup> The Court nevertheless concluded that the language and reasoning of *Anderson* were applicable to a property division on divorce, noting further that the supreme court in its decision had relied in part upon the first appeal of the present case.<sup>367</sup>

In *Jones v. Jones*<sup>368</sup> the court considered the community's right to reimbursement due to enhancement of the husband separate business interests. The husband and his brother were the primary managing and operating officers of a business, as well as the only common stockholders. The court found that during the marriage the husband's salary was far below an amount commensurate to his actual worth to the business and ample funds were available to pay for the services rendered.<sup>369</sup> Under *Jensen v. Jensen*<sup>370</sup> the community is entitled to reimbursement for the value of time and effort expended by either or both spouses to enhance the separate estate of either, excluding that reasonably necessary to preserve the separate estate.<sup>371</sup> This amount is reduced by any compensation received for that time and effort in the form of salary, bonuses, and dividends.<sup>372</sup> Under this principle the court held in *Jones* that the community estate was entitled to reimbursement for its enhancement in the amount by which the husband's salary was inadequate.<sup>373</sup>

*Exercise of Discretion.* A trial court has broad discretion in making an appropriate division of community property on divorce.<sup>374</sup> Such a division will not be disturbed on appeal unless a clear abuse of discretion is shown.<sup>375</sup> Further, an appellate court may not merely substitute its discretion for that

366. *Id.* at 786.

367. *Id.*

368. 699 S.W.2d 583 (Tex. App.—Texarkana 1985, no writ).

369. *Id.* at 586.

370. 665 S.W.2d 107 (Tex. 1984).

371. *Id.* at 110.

372. *Id.* For extensive discussion of *Jensen* see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 SW. L.J. 131, 137-39 (1984); McKnight, *Reimbursement for Uncompensated Labor Rendered for a Closely-Held Corporation*, 3 ST. B. LIT. SEC. REP.: THE ADVOCATE, December 1984, at 8-14.

373. 699 S.W.2d at 586.

374. The Texas Family Code gives the trial court broad latitude in making a division that is "just and right." TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp. 1986); see *Tarin v. Tarin*, 605 S.W.2d 392, 393 (Tex. Civ. App.—El Paso 1980, no writ); *McKibben v. McKibben*, 567 S.W.2d 538, 539 (Tex. Civ. App.—San Antonio 1978, no writ); Comment, *Division of Marital Property on Divorce: What Does the Court Deem "Just and Right?"*, 19 HOUS. L. REV. 503, 503-25 (1982). A trial court is presumed to have exercised its discretion properly. *Jones v. Jones*, 699 S.W.2d 583, 585 (Tex. App.—Texarkana 1985, no writ). A trial court in its discretion may disregard a jury's answers to special issues concerning the division of the marital estate, because such answers are advisory only. *Barker v. Barker*, 688 S.W.2d 121, 122 (Tex. App.—Corpus Christi 1985, no writ).

375. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981); *McKnight v. McKnight*, 543 S.W.2d 863, 866 (Tex. 1976); *Cockerham v. Cockerham*, 527 S.W.2d 162, 173 (Tex. 1975); *Patt v. Patt*, 689 S.W.2d 505, 507 (Tex. App.—Houston [1st Dist.] 1985, no writ); *Hardin v. Hardin*, 681 S.W.2d 241, 243 (Tex. App.—San Antonio 1984, no writ); see also authorities cited in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 39 SW. L.J. 1, 32 n.299 (1985). In *Earp v. Earp*, 688 S.W.2d 245, 248 (Tex. App.—Fort Worth 1985, no writ), the court held that abuse of discretion is not a proper subject for a bill of review. The court stated that the ex-wife had failed to show a prima facie meritorious defense to her ex-

of the trial court, in that a just and right division is a matter lying solely within the discretion of the trial court.<sup>376</sup> Community property need not be divided equally, but the court must have some reasonable basis for decreeing an unequal division.<sup>377</sup> Among the factors that a court may look to in making an unequal division of community property are the relative earning capacities and business experience of the parties, the size of the respective separate estates, and the fault of either party in the breakdown of the marriage.<sup>378</sup>

When a court of appeals finds reversible error which materially affects the trial court's just and right division of the property, it must remand the division of the entire community estate.<sup>379</sup> Hence in *Jacobs v. Jacobs*<sup>380</sup> the Texas Supreme Court reversed an appellate court's decision that limited remand to specific properties.<sup>381</sup> In *Jacobs* the court of appeals had ruled that the trial court erred in characterizing certain property as separate or community and had struck certain reimbursement awards but had affirmed other portions of the lower court's division.<sup>382</sup> The court of appeals had remanded for a new division only that portion of the cause that affected the mischaracterized property.<sup>383</sup> The Texas Supreme Court held that a court of appeals must remand the entire community estate for a new division when it finds reversible error which materially affects the trial court's division.<sup>384</sup> The court also reiterated its holding in *McKnight v. McKnight*<sup>385</sup> that an appellate court must not substitute its discretion for that of the trial court with regard to the trial court's just and right division of the community estate.<sup>386</sup> Under *McKnight* the appellate court is required to remand the entire property division rather than excise reimbursement claims from the division and remand as to specific properties only.<sup>387</sup>

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husband's alleged wrongful acts, after having grounded her plea for relief on the trial court's unequal division of the community estate. *Id.* at 247-48.

376. *Jacobs v. Jacobs*, 687 S.W.2d 731, 732 (Tex. 1985); *McKnight v. McKnight*, 543 S.W.2d 863, 867 (Tex. 1976).

377. *Patt v. Patt*, 689 S.W.2d 505, 507 (Tex. App.—Houston [1st Dist.] 1985, no writ); *Tarin v. Tarin*, 605 S.W.2d 392, 394 (Tex. Civ. App.—El Paso 1980, no writ); *Zamora v. Zamora*, 611 S.W.2d 660, 662 (Tex. Civ. App.—Corpus Christi 1980, no writ).

378. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981); *Jones v. Jones*, 699 S.W.2d 583, 585 (Tex. App.—Texarkana 1985, no writ); *Patt v. Patt*, 689 S.W.2d 505, 507 (Tex. App.—Houston [1st Dist.] 1985, no writ); *Padon v. Padon*, 670 S.W.2d 354, 359 (Tex. App.—San Antonio 1984, no writ). For material discussing the equitable distribution of marital property see Annot., 41 A.L.R.4th 481, 484-522 (1985).

379. *Jacobs v. Jacobs*, 687 S.W.2d 731, 732 (Tex. 1985).

380. 687 S.W.2d 731 (Tex. 1985).

381. *Id.* at 733.

382. *Jacobs v. Jacobs*, 669 S.W.2d 759, 762-66 (Tex. App.—Houston [14th Dist.] 1984), *rev'd*, 687 S.W.2d 731, 732 (Tex. 1985).

383. *Id.* at 763.

384. 687 S.W.2d at 732. The court pronounces the standard twice in the opinion. *See id.* at 733. The second statement of the standard omits the word "materially." *Id.*

385. 543 S.W.2d 863, 866 (Tex. 1976) (appellate court erred in rendering specific awards of property rather than remanding, after determination that the trial court had abused its discretion).

386. 687 S.W.2d at 732 (citing *McKnight v. McKnight*, 543 S.W.2d 863, 867 (Tex. 1976)).

387. *Id.*

In *Patt v. Patt*<sup>388</sup> the trial court awarded the wife the exclusive use of the parties' home for life and awarded each spouse a one-half interest in the home at that time.<sup>389</sup> When the parties were divorced four of the parties' adult children were living with the wife.<sup>390</sup> On appeal the husband argued that the trial court's division was manifestly unjust and unfair.<sup>391</sup> Declining to find an abuse of discretion, the court of appeals affirmed the division.<sup>392</sup> The appellate court concluded that the trial court was concerned primarily with the wife's ability to support herself and noted that the house provided the ex-wife with current income in the form of rents collected from her children or from others.<sup>393</sup>

An appeals court may decline to find an abuse of discretion when the record does not contain specific findings of fact regarding the value of all items of community property.<sup>394</sup> Thus, in *Jones v. Jones*<sup>395</sup> the court rejected the contention of the husband that the trial court abused its discretion in awarding to him only fourteen percent of the community property.<sup>396</sup> The court stated that it was incumbent upon the husband to request additional findings of fact<sup>397</sup> that would have established the specific values of community assets and liabilities considered by the trial court.<sup>398</sup> The court further stated that any "omitted unrequested elements"<sup>399</sup> supported by evidence would be supplied by a presumption in support of the judgment.<sup>400</sup> The court, therefore, declined to find an abuse of discretion in the lower court's property division.<sup>401</sup>

On the other hand, in *Andrews v. Andrews*<sup>402</sup> the husband contended that the ultimate division of the community estate of the parties was substantially

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388. 689 S.W.2d 505 (Tex. App.—Houston [1st Dist.] 1985, no writ).

389. *Id.* at 506, 508.

390. *Id.* at 507.

391. *Id.* at 506.

392. *Id.* at 508.

393. *Id.* The court also noted that the husband's equity in the home would be increased by the wife's monthly mortgage payments. *Id.*

Similarly the San Antonio court noted the parties disparate income-earning potential in declining to find an abuse of discretion in the trial court's division. *Hardin v. Hardin*, 681 S.W.2d 241, 243 (Tex. App.—San Antonio 1984, no writ). The appellate court held that the lower court did not abuse its discretion in failing to award the wife an interest in her husband's retirement benefits and remarked that at the time of the trial the husband was 67 and retired, while the wife was 60 and receiving income. *Id.* In *Schuster v. Schuster*, 690 S.W.2d 644 (Tex. App.—Austin 1985, no writ), the court declined to hold that the lower court had abused its discretion in ordering an unequal division, noting that the party receiving the lesser portion had more formal education, greater earning capacity, and a larger separate estate than the other spouse. *Id.* at 645.

394. *Jones v. Jones*, 699 S.W.2d 583, 585-86 (Tex. App.—Texarkana 1985, no writ).

395. *Id.*

396. *Id.* at 586.

397. TEX. R. CIV. P. 298 permits either party to request of the trial judge further, additional, or amended findings of fact. If the court declines to give them, however, the party may be without a further practicable remedy.

398. 699 S.W.2d at 585.

399. TEX. R. CIV. P. 299.

400. 699 S.W.2d at 586 (citing TEX. R. CIV. P. 299).

401. *Id.*

402. 677 S.W.2d 171 (Tex. App.—Austin 1984, no writ).



unequal in favor of the wife. The wife defended the division on the ground that the husband had wasted, mismanaged, or converted community funds. The court held that, although the husband had made some poor investments of community funds, he had acted in good faith, and no fraud on the community had been demonstrated with respect to his diversion of property to his mother.<sup>403</sup> The case was remanded for a redivision of the community estate.<sup>404</sup>

One of the Houston courts of appeals reversed the lower court's division on the grounds of abuse of discretion. In *Welch v. Welch*<sup>405</sup> the trial court had awarded the wife a net share of the community property worth approximately \$93,000 and had awarded the husband property that was subject to debts exceeding the value of the assets by approximately \$23,000.<sup>406</sup> The court of appeals reversed, holding that the division of the community property was clearly inequitable.<sup>407</sup> The court noted that, although the husband had received more education than his wife and also received income from certain separate real property, the husband's business was burdened with a substantial amount of debt and the husband passed on the income from the real property to his mother as her sole source of support.<sup>408</sup> Hence, the court concluded that the evidence might have justified an award of a greater portion of the community estate to the wife, but that the court could not find support for the lower court's grossly unequal division, which constituted a clear abuse of discretion.<sup>409</sup>

*Military Retirement Benefits.* In *McCarty v. McCarty*<sup>410</sup> the United States Supreme Court ruled on June 26, 1981, that nondisability military retirement benefits were not divisible as community property by state courts.<sup>411</sup> Because the decision has not been given retroactive effect,<sup>412</sup> an ex-spouse divorced under a final, unappealed divorce decree entered prior to the date of decision was not permitted to suspend payments of benefits to his ex-spouse.<sup>413</sup> An issue was also raised with respect to suits to partition retirement benefits not disposed of under a pre-*McCarty* decree.<sup>414</sup> In *Trahan v.*

403. *Id.* at 175.

404. *Id.* at 175-76.

405. *Welch v. Welch*, 694 S.W.2d 374 (Tex. App.—Houston [14th Dist.] 1985, no writ).

406. *Id.* at 375-76.

407. *Id.* at 376.

408. *Id.*

409. *Id.* at 377.

410. 453 U.S. 210 (1981).

411. *Id.* at 233.

412. *Segrest v. Segrest*, 649 S.W.2d 610, 612-13 (Tex.), *cert. denied*, 104 S. Ct. 242, 78 L. Ed. 2d 232 (1983); see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 Sw. L.J. 131, 140-41 (1984); see also authorities cited *id.* at 163 n.278 (decisions of Texas intermediate appellate courts resolving the issue under the doctrine of *res judicata*). *But see Ex parte Acree*, 623 S.W.2d 810, 811-12 (Tex. Civ. App.—El Paso 1981, no writ) (permitting collateral attack on pre-*McCarty* final decree by habeas corpus proceeding).

413. *Segrest v. Segrest*, 649 S.W.2d 610, 612-13 (Tex. 1983).

414. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 37 Sw. L.J. 65, 100-01 (1983).

*Trahan*<sup>415</sup> the Texas Supreme Court refused to permit a division of military retirement benefits left undivided on divorce.<sup>416</sup> The court noted that the case was on appeal at the time *McCarty* was decided and concluded that *McCarty* precluded any further division of the benefits because no final judgment on the merits had been rendered.<sup>417</sup> Then Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA),<sup>418</sup> authorizing state courts to divide military pension benefits on divorce in accordance with state community property law.<sup>419</sup> The Act applies to funds payable after June 25, 1981,<sup>420</sup> and thus Congress apparently intended that *McCarty* have no effect in subsequent cases.<sup>421</sup>

All military retirement benefits that accrue during marriage are community property.<sup>422</sup> In reversing *McCarty* the USFSPA permits state courts to divide even those benefits that vested while *McCarty* was in effect and which arguably are separate property.<sup>423</sup> Hence, in *Jackson v. Green*<sup>424</sup> the Corpus Christi court noted that a trial court may award benefits for pay periods beginning after June 25, 1981 and thus affirmed the trial court's award of a lump sum for the ex-wife's interest in the benefits from that date until the date of the partition suit.<sup>425</sup>

In *Workings v. Workings*<sup>426</sup> the husband had been receiving military retirement benefits when the parties were divorced in 1968. The divorce decree stated that the parties had already divided their community property but did not state how they had divided it. The husband continued to receive all retirement benefits. The parties later remarried, and the second breakdown of their marriage was before the court. At trial, testimony of the

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415. 626 S.W.2d 485 (Tex. 1981).

416. *Id.* at 488.

417. *Id.* at 487-88.

418. 10 U.S.C. § 1408 (1982) (effective Feb. 1, 1983).

419. *Id.* § 1408(c)(1).

420. *Id.*

421. For background discussion of *McCarty* and the USFSPA, see generally Newton & Trail, *Uniformed Services Former Spouses' Protection Act—A Legislative Answer to the McCarty Problem*, 46 TEX. B.J. 291, 291-307 (1983); Reppy, *Reconsidering the Rules for Military Benefits*, 5 FAM. ADVOC., Spring 1983, at 30-35, 40; Sampson & Friday, *McCarty Redux: Construing the Uniformed Services Former Spouses' Protection Act*, 82-3 ST. B. SEC. REP. FAM. L., Fall 1982, at 7-12; Note, *Closing the McCarty-USFSPA Window: A Proposal for Relief from McCarty Era Final Judgments*, 63 TEX. L. REV. 497, 497-531 (1984). For material discussing the Act with reference to the laws of other jurisdictions, see Comment, *The Uniformed Services Former Spouses' Protection Act: A Partial Return of Power*, 11 W. ST. U.L. REV. 71, 77-83 (1983) (California); Comment, *McCartyism in New Mexico: McCarty v. McCarty and the Uniformed Services Former Spouses' Protection Act*, 13 N.M.L. REV. 665, 665-86 (1983) (New Mexico).

422. See *Ex parte Burson*, 615 S.W.2d 192, 193-94 (Tex. 1981); *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976); TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975).

423. See *Cameron v. Cameron*, 641 S.W.2d 210, 212 (Tex. 1982); *Vines v. Vines*, 683 S.W.2d 117, 118 (Tex. App.—San Antonio 1984, no writ). In *Vines* the court concluded that if the USFSPA truly reversed *McCarty*, then courts should be able to divide retirement benefits regardless of *McCarty*. *Id.* But see *Smith v. Smith*, 694 S.W.2d 636, 638 (Tex. App.—San Antonio 1985, no writ) (*McCarty* satisfied condition subsequent in order clarifying divorce decree, thus relieving ex-husband of duty to pay benefits despite passage of USFSPA).

424. 700 S.W.2d 620 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

425. *Id.* at 623.

426. 700 S.W.2d 251 (Tex. App.—Dallas 1985, no writ).

spouses conflicted as to how the parties agreed to divide the retirement benefits prior to the first divorce.<sup>427</sup> The trial court made no specific finding as to that agreement but nevertheless declared that the retirement benefits were community property and divided them.<sup>428</sup> On appeal the husband claimed the retirement benefits as separate property under the earlier property agreement. The Dallas Court of Appeals remanded the case to the trial court for a determination of the division made in 1968 and to deal with the retirement benefits accordingly.<sup>429</sup>

A recurring issue with regard to military retirement benefits has been the proper procedure for obtaining a post-divorce division of benefits. Community property not divided on divorce is held by the former spouses as tenants in common.<sup>430</sup> As such the proper means for dividing such benefits is a suit for partition.<sup>431</sup> If the decree is silent as to the benefits, such relief is generally available.<sup>432</sup> On the other hand, when benefits have been expressly disposed of by a final divorce decree, a demand for a portion of the benefits amounts to a collateral attack on the judgment, and the courts are less willing to grant relief.<sup>433</sup> Hence, in *Allison v. Allison*<sup>434</sup> the Texas Supreme Court affirmed the lower court's holding that retirement benefits expressly awarded to the ex-husband under the divorce decree rendered during the period after *McCarty* and before the effective date of the USFSPA are not subject to later division.<sup>435</sup> Similarly, in *Breen v. Breen*<sup>436</sup> the parties were divorced in June of 1982, and the husband was awarded all military retirement benefits pursuant to *McCarty*. After passage of the USFSPA the ex-wife brought suit to partition the military retirement benefits, arguing that USFSPA retroactively alters prior final divorce decrees. The ex-husband responded by pleading res judicata as to the divorce decree. The court of appeals agreed, concluding that the USFSPA does not give Texas courts the power to modify post-*McCarty* final judgments which had specifically awarded the retirement benefits.<sup>437</sup>

In *O'Connor v. O'Connor*,<sup>438</sup> however, the San Antonio court upheld a

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427. *Id.* at 253. The parties' partition agreement appears to have been oral. The court said that at the time of the final divorce in 1968 an oral partition was valid, *id.* at 254, citing *Loston v. Loston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ dismissed), and *Nelson v. Geit*, 314 S.W.2d 124, 125 (Tex. Civ. App.—Texarkana 1958, writ dismissed).

428. 700 S.W.2d at 253.

429. *Id.* at 254.

430. *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970).

431. See *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977); *Busby v. Busby*, 457 S.W.2d 551, 554-55 (Tex. 1970); *Keller v. Keller*, 135 Tex. 260, 267, 141 S.W.2d 308, 311 (1940).

432. See *Harrell v. Harrell*, 692 S.W.2d 876, 876 (Tex. 1985) (per curiam).

433. See *Allison v. Allison*, 700 S.W.2d 914, 915 (Tex. 1985).

434. 700 S.W.2d 914 (Tex. 1985).

435. *Id.* at 915 (citing *Constance v. Constance*, 544 S.W.2d 659, 660-61 (Tex. 1976)).

436. 693 S.W.2d 495 (Tex. App.—San Antonio 1985, writ refused n.r.e.).

437. *Id.* at 498. The court further rejected the ex-wife's argument that its holding would have the harsh effect of punishing her for not appealing the divorce decree when *McCarty* would have foreclosed such an appeal. *Id.* In dismissing the ex-wife's claim the court noted that divorce decrees are particularly in need of finality. *Id.* (citing *Ex parte Havermale*, 636 S.W.2d 828, 836 (Tex. App.—San Antonio 1982, no writ)).

438. 694 S.W.2d 152 (Tex. App.—San Antonio 1985, writ refused n.r.e.).

lower court's partition that awarded the ex-wife a portion of her ex-husband's benefits received by him after the parties' post-*McCarty*, pre-USFSPA divorce.<sup>439</sup> The court set forth two guidelines to govern the availability of partition in such cases. First, the court noted that the decision to permit partition may turn on whether the suit would constitute a direct or a collateral attack on the divorce decree.<sup>440</sup> Second, the court stated that if the decree is final a court should look to whether the decree is silent or explicit with respect to the division of benefits.<sup>441</sup> In the case before it the court found language in the decree expressly disclaiming disposition of benefits and, therefore, affirmed the lower court's partition.<sup>442</sup>

In two other cases<sup>443</sup> the San Antonio court also held that military retirement benefits not divided on divorce were owned by the ex-spouses as tenants in common. Because *McCarty* was in effect<sup>444</sup> the retirement benefits could not be divided as community property at the time of divorce. Once the USFSPA was passed, however, the effect of *McCarty* was reversed, and Texas law applied to the benefits.<sup>445</sup> Thus, in each case a partition suit could be entertained.<sup>446</sup>

One of the more difficult issues relating to the apportionment of retirement benefits stems from unapportioned increases in benefits arising after divorce. In 1983 the Texas Supreme Court held in *Berry v. Berry*<sup>447</sup> that when a spouse retires after divorce and receives retirement benefits, the benefits are apportioned to the spouses on the basis of the value of the community interest in the pension upon divorce.<sup>448</sup> Moreover, a division of those bene-

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439. *Id.* at 155.

440. *Id.* at 154. The courts of appeals generally permit trial courts to reconsider division of retirement benefits when an ex-spouse directly attacks a divorce decree. See *Patino v. Patino*, 687 S.W.2d 799, 802-03 (Tex. App.—San Antonio 1985, no writ); *Voronin v. Voronin*, 662 S.W.2d 102, 106-07 (Tex. App.—Austin 1983, writ dismissed); *Gordon v. Gordon*, 659 S.W.2d 475, 478-79 (Tex. App.—Corpus Christi 1983, no writ).

441. 694 S.W.2d at 154. Final divorce decrees with no specific designation as to the retirement benefits may be subject to collateral attack. See *Harkrider v. Morales*, 686 S.W.2d 712, 715 (Tex. App.—San Antonio 1985, no writ) (partition suit); *Harrell v. Harrell*, 684 S.W.2d 118, 123-24 (Tex. App.—Corpus Christi 1984, no writ) (bill of review); *Trahan v. Trahan*, 682 S.W.2d 332, 334 (Tex. App.—Austin 1984, writ refused n.r.e.) (partition suit). If the divorce decree expressly awards the retirement benefits, then res judicata bars any subsequent division of the benefits. See *Breen v. Breen*, 693 S.W.2d 495, 498 (Tex. App.—San Antonio 1985, writ refused n.r.e.).

442. 694 S.W.2d at 155.

443. *Forsman v. Forsman*, 694 S.W.2d 112 (Tex. App.—San Antonio 1985, writ refused n.r.e.); *Harkrider v. Morales*, 686 S.W.2d 712 (Tex. App.—San Antonio 1985, no writ).

444. Both the *Forsman* and the *Harkrider* divorces were granted in September, 1981. In *Trahan v. Trahan*, 626 S.W.2d 485 (Tex. 1981), the Texas Supreme Court construed *McCarty* to hold that the federal supremacy clause foreclosed the division of military retirement benefits under Texas community property law. *Id.* at 487.

445. *Forsman*, 694 S.W.2d at 114; *Harkrider*, 686 S.W.2d at 714.

446. 694 S.W.2d at 114 (citing *Busby v. Busby*, 457 S.W.2d 551, 554-55 (Tex. 1970)); 686 S.W.2d at 715.

447. 647 S.W.2d 945 (Tex. 1983).

448. *Id.* at 947. In *Berry* the husband retired 12 years after the divorce from a position that he had held during his marriage. The ex-wife brought a partition suit to recover a share of the benefits received upon the ex-husband's retirement but undivided on divorce. The Texas Supreme Court held the ex-wife entitled to one-half of the amount that the husband would have received had he retired at the date of divorce. *Id.* at 946-47. For discussions of *Berry* see

fits must be based on the spouse's rank attained at the time of divorce.<sup>449</sup>

In *Harrell v. Harrell*<sup>450</sup> the ex-wife challenged the trial court's finding that any post-divorce increases in the ex-husband's retirement benefits were not subject to partition. In support of the trial court's holding the ex-husband argued that *Berry* prohibits an award of post-divorce increases in retirement benefits to the extent the ex-husband's post-divorce labor contributed to those increases.<sup>451</sup> The court of appeals distinguished *Berry*, however, since the increases in the case before it did not result from the ex-husband's post-divorce efforts.<sup>452</sup> Thus, an award to the ex-wife of one-half of the post-divorce increases in the ex-husband's retirement benefits did not invade the ex-husband's separate property.<sup>453</sup>

*Islamic Divorce.* In the past Texas courts have usually relied on the law of the place where an event occurred in order to determine its legal consequences.<sup>454</sup> For the validity of divorce the law of the domicile of the parties was usually controlling.<sup>455</sup> In *Duncan v. Cessna Aircraft Co.*<sup>456</sup> the Texas Supreme Court adopted the "most significant relationship" test of the Second Restatement of Conflict of Laws<sup>457</sup> as the prevailing principle for choice of law purposes. In *Seth v. Seth*<sup>458</sup> the Fort Worth Court of Appeals held that for determining the validity of a prior foreign divorce of foreign nationals later domiciled in Texas, a Texas court properly looks to the "policies" of the law of Texas.<sup>459</sup> In *Seth* a second wife sued her husband for divorce, and the first wife intervened to contest the validity of the second marriage. The trial court denied the divorce on the ground that a subsisting prior marriage existed, and the petitioner appealed. The husband and his first wife had been

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McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 SW. L.J. 131, 141-42 (1984); Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequities in Berry v. Berry*, 37 BAYLOR L. REV. 107, 107-79 (1985); Note, *Berry v. Berry: Valuation of Retirement Benefits in the Omitted Property Case*, 24 S. TEX. L.J. 895, 895-902 (1983). In *Brown v. Robertson*, 606 F. Supp. 494 (W.D. Tex. 1985), a federal court said by way of obiter dictum that retirement benefits to be paid after divorce but earned during marriage are community property and a contingent interest that will vest upon receipt. Thus a trial court has jurisdiction under TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1986) to divide benefits not yet in existence. 606 F. Supp. at 497.

449. See *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983); *Rankin v. Bateman*, 686 S.W.2d 707, 710 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); see also *Jackson v. Green*, 700 S.W.2d 620, 622 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (burden on spouse receiving benefits to prove rank at the time of divorce).

450. 700 S.W.2d 645 (Tex. App.—Corpus Christi 1985, no writ).

451. In *Berry* the court found that the increase in retirement benefits occurred as a result of post-divorce labor and union contract negotiations. The court found that the increased benefits were the ex-husband's separate property which could not be awarded to the ex-wife. *Berry*, 647 S.W.2d at 947.

452. 700 S.W.2d at 648.

453. *Id.* (citing *Cameron v. Cameron*, 641 S.W.2d 210, 215 (Tex. 1982)).

454. See *Gutierrez v. Collins*, 583 S.W.2d 312, 313-18 (Tex. 1979).

455. See *Hopkins v. Hopkins*, 540 S.W.2d 783, 786 (Tex. Civ. App.—Corpus Christi 1976, no writ).

456. 665 S.W.2d 414, 420-21 (Tex. 1984).

457. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

458. 694 S.W.2d 459 (Tex. App.—Fort Worth 1985, no writ).

459. *Id.* at 462.

non-Moslem Indian nationals. After forming a liaison with his second wife and long before their arrival in Texas, the husband and his prospective spouse converted to Islam in India, and a year later the husband divorced the first wife in Kuwait. "This divorce was rendered through a summary, ex parte procedure known as talak . . . . [T]he divorce was rendered when husband pronounced three times: 'I divorce you.'"<sup>460</sup> The first wife had no notice of this apparently formal, though private, act. The following day the husband was married to the petitioner in Kuwait.

The appellate court upheld the trial court's judgment on the ground that allowing a non-Moslem to embrace Islam by a short verbal phrase and then to divorce his wife was so harsh to the non-Moslem wife as to be contrary to "our notions of good morals and natural justice."<sup>461</sup> The court, therefore, declined to apply Islamic law.<sup>462</sup> The court also noted that the divorce did not seem to have been sanctioned by a proper state body of Kuwait and thus was apparently looked upon as a non-governmental act.<sup>463</sup> The court did not discuss the domicile of the husband at the time of the first divorce.

Although a growing body of literature is available<sup>464</sup> on the institution of the talak as practiced with some degree of difference in various Moslem countries, the court mentioned none of this material, and the decision does not add much, if anything, to an appreciation or solution of the problems that arise in connection with the validity of a talak when called into question in a Texas court.

*Enforcement.* The 1983 statutory provisions setting out the rules for enforcement of divorce decrees<sup>465</sup> have been somewhat clarified and explained in recent decisions. In *Ex parte Goad*<sup>466</sup> the ex-wife filed three separate motions for contempt seeking to enforce payments of her ex-husband's military retirement benefits awarded her under a divorce decree. The motions differed from one another only in the amount claimed. Only the first of these motions was filed prior to the effective date<sup>467</sup> of section 3.70 of the Family Code, which provides in part that motions to enforce the division of future property must be filed within two years after the right to the property ma-

460. *Id.* at 461.

461. *Id.* at 463.

462. *Id.*

463. *Id.*

464. See K. AHMAD, *MUSLIM LAW OF DIVORCE* 28-35 (1978); 2 A. EHRENZWEIG & E. JAYME, *PRIVATE INTERNATIONAL LAW* 172-73 (1973); Anderson, *Modern Trends in Islam: Legal Reform and Modernisation in the Middle East*, 20 *INT'L & COMP. L.Q.* 1, 7-8 (1971); Carroll, *A "Bare" Talaq is Not a Divorce Obtained by "Other Proceedings,"* 101 *LAW Q. REV.* 170, 170-75 (1985); Carroll, *The Pakistani Talaq in English Law: Ex parte Minhas and Quazi v. Quazi*, 2 *ISLAMIC & COMP. L.Q.* 17, 17-37 (1982); Herzog, *Conflict of Laws*, 26 *SYRACUSE L. REV.* 9, 25-26 (1975); Hill, *Recognition of the "Bare" Talaq: The Last Word?*, 15 *FAM. L.* 290, 290-91 (1985); McEwan, *Transnational Divorce*, 129 *SOLIC. J.* 214, 214-15 (1985).

465. *TEX. FAM. CODE ANN.* §§ 3.70-.77 (Vernon Supp. 1986); enacted as Act of June 17, 1983, ch. 424, § 2, 1983 *Tex. Gen. Laws* 2346, 2350-53.

466. 690 S.W.2d 894 (Tex. 1985).

467. Subchapter D became effective on September 1, 1983. Act of June 17, 1983, ch. 424, § 2, 1983 *Tex. Gen. Laws* 2346, 2350-53, 2361.

tures or the decree becomes final, whichever is later.<sup>468</sup> The trial court rendered a judgment of contempt and ordered the ex-husband to pay a lump sum representing withheld benefits.<sup>469</sup> In presenting his writ of habeas corpus<sup>470</sup> to the Texas Supreme Court, the ex-husband contended that the lower court was without authority to order the payment of the sum because it was barred by the two-years limitations period of section 3.70.<sup>471</sup> The supreme court held, however, that the limitations period did not bar the suit for contempt.<sup>472</sup> The court noted that section 3.70(b) provides that enforcement proceedings "shall be as in civil cases generally."<sup>473</sup> The court, therefore, reasoned that Article 5539b,<sup>474</sup> which provides that certain amendments to pleadings shall not be subject to a plea of limitation when the original pleading was not thereby affected, was applicable to contempt proceedings to compel payment of retirement benefits.<sup>475</sup> The court concluded that the ex-wife's third motion for contempt did not allege a "wholly new, distinct or different transaction and occurrence,"<sup>476</sup> and thus her motion was not barred by the two-years limitations period of section 3.70.<sup>477</sup>

A number of decisions of the Texas courts of appeals dealt with procedural and substantive issues arising out of motions in aid or clarification of a decree.<sup>478</sup> In *Brannon v. Brannon*<sup>479</sup> the ex-wife filed a partition suit seeking an accounting and a partition of her ex-husband's military retirement benefits, which had not been divided under the parties' divorce decree. The trial court entered judgment awarding the ex-wife a portion of the retirement benefits. Two years later the ex-wife filed a motion in aid of judgment,<sup>480</sup> seeking to clarify the partition to take into account future cost of living increases. The trial court granted the motion, and the ex-husband appealed.<sup>481</sup>

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468. TEX. FAM. CODE ANN. § 3.70(c) (Vernon Supp. 1986). Prior to the enactment of this section, motions to enforce division of future property were governed by *Huff v. Huff*, 648 S.W.2d 286 (Tex. 1983).

469. 690 S.W.2d at 895-96.

470. TEX. R. CIV. P. 475.

471. 690 S.W.2d at 896.

472. *Id.*

473. TEX. FAM. CODE ANN. § 3.70(b) (Vernon Supp. 1986).

474. TEX. REV. CIV. STAT. ANN. art. 5539b (Vernon 1958).

475. 690 S.W.2d at 897.

476. TEX. REV. CIV. STAT. ANN. art. 5539b (Vernon 1958).

477. 690 S.W.2d at 897.

A similar issue confronted the court of appeals in *Perkins v. Perkins*, 690 S.W.2d 706 (Tex. App.—El Paso 1985, writ ref'd n.r.e.). There the court rejected the argument of the ex-husband that the lower court had no authority to enforce payments of retirement benefits to his ex-wife under the new enforcement provisions because the decree was rendered before the effective date of those provisions. *Id.* at 708. The court stated that it found no language within the enforcement provisions which limited their applicability to judgments rendered after the effective date, noting that all payments enforced by the lower court arose after the effective date. *Id.*

478. TEX. FAM. CODE ANN. § 3.72 (Vernon Supp. 1986).

479. 692 S.W.2d 528 (Tex. App.—Dallas 1985, no writ).

480. The Family Code limits orders entered to enforce the property division to orders in aid or clarification of the prior order. TEX. FAM. CODE ANN. § 3.71(a) (Vernon Supp. 1986). The Code permits a court to issue a clarifying order on a finding that the original form of the division of property is not sufficiently specific to be enforceable by contempt. *Id.* § 3.72(b).

481. 692 S.W.2d at 529.

The Dallas Court of Appeals held that such a motion is an impermissible procedure for clarification of a prior judgment obtained in a partition suit subsequent to divorce.<sup>482</sup> The court cited subsection 3.70(d)<sup>483</sup> of the Family Code, which expressly excludes from the scope of Subchapter D existing property not divided on divorce.<sup>484</sup> The court, therefore, vacated the lower court's judgment and entered an order dismissing the ex-wife's motion in aid of judgment.<sup>485</sup>

Subchapter D permits a trial court to issue an order in aid or clarification of a judgment upon a finding that the division of property is not specific enough to be enforced by contempt.<sup>486</sup> Section 3.71(a), however, expressly forbids a court from using such an order to alter or change the substantive division of the property.<sup>487</sup> This restriction is in accordance with prior law.<sup>488</sup> Two decisions considered a trial court's authority in this respect.<sup>489</sup> In *In re Allen*<sup>490</sup> the parties had entered into a property settlement agreement<sup>491</sup> that set aside to the husband all personal property in his control. The agreement was subsequently incorporated in the divorce decree, and the court ordered the parties to execute instruments necessary to effect its terms. About six weeks after the judgment was no longer subject to modification by the court, it was realized that the property settlement failed to make reference to a specific piece of realty. The ex-husband moved for enforcement of the decree. Because the realty was acquired to be sold to a partnership of which the ex-husband was a partner,<sup>492</sup> he argued that the realty was partnership property. He further argued that because his partnership interest was personalty and because it was in his control, the agreement incorporated in the decree actually disposed of the realty under its terms. The trial court accepted his argument and ordered the ex-wife to convey the realty to her ex-husband. On appeal the Amarillo court reversed, holding that the clarification order amounted to a modification of the divorce decree.<sup>493</sup> The court noted that resolution of the problem required a determination whether the realty was partnership property and that a construction of the property settlement agreement was necessary.<sup>494</sup> The trial court lacked authority to re-

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482. *Id.* at 530.

483. Subsection 3.70(d) provides that "The procedures and limitations provided by this subchapter do not apply to existing property not divided on divorce and thereby held by the ex-spouses as tenants in common. A suit for partition of that property is governed by the rules applicable to civil cases generally." TEX. FAM. CODE ANN. § 3.70(d) (Vernon Supp. 1986).

484. 692 S.W.2d at 530.

485. *Id.*

486. TEX. FAM. CODE ANN. § 3.72(b) (Vernon Supp. 1986).

487. *Id.* § 3.71(a).

488. *See* *McGehee v. Epley*, 661 S.W.2d 924, 925 (Tex. 1983); *Schwartz v. Jefferson*, 520 S.W.2d 881, 888 (Tex. 1975); *Harris v. Harris*, 679 S.W.2d 75, 77 (Tex. App.—Dallas 1984, writ *dism'd*).

489. *In re Allen*, 692 S.W.2d 112 (Tex. App.—Amarillo 1985, no writ); *Bjornson v. Corbitt*, 690 S.W.2d 345 (Tex. App.—Fort Worth 1985, no writ).

490. 692 S.W.2d 112 (Tex. App.—Amarillo 1985, no writ).

491. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1986).

492. 692 S.W.2d at 113-14.

493. *Id.* at 116.

494. *Id.*



solve these issues under a section 3.70 motion.<sup>495</sup>

In *Bjornson v. Corbitt*<sup>496</sup> attorneys for the ex-wife in a suit for divorce brought a petition in intervention to collect attorney's fees, alleging an indebtedness on the part of the ex-wife and the former community estate. The petition was filed almost a year after the judgment of divorce had been signed. The court granted the intervention and awarded the attorneys a judgment against the former spouses.<sup>497</sup>

The court of appeals reversed and remanded.<sup>498</sup> The court held that when thirty days from the date of the judgment had expired, the judgment became final,<sup>499</sup> and the lower court lost authority to modify the judgment.<sup>500</sup> The court rejected the attorneys' argument that the trial court had merely clarified the prior judgment under the authority of section 3.71 and 3.72.<sup>501</sup> The later order affirmatively imposed a new obligation upon the former spouses.<sup>502</sup>

*Attorney's Fees.* A trial court is empowered to assess attorney's fees against either spouse in a divorce proceeding under its equitable power to divide the parties' estate in a manner that is just and right.<sup>503</sup> Thus, a trial court, in making an equitable division of the community, may award attorney's fees taking into account the conditions and needs of the parties as well as the

495. *Id.*

496. 690 S.W.2d 345 (Tex. App.—Fort Worth 1985, no writ).

497. *Id.* at 346-47.

498. *Id.* at 348.

499. A trial court has the authority to grant a new trial or to vacate, modify, correct, or reform a judgment within the 30-day period after the judgment is signed. TEX. R. CIV. P. 329b(d). Upon expiration of the period the judgment becomes final. *See id.* 329b(f).

500. 690 S.W.2d at 347.

501. TEX. FAM. CODE ANN. §§ 3.71, 3.72 (Vernon Supp. 1986). These sections are discussed *supra* note 480.

502. 690 S.W.2d at 347. The court also rejected the attorneys' argument that the trial court was authorized to enter the later order under § 3.74 of the Family Code. *Id.* This section permits a court to enter a money judgment in favor of a party who failed to receive property or payments of money awarded in the decree. TEX. FAM. CODE ANN. § 3.74 (Vernon Supp. 1986).

In *Starr v. Starr*, 690 S.W.2d 86 (Tex. App.—Dallas 1985, no writ), the court held that an appeal lies from an order in aid or clarification of a prior order when the order "dispose[s] of all parties and all issues and leave[s] nothing in the suit for further decision except as necessary for carrying the decree into effect." *Id.* at 88. The court reasoned that such an order is a "final judgment" within the meaning of former article 2249, Act of June 8, 1981, ch. 291, § 55, 1981 Tex. Gen. Laws 761, 785, *repealed by* Act of June 16, 1985, ch. 959, § 9, 1985 Tex. Sess. Law Serv. 7043, 7218 (Vernon), which provided that an appeal or writ of error could be taken from every final judgment of the district court. *Id.* at 87-88. In *Herbert v. Herbert*, 694 S.W.2d 646 (Tex. App.—Fort Worth 1985, no writ), the Fort Worth court distinguished *Starr*. The court pointed out that in *Starr* the order disposed of all parties and issues before the court, whereas in the case before it the order dismissing the motion to clarify did so without prejudice to other claims of the parties. *Id.* at 650.

503. TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp. 1986); *see also id.* § 3.58(c)(4) (permitting an award of attorney's fees in conjunction with a temporary injunction for the preservation of the property and protection of the parties); *id.* § 3.65 (Vernon 1975) (permitting an award of costs in a suit for divorce or annulment or to declare a marriage void); *id.* § 3.77 (Vernon Supp. 1986) (permitting an award of attorney's fees in a Subchapter D enforcement proceeding).

surrounding circumstances.<sup>504</sup> A claim for such attorney's fees, however, must be raised in the divorce proceeding so that the issue will not later be barred as *res judicata*.<sup>505</sup> Hence, in *John M. Gillis, P.C. v. Wilbur*<sup>506</sup> the attorney representing the wife in a divorce failed to plead for attorney's fees on behalf of his client, and the agreed decree of the parties made no express reference to attorney's fees. The attorney later brought suit for his fee. The court of appeals affirmed a summary judgment against the attorney, holding that the suit was barred.<sup>507</sup> The court reasoned that recovery of attorney's fees was an integral part of a divorce proceeding and that the issue could not be separated from the other issues arising in a property division.<sup>508</sup> The court stated that a contrary holding would require a relitigation of all issues relating to a fair and equitable division of the property.<sup>509</sup> Such a holding would not promote judicial economy, would encourage vexatious litigation, and could increase the likelihood of a double recovery.<sup>510</sup> The court, therefore, concluded that the attorney was required to plead for attorney's fees on behalf of his client against her spouse in the divorce suit or else be barred from seeking those fees against his client's spouse in a separate suit.<sup>511</sup>

*Other Post-Divorce Disputes.* In a post-divorce bankruptcy proceeding<sup>512</sup> the debtor's ex-wife sought to exclude from the debtor's discharge his obligation to pay joint debts that had been incurred during their marriage. The ex-husband had assumed these debts in a property settlement agreement that was incorporated in the divorce decree. The bankruptcy court considered whether the debtor's assumption of joint debts constituted a support obligation owed to the ex-wife and hence not dischargeable under section 523(a)(5) of the Bankruptcy Code.<sup>513</sup> The court ascertained that the parties intended the agreement to be for the ex-wife's support,<sup>514</sup> that it was for support,<sup>515</sup> and that the amount of support represented by the debtor's assumption of debts was not excessive.<sup>516</sup> Hence, the court granted the exception from the

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504. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981); *Carle v. Carle*, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950).

505. *John M. Gillis, P.C. v. Wilbur*, 700 S.W.2d 734, 737 (Tex. App.—Dallas 1985, no writ).

506. 700 S.W.2d 734 (Tex. App.—Dallas 1985, no writ).

507. *Id.* at 737.

508. *Id.* at 736.

509. *Id.* at 737.

510. *Id.* The policy considerations relied upon by the court were drawn from *Gilbert v. Fireside Enters., Inc.*, 611 S.W.2d 869, 876 (Tex. Civ. App.—Dallas 1980, no writ).

511. 700 S.W.2d at 737. In *Reed v. Terrell*, 759 F.2d 472 (5th Cir. 1985), the Fifth Circuit court held that former husbands against whom attorney's fees awards had been rendered in state divorce and custody suits were not permitted to invoke federal district court jurisdiction to attack the awards on civil rights grounds. *Id.* at 473. The court noted that the husbands did not appeal from the judgments entered against them and concluded that a federal district court does not have jurisdiction of actions which seek review of judgments that should have been attacked directly in a state court. *Id.*

512. *In re Holland*, 48 Bankr. 874 (Bankr. N.D. Tex. 1984).

513. 11 U.S.C.A. § 523(a)(5) (West Pam. Supp. 1986).

514. 48 Bankr. at 877.

515. *Id.*

516. *Id.*

debtor's discharge.<sup>517</sup> Though carefully constructed, the argument seems artificial. The analysis is nevertheless better than that of Fifth Circuit court in *In re Nunnally*<sup>518</sup> that the divorce court's property division constituted an "alimony substitute"<sup>519</sup> and that compliance with the order was therefore non-dischargeable.<sup>520</sup>

In *In re Teichman*<sup>521</sup> the Ninth Circuit court arrived at a somewhat more appealing reason for denying a discharge of the duty to comply with a division of community property on divorce. There the court relied on the principle of trusteeship; in the divorce decree the ex-husband was designated as trustee of the retirement benefits as received by him for the benefit of his ex-wife.<sup>522</sup> The court does not explain, however, why the ex-husband in such a situation is different from any other judgment debtor ordered to make payment to his creditor and whose duty is discharged under the Bankruptcy Code. Generally, none of the courts' explanations is very satisfactory. Either the Bankruptcy Code should be amended to bar the discharge of obligations between ex-spouses as adjudicated on divorce or clarified so that the bar to discharge of support obligations may apply without contrived results.

A common issue after divorce is whether an ex-spouse's beneficial interest in a life insurance policy was affected by the decree. In *Parker v. Parker*<sup>523</sup> the wife was named as primary beneficiary of the husband's life insurance policy. The divorce court awarded each spouse title to any policy of life insurance on the life of that spouse. Thereafter the former husband failed to change the designation of his ex-wife as beneficiary. After the former husband's death suit was brought on behalf of the estate against the ex-wife to recover the proceeds. The trial court granted summary judgment in favor of the ex-wife.<sup>524</sup>

On appeal by the estate it was argued that the divorce decree disposed of the rights of the ex-wife under the policy. The court of appeals rejected the contention, holding that nothing in the divorce decree affected the right of the decedent to designate whomever he wished as policy beneficiary.<sup>525</sup> The court stated that in the absence of specific language dealing with both the ownership and beneficial interests in a policy, a decree or property settlement agreement which awards only title to a policy to one spouse as separate property is not to be construed as having terminated any beneficial interest

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517. *Id.*

518. 506 F.2d 1024 (5th Cir. 1975).

519. *Id.* at 1027.

520. *Id.*; see also *In re Coil*, 680 F.2d 1170, 1172 (7th Cir. 1982) (payments to the ex-wife required of the ex-husband under a settlement agreement were in the nature of support); *In re Fox*, 5 Bankr. 317, 320-21 (Bankr. N.D. Tex. 1980) (payments by ex-husband due ex-wife under promissory note were in the nature of support); Tucker, *The Treatment of Spousal and Support Obligations Under Chapter 13 of the Bankruptcy Reform Act*, 45 TEX. B.J. 1359, 1359-64 (1982).

521. 774 F.2d 1395 (9th Cir. 1985).

522. *Id.* at 1398-1400.

523. 683 S.W.2d 889 (Tex. App.—Fort Worth 1985, writ ref'd).

524. *Id.* at 890.

525. *Id.* (citing *Partin v. de Cordova*, 464 S.W.2d 956, 957 (Tex. Civ. App.—Eastland 1971, writ ref'd)).

held by the other spouse.<sup>526</sup> In so holding the court disapproved of *McDonald v. McDonald*,<sup>527</sup> a 1982 decision of the Dallas court in which that court held that a divorce decree containing provisions similar to the decree at issue divested an ex-spouse of her beneficial interest under a policy.<sup>528</sup>

The San Antonio court also declined to follow *McDonald* in a similar situation.<sup>529</sup> In *Lewis v. Lewis*<sup>530</sup> the insurance policy at issue permitted the owner to change the designated beneficiary at any time, but the ex-husband as owner of the policy failed to alter his ex-wife's status before his death.<sup>531</sup> The court stated that the law indulges a presumption of gift in favor of the named beneficiary, and some affirmative action other than subjective or expressed intention is required to give weight to a change of beneficiary.<sup>532</sup> The court concluded that the evidence was insufficient to rebut the presumption of gift, noting that the ex-husband did nothing to change the beneficiary despite the fact that under the policy he was entitled to do so at any time.<sup>533</sup>

In *Western Fire Insurance Co. v. Pitts*<sup>534</sup> the ex-husband unsuccessfully argued that his conveyance of a house to his ex-wife in accordance with a property settlement agreement did not fall within a fire insurance policy provision which relieved the company of liability upon the change in ownership of the insured property. The husband argued that the change in ownership was not of a nature calculated to increase the motive to burn the property or diminish the motive to guard the property against fire, and hence the conveyance did not affect coverage under the policy. In holding for the insurance company the court stated that parting with the beneficial and legal title as well as possession of the insured property is of such a nature as to diminish the motive and the opportunity to guard the property against fire and relieves the insurer from liability under such a change-of-ownership provision.<sup>535</sup>

In *Formby v. Bradley*<sup>536</sup> the husband and wife executed a mutual will that authorized the surviving spouse to act as independent executor of the decedent's estate. An alternate executrix was named in the event of the spouses' simultaneous death. The husband died five years after the couple were divorced. On appeal from a denial of the surviving ex-wife's application for appointment as executrix, the court held that the ex-wife's divorce from the decedent nullified the provisions in the will appointing her as executrix.<sup>537</sup> Similarly, the court ruled that the alternate executrix was not entitled to

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526. *Id.* (citing *Pitts v. Ashcraft*, 586 S.W.2d 685, 696 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.)).

527. 632 S.W.2d 636, 638-39 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

528. 683 S.W.2d at 890.

529. *Lewis v. Lewis*, 693 S.W.2d 672, 675-76 (Tex. App.—San Antonio 1985, no writ).

530. 693 S.W.2d 672 (Tex. App.—San Antonio 1985, no writ).

531. *Id.* at 673, 675.

532. *Id.*

533. *Id.* at 675-76. For discussion of a case involving violation of an order restraining the changing of a beneficiary designation see *supra* notes 38-43 and accompanying text.

534. 683 S.W.2d 739 (Tex. App.—Texarkana 1984, no writ).

535. *Id.* at 740-41.

536. 695 S.W.2d 782 (Tex. App.—Tyler 1985, no writ).

537. *Id.* at 783. See TEX. PROB. CODE ANN. § 69(a) (Vernon 1980).

serve, because simultaneous death, the requisite contingency for her appointment, had not occurred.<sup>538</sup>

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538. 695 S.W.2d at 784.