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FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight*

I. STATUS

INFORMAL Marriage. In *Ortiz v. Santa Rosa Medical Center*¹ both oral and written evidence was offered to show that a man and woman had represented to the public that they were husband and wife. One of the items of written evidence was the deceased woman's application for a life insurance policy in which she stated that the man was her husband. On the basis of precedent, that evidence standing alone would have been enough to present the issue of a public holding-out to the jury.² *Jackson v. Smith*,³ however, presented the appellate court with a closer evidentiary call. *Jackson* involved a dispute as to whether an informal marriage existed and, if so, whether the alleged husband's naming his sister as the beneficiary of his life-insurance policy constituted a fraud on the community estate. The alleged wife asserted that her alleged husband had procured her signature to the application for the life insurance policy by fraud. Nevertheless she relied on that very instrument, which both alleged spouses had signed, as evidence of a public assertion of their marital union. Although this document was apparently the only evidence in the record of the couple's representation to others that they were married, the appellate court held that the evidence was sufficient to support the trial court's finding of an informal marriage.⁴

Over a decade ago a Texas appellate court found a valid informal marriage in a peculiar conflict-of-laws context.⁵ The couple had lived together in Texas for several years in circumstances that would have produced an

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1. 702 S.W.2d 701 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

2. *Persons v. Persons*, 666 S.W.2d 560, 562 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.), noted in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 39 Sw. L.J. 1, 1 (1985) [hereinafter McKnight, 1985 *Annual Survey*]. The evidence of an informal marriage in *Oates v. Hodge*, 713 S.W.2d 361 (Tex. App.—Dallas 1986, no writ), was inconclusive, and the insurance policy in issue was not characterized as either separate or community property of the decedent. *Id.* at 363.

3. 703 S.W.2d 791 (Tex. App.—Dallas 1985, no writ).

4. *Id.* at 795. Rejecting the appellant-husband's motion for a new trial on the basis of newly discovered evidence, the Corpus Christi court of appeals in *Hernandez v. Hernandez*, 703 S.W.2d 250 (Tex. App.—Corpus Christi 1985, no writ), made the telling observation that the evidence was scarcely *new*, because the husband would have known of his own intention to enter into an informal marriage at the time of the trial. *Id.* at 254.

5. *Durr v. Newman*, 537 S.W.2d 323, 326 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.); see *Rodriguez v. Avalos*, 567 S.W.2d 85, 87 (Tex. Civ. App.—El Paso 1978, no writ).

informal marriage except for the fact that the man had a living spouse. Section 2.22 of the Family Code⁶ provides that if either party to a marriage has a prior marriage that is not dissolved, a second marriage is void.⁷ The section further states, however, that if the prior marriage is dissolved and afterwards the parties "have lived together as husband and wife and represented themselves to others as being married," the second marriage becomes valid.⁸ Relying on the fact that the couple resided together as husband and wife during a trip to another jurisdiction that does not recognize informal marriage, but after the impediment to marriage was removed, the Texas court concluded that a valid marriage existed between them under section 2.22, although the husband died during the brief sojourn outside Texas.⁹ The parties were, nevertheless, domiciliaries of Texas throughout their relationship. In a decidedly different situation a federal court sitting in Nevada has relied on this authority to find an informal marriage between domiciliaries of that state (which does not recognize informal marriage), because of the couple's brief cohabitation in Texas as husband and wife after a subsisting marriage of one of them was terminated by divorce.¹⁰ Rejecting the authority of a Texas case that clearly demonstrates the error of this conclusion,¹¹ the foreign federal court might nevertheless have relied on a New Mexico case that supports its errant position.¹²

Interspousal Immunity, Loss of Consortium, and Wrongful Death. A spouse may assert a claim for loss of consortium as an element of recovery for an injury to the other spouse.¹³ In this respect, however, the Corpus Christi court of appeals has reiterated the proposition that damages for loss of consortium are not measured by the injured spouse's inability to perform household chores and to participate in family-related activities.¹⁴

Ten years ago *Bounds v. Caudle*¹⁵ established the rule that a spouse sued for a wrongful death willfully inflicted cannot raise the defense of interspousal immunity.¹⁶ The San Antonio court of appeals recently extended the *Bounds* holding to cover causes of action for wrongful death as a result of negligence.¹⁷ Although one appellate court has held that the doctrine of interspousal immunity is still applicable to a case of negligent injury not

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

7. *Id.*

8. *Id.*

9. *Durr*, 537 S.W.2d at 326.

10. *Orr v. Bowen*, 648 F. Supp. 1510, 1514 (D. Nev. 1986).

11. *Braddock v. Taylor*, 592 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

12. *In re Willard*, 93 N.M. 352, 600 P.2d 298, 300 (Ct. App. 1979).

13. *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978).

14. *Delta Drilling Co. v. Cruz*, 707 S.W.2d 660, 667 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); see *Whittlesey*, 572 S.W.2d at 666.

15. 560 S.W.2d 925 (Tex. 1977).

16. *Id.* at 927.

17. *Sneed v. Sneed*, 705 S.W.2d 392, 396 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

resulting in the injured spouse's death,¹⁸ one wonders whether that precedent will stand in the light of this further breakdown of the doctrine. In a concurring opinion in *Stafford v. Stafford*¹⁹ two Texas Supreme Court judges took the opportunity of responding to an argument based on interspousal immunity to declare that the rule has wholly outlived its time and should be abolished.²⁰

If the doctrine of interspousal immunity is disposed of, the way will be opened to join actions for interspousal torts with suits for divorce. In *Stafford* no defense was raised on the ground of interspousal immunity. Without severance the case went to judgment on both causes with the personal injury suit tried to a jury and the suit for divorce tried to the judge without a jury. Once the doctrine of interspousal immunity is put to rest, pleaders must still bear in mind that all complaints that spouses may make against each other do not necessarily constitute discrete causes of action. The point is illustrated by *Cluck v. Cluck*.²¹ In that case an ex-wife brought suit against her former husband for what was termed "loss of consortium" but what actually amounted to his affair with another woman. To be sure, the other woman might have been proceeded against for alienation of affection, but the man's consorting with his paramour did not constitute a distinct cause of action against him on behalf of his wife. It was only an element of the damages she had suffered as a result of the breakdown of her marriage, and the divorce court had already considered that factor in making a property division in favor of the wife.²²

Equal Protection. In spite of the view of three dissenting Justices, the United States Supreme Court in *Bowen v. Owens*²³ concluded that Congress had not violated the principle of equal protection in providing between 1979 and 1983 that a *divorced* widowed spouse of a wage-earner who *remarried* after age sixty lost Social Security survivor's benefits, whereas a divorced, but not remarried, surviving spouse was not so deprived. It was rational, the Court said, for Congress to treat divorced, but not remarried, surviving spouses differently from those who had remarried, because remarried divorced spouses are generally less dependent upon the resources of their former spouses than are surviving spouses who have not remarried.²⁴ The Court's rationalization is hard to defend, and the reason for its nice distinction obviously did not convince the Congress, which rectified its earlier discrimina-

18. *Bruno v. Bruno*, 589 S.W.2d 179, 180 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

19. 726 S.W.2d 14 (Tex. 1987); see *Price v. Price*, 718 S.W.2d 65, 66 (Tex. App.—San Antonio 1986, writ granted) (right to sue for premarital injury denied on the ground of interspousal immunity).

20. 726 S.W.2d at 15-17 (Mauzy, J., joined by Gonzalez, J., concurring).

21. 712 S.W.2d 599 (Tex. App.—Corpus Christi 1986, no writ).

22. *Id.* at 602. For discussions of related issues, see McKnight, *1985 Annual Survey*, *supra* note 2, at 4-5; McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 Sw. L.J. 131, 168 (1984) [hereinafter McKnight, *1984 Annual Survey*].

23. 106 S. Ct. 1881, 90 L. Ed. 2d 316 (1986).

24. *Id.* at 1886, 90 L. Ed. 2d at 324-25.

tory rule in 1983.²⁵

II. CHARACTERIZATION OF MARITAL PROPERTY INTERESTS

Premarital Agreement. In *Williams v. Williams*²⁶ the wife in a divorce proceeding alleged that a premarital agreement entered into on the day before marriage was procured by fraud, duress, and overreaching.²⁷ According to the husband's testimony, he reminded his wife-to-be that they had previously discussed entering into a premarital agreement by which the income and increases of the separate estate of each would be the separate property of each, when he presented her with such an agreement and asked her to execute it. The man further promised to execute a codicil to his will leaving all his property to the woman if they were still married at the time of his death, and several days after the marriage he carried out this promise. The woman testified that although she did not like the agreement, she nonetheless agreed to it because approximately twenty guests were expected at the wedding the following day. Although the wife-to-be was not advised by counsel²⁸ in making her decision, the trial court found that the husband had discharged his burden of proof by clear and convincing evidence that the wife knowingly entered into the agreement after giving informed consent and without being subjected to duress. She was sophisticated in matters of business and was aware of the contents of the agreement when she executed it.²⁹ The

25. Social Security Amendments of 1983, Pub. L. No. 98-21, § 301(b)(1), 97 Stat. 65, 111 (codified at 42 U.S.C. § 402 (Supp. II 1984)).

26. 720 S.W.2d 246 (Tex. App.—Houston [14 Dist.] 1986, no writ).

27. See TEX. FAM. CODE ANN. § 5.45 (Vernon Supp. 1987).

28. See McKnight, *Commentary to the Texas Family Code, Title 1, § 5.45*, 13 TEX. TECH L. REV. 611, 783-84 (1982).

29. [A]t the time of the marriage [the wife] was an educated person who had substantial business experience. She had attended business seminars and training seminars sponsored by the American Institute of Banking. Significant also is the fact that [her] job exposed her to contracts which dealt with banking financial records. . . . [An] assignment [by the bank by which she was employed] included soliciting and reviewing the bids submitted for the furnishings and safety boxes of a large bank and for moving the furniture from one location to another. The fact that the president of the bank acted on her recommendation is an indication of her business acumen.

Additionally, we note that [she] was also familiar with the contents of the premarital agreement. She was of the opinion that the items designated in the agreement as the respective separate property of herself and [the man she was about to marry] were in fact their respective separate property at the time the agreement was executed. [She] conceded that, at the time she executed the agreement, she had no objection to the division of the property as set forth therein. She did think, however, that the agreement put a romantic relationship on a crudely businesslike basis. [The husband's] testimony disclosed that the agreement was a condition of his pending marriage and further, that he was motivated to protect his children by prior marriages.

We have considered the public policy in favor of such agreements in the September 1, 1981 amendments to the Texas Family Code. Our courts have construed the Family Code provisions as broadly as possible to allow the parties flexibility to contract with respect to property incident to a marriage. *Williams v. Williams*, 569 S.W.2d 867, 870 (Tex. 1978). Considering the maturity of the individuals, their business backgrounds, their educational levels, their experiences in prior marriages, their experiences with the sale of properties, their re-

appellate court sustained the trial court's finding.³⁰

Community Presumption. Property acquired as separate property by a spouse domiciled in another jurisdiction retains its separate character when the spouse establishes a domicile in Texas,³¹ although such property is subject to division on divorce if it would have been community property if acquired by a Texas domiciliary.³² Once immigrants to Texas are domiciled here, the community presumption as to their marital acquisitions prevails for all purposes.³³ Thus, among Texas domiciliaries the burden of proof is upon the claimant of separate property to establish its separate character and to rebut the presumption that all property acquired during a marriage or on hand at its dissolution is community property.³⁴ Hence, the proceeds of sale of a herd of livestock of a deceased spouse is considered community property unless the community presumption is rebutted. A showing that the decedent owned such a herd at marriage and the trial court's finding that there was no net increase in the value of the herd when the marriage terminated do not rebut the community presumption.³⁵

In *Allen v. Allen*³⁶ the wife had brought a separate proprietorship into the marriage, which she continued to operate during marriage and then incorporated. Although it was asserted that the wife contributed no physical assets to the corporation and that therefore only business goodwill was incorporated, the wife was nevertheless unable to show that the capital incorporated was her separated property at the time of incorporation nine months after her marriage. She therefore failed to overcome the presumption that the corporation was community property.³⁷

Another case³⁸ addressed a post-divorce dispute as to entitlement to insurance proceeds on a set of table-silver stolen from an ex-wife. The divorce decree awarded to each spouse so much of "the Estate of the parties" as was in the possession of each.³⁹ Interpreting the division of "the Estate of the parties" as pertaining only to the spouse's community estate the appellate court concluded that there was an issue of fact as to whether the silver was

spective ages and further, their motivations to protect their respective children, we do not find that the agreement in contemplation of marriage was obtained by fraud, duress or overreaching.

720 S.W.2d at 248-49.

30. *Id.* at 251. In *Miele v. United States*, 637 F. Supp. 998 (S.D. Fla. 1986), the court rejected an argument that a premarital agreement for a marital consideration constituted a fraudulent transfer against the Internal Revenue Service, to whom the transferring party was liable for taxes. *Id.* at 1000.

31. *Estate of Hanau v. Hanau*, 30 Tex. Sup. Ct. J. 442, 443-44 (May 20, 1987).

32. TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1987).

33. 30 Tex. Sup. Ct. J. at 443-44.

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

35. *Bobbitt v. Bass*, 713 S.W.2d 217, 220 (Tex. App.—El Paso 1986, writ dismissed w.o.j.).

36. 704 S.W.2d 600 (Tex. App.—Fort Worth 1986, no writ).

37. *Id.* at 603-05.

38. *McIntire v. McIntire*, 702 S.W.2d 284 (Tex. App.—Houston [1st Dist.] 1985, writ refused n.r.e.).

39. *Id.* at 288.

community property or the ex-husband's separate property.⁴⁰ The burden would be on the ex-husband to prove the latter assertion on remand.

*Buck v. Rogers*⁴¹ concerned an ex-wife's post-divorce suit under a property settlement agreement providing that any significant undisclosed community property would be owned equally by the parties. In negotiating the property settlement the attorney-husband failed to disclose his contingent-fee interests in pending personal-injury claims of clients. The court held that these contingent-fee interests were community property and therefore that the ex-wife was entitled to one-half their value.⁴²

Once it is established that property belonged to a partnership in which a deceased spouse held a community partnership interest, the burden of proof is upon the surviving spouse to show the value of that interest on dissolution of the partnership due to the death of the spouse-partner if the amount sought is different from that shown in the accounting of the firm. In *Bader v. Cox*⁴³ the widow-executrix of an attorney, who was a member of a legal partnership, sought the value of her deceased husband's interest in his law firm. In this instance assets of the partnership included contingent-fee contracts with clients, and the value of these assets was at issue. It had been the practice of the partnership to distribute profits derived from each contingent-fee case to the partners on a proportionate basis without regard to which partner worked on a particular case. A majority of the court concluded that the same method of distribution should prevail with respect to profits from all cases pending at the husband's death.⁴⁴ The court noted, however, that "if the surviving partners expend a significantly greater effort winding up the pending cases than they would have if [the] decedent were still alive, the method of distribution may unjustly favor [the widow]."⁴⁵ Hence, in making a partition between the firm and the widow, the trial court would have to take such equities into account in favor of the partners.⁴⁶

In *Bader v. Cox* the court also discussed the doctrine of judicial estoppel as it might have affected determination of facts at issue, though in that case no estoppel operated because allegations that might have been asserted as admissions barring the introduction of contrary evidence had been amended.⁴⁷ In *Roosevelt v. Roosevelt*⁴⁸ the situation was different. In that

40. *Id.*

41. 709 S.W.2d 283 (Tex. App.—Corpus Christi 1986, no writ).

42. *Id.* at 286. The ex-wife also recovered her attorney's fees and exemplary damages for fraud. *Id.* at 287. For another recent instance of the characterization of contingent fees in a divorce context, see *In re Garrett*, 140 Ariz. 564, 683 P.2d 1166, 1169 (Ct. App. 1984); see also J. MCKNIGHT & W. REPPY, *TEXAS MATRIMONIAL PROPERTY LAW* 62-63 (1983); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 112-13 (1979) [hereinafter McKnight, 1979 *Annual Survey*]; McKnight, *Family Texas Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 114-15 (1978).

43. 701 S.W.2d 677 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

44. *Id.* at 683.

45. *Id.*

46. *Id.* (citing the Texas Uniform Partnership Act, TEX. REV. CIV. STAT. ANN art. 6132b, §§ 5, 18 (Vernon 1970)).

47. *Id.* at 685.

48. 699 S.W.2d 372 (Tex. App.—El Paso 1985, writ dism'd w.o.j.).

case the wife in a divorce proceeding had listed a number of items of jewelry in her sworn inventory and identified them as community property. Her assertion as to the character of that property was, therefore, a judicial admission that was binding on her.⁴⁹ Although the affiant offered no evidence or argument to contradict her inventory, and although the husband's counsel indicated that he had no objection to the court's awarding the jewelry to the wife, the trial court's characterization of the property as her *separate property* was held to be reversible error.⁵⁰ Several months later, however, the same appellate court seemingly held that it was harmless error for a trial court to award military retirement pay to a pensioner because the court thought that the pension interest was actually a divisible community asset.⁵¹ If the appellate court's later decision is properly understood, it is difficult to see how the award could be allowed to stand because the amount involved could scarcely be regarded as trivial.⁵²

In *Allen v. Allen*⁵³ the parties had stipulated that the husband's retirement plan was his separate property and the stipulation was not withdrawn. Hence, the stipulation was binding on appeal just as it was before the trial court.⁵⁴ The stipulation therefore constituted a judicial admission as to the character of the property.⁵⁵

Joint Tenancy. Although no appellate court has analyzed the effect of the November 1980 amendment to article XVI, section 15 of the Texas Constitution⁵⁶ on spousal attempts to convert their community property into a joint tenancy by way of partition in a single transaction,⁵⁷ the Texas Supreme Court held in *Williams v. McKnight*⁵⁸ in 1966 that Texas spouses must first convert their community property to separate property before creating a joint tenancy of the property.⁵⁹ In *Ossorio v. Leon*⁶⁰ the San Antonio court of appeals dealt with an agreement between Mexican spouses and a Texas bank that the survivor of them should receive all money remaining in

49. *Id.* at 374.

50. *Id.*

51. *Conroy v. Conroy*, 706 S.W.2d 745, 748 (Tex. App.—El Paso, 1986, no writ); see *Allen v. Allen*, 704 S.W.2d 600, 603 (Tex. App.—Fort Worth 1986, no writ) (dictum).

52. See McKnight, 1984 *Annual Survey*, *supra* note 22, at 162.

53. 704 S.W.2d 600 (Tex. App.—Fort Worth 1986, no writ).

54. *Id.* at 605.

55. *Id.*

56. TEX. CONST. art. XVI, § 15 (as amended, 1980). for a discussion of November 25, 1980, as the effective date of the amendment, see McKnight, *The Constitutional Redefinition of Texas Matrimonial Property as It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY'S L.J. 449, 453 (1982).

57. In *Maples v. Nimitz*, 612 S.W.2d 690, 693 n.3 (Tex. 1981), the Texas Supreme Court alluded to the 1980 amendment allowing interspousal partition of present community property and future acquisitions in a way that suggested that the whole issue of interspousal partitions might be subject to reexamination. The facts before the court, however, occurred prior to the amendment. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 40 Sw. L.J. 1, 7-9 (1986) [hereinafter, McKnight, 1986 *Annual Survey*].

58. 402 S.W.2d 505 (Tex. 1966).

59. *Id.* at 507; see Warach & Wright, *Money, Money, Who Gets the Money? Or Joint Bank Accounts With Right of Survivorship*, 47 TEX. B.J. 237, 238-39 (1984).

60. 705 S.W.2d 219 (Tex. App.—San Antonio 1985, no writ).

their account. While the spouse's agreement did not purport to create a joint tenancy in the strict sense, the mutual agreement between them and the bank gave the survivor a right to the funds on deposit, and the appellate court treated the right of the survivor as one of ownership, not merely a right of access to the funds deposited.⁶¹ The court held that in assessing the effect of a transaction between spouses domiciled in Mexico and a Texas bank with respect to Mexican community property, the law of the spouses' domicile was controlling.⁶² The spouses had opened an account in the bank in which they deposited their community property accumulated in Mexico. The account in the names of both spouses was designated "Joint Account—Payable to Either or Survivor." Under the law of the Federal District of Mexico where the spouses were domiciled, the effect of the contract with the bank was that the survivor would be the owner of the property.⁶³ The provision for mutual survivorship to the funds in the account was therefore given effect.⁶⁴

In *First Federal Savings & Loan Association v. Ritenour*⁶⁵ the husband and wife had purported to partition their community property in December 1980 to create a joint tenancy in a bank's certificates of deposit. After renewing these certificates the following year, the husband became concerned that his wife might attempt to withdraw the funds unilaterally. After discussing this concern with the bank, the husband (with the bank's advice) executed a "hold" on the certificate so that neither spouse could withdraw the funds unilaterally. Nevertheless, the wife thereafter substantially dissipated the account, and the husband brought suit against the bank under the Deceptive Trade Practices Act⁶⁶ for the amount of the funds withdrawn while the husband relied on the misrepresented efficacy of the bank's undertaking. The bank in turn sought indemnity from the wife. The trial court ruled in favor of the husband against the bank and in favor of the bank against the wife, but provided that the two judgments should not be offset. On appeal the Corpus Christi court held that the husband had standing to sue the bank under the Deceptive Trade Practices Act and that the bank had no right to recovery against the wife.⁶⁷

Apart from the husband's standing to sue and recover against the bank under the Deceptive Trade Practices Act in such a situation, the *Ritenour* case is of interest mainly in its inferential definition of the incidents of a valid joint tenancy between spouses, which all parties assumed that the agreement with the bank created. Relying on authorities involving persons who were not spouses⁶⁸ or were foreign spouses,⁶⁹ the appellate court in *Ritenour* con-

61. *Id.* at 221.

62. *Id.* at 222.

63. *Id.*

64. *Id.* at 222-23.

65. 704 S.W.2d 895 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

66. TEX. BUS. & COM. CODE ANN. § 17.41 (Vernon Supp. 1985).

67. 704 S.W.2d at 900.

68. *Calvert v. Wallrath*, 457 S.W.2d 376, 378 (Tex. 1970).

69. *McCarver v. Trumble*, 660 S.W.2d 595, 598 (Tex. App.—Corpus Christi 1983, no writ) (spouses domiciled in Colorado who acquired Texas land as a joint tenancy), *discussed in*

cluded that each spouse had full title to the property vis-à-vis the bank and therefore the wife had the power to withdraw the funds.⁷⁰ Hence, the bank could not recover from the wife for her depletion of the account.⁷¹ It would seem that the husband's recovery from the bank involving his loss of separate property would therefore have been a separate property recovery, although the court did not discuss that point. If the court is correct as to the wife's right to withdraw all of the funds, the husband had the same right. After all, if the spouses had partitioned their community funds to create the joint tenancy, as was assumed, each then had only separate property that they used to create the joint tenancy in which they would continue to have nothing except separate property interests.

This case illustrates that the true joint tenancy between spouses not only fails to meet expectations of spouses but also those of third persons with whom they deal. If by constitutional amendment⁷² it becomes possible for spouses to create a mere right of survivorship in community property without the creation of a joint tenancy for the purpose of achieving the right of survivorship, some of these problems will be avoided. Even so, the question will still remain whether a cause of action would arise under the Deceptive Trade Practices Act for a misrepresentation to a spouse with respect to an agreement between that spouse and a bank by which the other spouse is denied access to a joint account in the bank. As to community property on deposit in a bank and subject to withdrawal by both spouses, that problem already stands unanswered. Two possible situations raise this question. If community property is deposited by the *sole manager* of it, and the other spouse's right of access to the funds was created by agreement between the sole-manager-depositor and the bank, the spouse who deposits solely managed community funds into the account ought to be able to change the designation of the account unilaterally at any time so that the depositor alone would have access to it.⁷³ If, however, the account is made up of jointly managed community funds, either as a result of mixing or combining solely managed community funds of the spouses⁷⁴ or as a result of *an agreement between the spouses* to that effect,⁷⁵ one spouse's agreement with the bank would not seem to preclude the other spouse's access to the account.⁷⁶ It is, therefore, open to some doubt whether a cause of action would accrue to the depositing spouse who is misled by the bank into thinking that a unilateral "hold" might be put on such an account in this situation.

McKnight, 1984 *Annual Survey*, *supra* note 22, at 143. *Ossorio v. Leon*, 705 S.W.2d 219, 222 (Tex. App.—San Antonio 1985, no writ) (spouses domiciled in Mexico who created a joint tenancy account in a Texas bank), may now be cited for the same proposition.

70. 704 S.W.2d at 900.

71. *Id.* at 900-01.

72. The Family Law Section of the State Bar of Texas has suggested that article XVI, § 15 of the Texas Constitution be further amended so that spouses may create a right of survivorship in community property.

73. See Tex. Fam. Code Ann. § 5.22(a) (Vernon 1975).

74. *Id.* § 5.22(b).

75. *Id.* § 5.22(b),(c) and possibly § 5.22(a); see *LeBlanc v. Waller*, 603 S.W.2d 265, 267 (Tex. Civ. App.—Houston [14 Dist.] 1980, no writ); McKnight, *supra* note 28, at 754-57.

76. See *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974).

Reimbursement. A considerable lack of consistency prevails among the courts of appeals with respect to the rules of reimbursement of one marital estate for the benefits rendered to another. Following *Vallone v. Vallone*,⁷⁷ the Corpus Christi and Fort Worth courts have demanded specific pleading of reimbursement,⁷⁸ whereas the Texarkana court seemingly relies⁷⁹ on the concurring observation of a single judge in *Jensen v. Jensen*⁸⁰ that the requirement should be dispensed with. Although the Tyler court adheres to the strict-pleading rule enunciated in *Vallone*,⁸¹ that court pointed out that if no objection to evidence of reimbursement is raised, that issue is properly treated as tried by implied consent.⁸² If in this instance the trial court should grant leave to file a trial amendment to include a claim for reimbursement, the appellate court will not set aside the trial court's order on appeal in the absence of a clear showing of abuse of discretion.⁸³

In *Zisblatt v. Zisblatt*⁸⁴ the husband, who acted as sales representative for a number of manufacturers, conducted much of his business through a corporation of which he owned all of the stock as his separate property. During his marriage he was thereby able to enrich his separate estate through his ordinary business activities. Although the wife sought reimbursement of the community estate for the enhancement of the husband's separate estate at community expense, the trial court seemingly ignored the wife's plea and awarded a preponderance of the marital acquisitions to the husband. Rather than following *Vallone* and *Jensen* in remanding the case for a consideration of the right of reimbursement, the Fort Worth court of appeals analyzed the issue as one of characterization.⁸⁵ The court supported this approach by concluding that the husband's corporation was his business alter ego, and, therefore, corporate assets were properly characterized as community property.⁸⁶ Disregarding the corporate entity and the facts found by the trial court, the appellate court stated that the alter-ego concept provides an equitable basis for relief based on fraud⁸⁷ and that it constitutes a ground for recovery independent from reimbursement principles.⁸⁸ In reaching this conclusion, the court relied heavily on the dissenting views rejected by the

77. 644 S.W.2d 455, 459 (Tex. 1982); see Paulsen, *Jensen III and Beyond: Exploring the Community Property Aspects of Closely Held Corporate Stock in Texas*, 37 BAYLOR L. REV. 653, 659-61 (1985).

78. *Hernandez v. Hernandez*, 703 S.W.2d 250, 252-53 (Tex. App.—Corpus Christi 1985, no writ); *Allen v. Allen*, 704 S.W.2d 600, 606 (Tex. App.—Fort Worth 1986, no writ).

79. *Jones v. Jones*, 699 S.W.2d 583, 586 (Tex. App.—Texarkana 1985, no writ), *discussed at greater length* in McKnight, *1986 Annual Survey, supra* note 57, at 34.

80. 665 S.W.2d 107, 110-11 (Tex 1984) (Robertson, J., concurring).

81. *Kamel v. Kamel*, 721 S.W.2d 450, 451 (Tex. App.—Tyler 1986, no writ).

82. *Id.* at 451-52; TEX. R. CIV. P. 301.

83. *Kamel*, 721 S.W.2d at 451 (citing *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 634 (Tex. 1986)); *cf. Morgan v. Morgan*, 725 S.W.2d 485, 487 (Tex. App.—Austin 1987, no writ).

84. 693 S.W.2d 944 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

85. *Id.* at 955-56.

86. *Id.* at 958.

87. *Id.* at 953.

88. *Id.* at 952.

majority of the court in *Vallone*.⁸⁹ Although in *Vallone* the Texas Supreme Court did not discuss the alter-ego argument, there is no need for this alternative and conflicting approach.

Although not called on to apply the principle of reimbursement in *Hernandez v. Hernandez*⁹⁰ because a claim was not asserted, the Corpus Christi court went on to restate the principle laid down by the Texas Supreme Court in *Anderson v. Gilliland*⁹¹ that the "amount of reimbursement for funds expended by [a marital] estate for improvement of another [marital] estate is the measure of enhancement in value to the benefited estate."⁹² The court then observed that the trial court's finding that the community benefits of sixteen years of rent-free occupancy of a separate home improved with community funds outweighed the value of improvements to the property and therefore precluded recovery for reimbursement.⁹³ Relying on an earlier opinion of the Corpus Christi court,⁹⁴ however, the Texarkana court of appeals rejected the proposition that the value of community enjoyment should be set off against the value of benefits received by a separate residence at community expense.⁹⁵ In the case of community payment of taxes, insurance, and interest for the benefit of other separate property, however, the Texarkana court twice reiterated the principle that an offset of community benefits is appropriate.⁹⁶ The Fort Worth court held in *Allen v. Allen*⁹⁷ that because the claimant failed to make a precise showing of how much community property was used to benefit a separate land-holding and to show that the amount expended exceeded the benefits received by the community, the claimant had made no case for reimbursement.⁹⁸

These diverse opinions with respect to setoff of profits and the value of enjoyment in cases of community claims for reimbursement against separate estates raise fundamental questions concerning reimbursement in those instances. In the case of profits of separate property, the community estate is absolutely entitled to them.⁹⁹ Why, then, should a community claim for reimbursement be reduced by the amount of profits generated? Why is it that if the benefit produces income, reimbursement is *reduced*, whereas if no profit whatever is produced, there is recovery in full? In the case of enjoyment of a separate home by the spouses, the grounds for questioning the concept of setoff are even broader. First, occupancy is an element of spousal

89. *Id.* at 952-53; see *Vallone v. Vallone*, 644 S.W.2d 455, 466 n.9 (Tex. 1982) (Sondock, J., dissenting).

90. 703 S.W.2d 250 (Tex. App.—Corpus Christi 1985, no writ).

91. 684 S.W.2d 673, 675 (Tex. 1985), discussed in Paulsen, *supra* note 77, at 722-23.

92. *Hernandez*, 703 S.W.2d at 252.

93. *Id.* at 253 (citing *Dakan v. Dakan*, 125 Tex. 305, 319, 83 S.W.2d 620, 627 (1935)).

94. *Trevino v. Trevino*, 555 S.W.2d 792, 798 (Tex. Civ. App.—Corpus Christi 1977, no writ).

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

96. *Id.*; *Nelson v. Nelson*, 713 S.W.2d 146, 148 (Tex. App.—Texarkana 1986, no writ).

97. 704 S.W.2d 600 (Tex. App.—Fort Worth 1986, no writ).

98. *Id.* at 606-07.

99. *De Blane v. Hugh Lynch & Co.*, 23 Tex. 25, 27 (1859); see TEX. FAM. CODE ANN. § 5.22(a)(2) (Vernon 1975) (revenue from separate property is solely managed *community* property).

support required by law.¹⁰⁰ Second, the court may order occupancy after divorce as an element of child support,¹⁰¹ and at death the right of a surviving spouse to occupy the decedent's separate homestead is constitutionally assured.¹⁰² Why, then, is reduction of reimbursement granted in these instances? Finally, it may be noted that setoff of profits or value of occupancy never applies in cases of claims for separate reimbursement against the community.¹⁰³

The courts of appeals have also expressed diverse views of the relevance of enhancement in value. While referring to the "enhanced value of the [benefited] estate" due to improvement, the San Antonio court of appeals in *Carley v. Carley*¹⁰⁴ seems to understand enhancement in terms of the *cost* of improvements rather than increase in market value due to the improvement.¹⁰⁵ In the case of community discharge of a premarital separate *indebtedness* incurred for the improvement of separate realty, the Texarkana court held in *Nelson v. Nelson*¹⁰⁶ that enhancement in value of the property was irrelevant. What was paid was merely an indebtedness.¹⁰⁷

In *Kamel v. Kamel*¹⁰⁸ the Tyler court of appeals reviewed a more complicated problem. The spouses had executed community obligations for the construction of improvements on the husband's separate property. The community, however, made no payments to discharge the indebtedness; it was the husband's father who retired a substantial part of the debt. The court concluded that the father's payment did not benefit the community but constituted an equal gift to each spouse as separate property.¹⁰⁹ Hence, the wife was entitled to reimbursement for her separate share contributed to the discharge of the debt.¹¹⁰

In *Smith v. Smith*¹¹¹ a claim for reimbursement was asserted for improvements made at community expense for land of which the husband owned an undivided one-half and leased the rest from his mother. The Texarkana court was unwilling to upset the trial court's award of reimbursement for enhancement of the entire property although the benefit was not shown to

100. See TEX. FAM. CODE ANN. § 4.02 (Vernon Supp. 1987) (Each spouse has the duty to support the other). The fundamental relationship between the homestead concept and the interspousal duty of support is illustrated by *Schulz v. L.E. Whitham & Co.*, 119 Tex. 211, 216-17, 27 S.W.2d 1093, 1095 (1930), and *Senegar v. La Vaughan*, 230 S.W.2d 311, 312-13 (Tex. Civ. App.—Beaumont 1950, writ ref'd n.r.e.).

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

102. TEX. CONST. art. XVI, § 52.

103. *Hilton v. Hilton*, 678 S.W.2d 645, 648 (Tex. App.—Houston [14th Dist.] 1984, no writ).

104. 705 S.W.2d 371 (Tex. App.—San Antonio 1986, writ diss'd w.o.j.).

105. *Id.* at 374.

106. 713 S.W.2d 146 (Tex. App.—Texarkana 1986, no writ).

107. *Id.* at 148.

108. 721 S.W.2d 450 (Tex. App.—Tyler 1986, no writ).

109. *Id.* at 452 (relying on *Rogan v. Williams & Co.*, 63 Tex. 123, 129 (1885); *Bradley v. Love*, 60 Tex. 472, 477 (1883); *McLemore v. McLemore*, 641 S.W.2d 395, 397 (Tex. App.—Tyler 1982, no writ)).

110. *Id.*

111. 715 S.W.2d 154 (Tex. App.—Texarkana 1986, no writ).

favor the husband's interest alone.¹¹² As pointed out in *Raulston v. Raulston*,¹¹³ however, a community benefit conferred on a third person in such an instance is a matter of constructive fraud and should be so evaluated before applying principles of reimbursement.¹¹⁴

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

Disposition of Solely Managed Community Property: Constructive Fraud. Although each spouse has the power of management, control, and disposition of all community property generated by his or her labor or separate property,¹¹⁵ the disposition of the other spouse's interest in the property is subjected to certain fiduciary restraints. Hence if the managing spouse disposes of some of the solely managed community property *gratuitously*, a presumption of constructive fraud arises as to the other spouse's half-interest in the property disposed of.¹¹⁶ Further, the burden of proving that the donation was fair and reasonable is upon the disposing spouse or the donee.¹¹⁷ Thus, if the husband buys a community life insurance policy on his own life, as he did in *Jackson v. Smith*,¹¹⁸ and names his sister as the beneficiary, his widow may assert a right to one-half of the proceeds. Because the sister failed to introduce evidence of the total value of the community estate and the proportionate value of one-half of the life insurance proceeds in issue, she did not even begin to discharge her burden of proving that the widow was adequately provided for with the rest of the community assets.¹¹⁹ The widow was therefore successful in her claim to one-half of the proceeds of the policy, and the decedent's one-half belonged to the designated beneficiary.¹²⁰

If a spouse diverts community funds to benefit himself rather than a third person at the expense of his spouse, the same analysis of rights should apply. In *Ashmore v. Carter*¹²¹ the husband named his estate as the beneficiary of a community policy on his life. In this situation, as in similar circumstances when a constructive fraud is alleged, it was for the donee to establish that the decedent's disposition of the widow's share of the particular community asset was reasonable under the circumstances.¹²² Thus, the court seems to have mistaken the burden of proof in reversing the trial court's award of one-half of the proceeds of the policy to the widow.¹²³ If, however, the de-

112. *Id.* at 157, 160 n.10.

113. 531 S.W.2d 683 (Tex. Civ. App.—Texarkana 1975, no writ). The authority of *McCanless v. Devenport*, 405 W.2d 903, 908 (Tex. Civ. App.—Dallas 1931 no writ), cited by the court in *Smith* is not convincing.

114. *Raulston*, 531 S.W.2d at 685.

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

116. *Givens v. Girard Life Ins. Co.*, 480 S.W.2d 421, 425 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

117. *Id.*

118. 703 S.W.2d 791 (Tex. App.—Dallas 1985, no writ).

119. *Id.* at 796.

120. *Id.*

121. 716 S.W.2d 171 (Tex. App.—Beaumont 1986, no writ).

122. *Reaney v. Reaney*, 505 SW.2d 338, 340 (Tex. Civ. App.—Dallas 1974, no writ).

123. *Ashmore*, 716 S.W.2d at 174.

ceased spouse disposes of his spouse's share of community property by will, the choices open to her are somewhat different. If a testamentary provision has been made for her of property to which she would not be otherwise entitled, that disposition is construed as conditioned on her allowing the testator's dispositions of her property interests to stand. Hence, she is put to an election to take under the will or to reclaim her property and forfeit the testamentary provision made for her.¹²⁴ If no provision is made for her under the will, the doctrine of equitable election is inapplicable, and she need merely assert her right to reclaim her property interest.¹²⁵ In *Robinson v. Shelton*¹²⁶ the husband had made a loan of community funds during marriage and forgave repayments in his will. This, then, did not constitute an inter vivos constructive fraud but a mere disposition by will of one-half of the debt.¹²⁷ In the absence of a testamentary provision for her, the provisions of the will did not put the widow to an election and her share of the loan was not forgiven.¹²⁸

Liability of Spouses to Third Persons. In preparing the liability provisions of the Family Code¹²⁹ the draftsmen thought it sufficient to define the sorts of marital property that spouses' creditors might look to for satisfaction of particular kinds of debts and to assume that the general rules of law applicable to a spouse's personal liability did not need to be explicitly stated except with respect to the rules for the support of spouses and minor children.¹³⁰ Because a number of appellate decisions indicate misconceptions about the general principles controlling a spouse's personal liability,¹³¹ however, the Family Law Section of the State Bar has recommended clarification of the Family Code in this respect.¹³² Nevertheless, the appellate courts have not always misconstrued the draftsmen's intentions.¹³³ The best recent exposition of those rules is in Justice Dickenson's brief opinion for the Eastland court of appeals in *Latimer v. City National Bank*.¹³⁴ The husband defaulted on notes he had made during marriage to a lender-bank, which thereupon brought suit against the borrowing husband and his wife. The trial court rendered judgment against both spouses, and the wife appealed. The East-

124. *Wright v. Wright*, 154 Tex. 138, 144, 274 S.W.2d 670, 674-75 (1955).

125. *Id.*, 274 S.W.2d at 674.

126. 717 S.W.2d 601 (Tex. 1986).

127. *Id.* at 602.

128. *Id.*

129. TEX. FAM. CODE ANN. §§ 5.61-62 (Vernon 1975).

130. *Id.* § 4.02 (Vernon Supp. 1987).

131. See, e.g., *Wileman v. Wade*, 665 S.W.2d 519, 520 (Tex. App.—Dallas 1983, no writ), discussed in *McKnight*, 1985 *Annual Survey*, *supra* note 2, at 15; *Anderson v. Royce*, 624 S.W.2d 621, 623 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), commented on in *McKnight*, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 37 Sw. L.J. 65, 76-77 (1983) [hereinafter *McKnight*, 1983 *Annual Survey*]; *Brazosport Bank v. Robertson*, 616 S.W.2d 363, 366-67 (Tex. App.—Houston [14th Dist.] 1981, no writ), commented on in *McKnight*, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 36 S.W. L.J. 97, 116-17 (1982) [hereinafter *McKnight*, 1982 *Annual Survey*].

132. See *Tindall*, *Proposed Legislation in Family Law*, 49 TEX. B.J. 1175, 1179 (1986).

133. See *In re Karber*, 25 Bankr. 9, 12 (Bankr. N.D. Tex. 1982).

134. 715 S.W.2d 825 (Tex. App.—Eastland 1986, no writ).

land court allowed the wife's appeal.¹³⁵ Although the husband's obligation was very clearly a community debt in that the creditor had not agreed to look only to the husband's separate property for payment, such a description of the obligation did not cause the wife to be personally liable for payment.¹³⁶ If the wife were personally liable, the community property subject to her sole management¹³⁷ and her separate property¹³⁸ would then be subject to seizure by the judgment creditor. The rest of the community estate,¹³⁹ all of which in this instance was apparently subject to the husband's sole or joint management, was nonetheless answerable in satisfaction of the debt.¹⁴⁰

The cardinal rule of community management is that control is given to the spouse whose efforts or property generate community profits.¹⁴¹ In turn, the rules of community liability generally follow those of management.¹⁴² In *Keda Development Corp. v. Stanglin*¹⁴³ a purchaser of community property at an execution sale against the husband, in a last-ditch effort to save some of the purchase from the husband's attack on the sale, attempted to rely on the fact that the wife was not a party to the proceeding. The city had sued the husband for an unpaid paving lien on property held in the husband's name only. Judgment was rendered against the husband, and the property was sold on execution. The husband later brought suit against the buyer on the grounds of gross inadequacy of price and irregularity of the sale, and the sale was set aside. On appeal, the buyer argued, inter alia, that because the property was community property, it was presumptively subject to the joint management of the spouses, and hence without the wife's joinder in the proceeding the husband could only set aside the sale of his interest in the property. In rejecting this argument the court first held that the community property in issue was clearly not subject to the joint management of the spouses because it was held in the husband's name only and a person dealing with him could therefore rely on his power to deal with the property under section 5.24 of the Family Code.¹⁴⁴ The court might have added that under Civil Practice and Remedies Code section 34.046¹⁴⁵ a purchaser at an execution sale stands as a bona fide purchaser from the judgment debtor if he

135. *Id.* at 826.

136. *Id.* at 826-27.

137. TEX. FAM. CODE ANN. § 5.61(b)(2) (Vernon 1975). The other rules of law there referred to are those that apply when one spouse acts as agent for the other, including the agency of procuring necessities and in connection with partnerships and joint ventures. The discussion of the point in Griffith & Dickey, *Debt Liability of Marital Property in Texas*, 14 COMM. PROP. J. 30, 38 (1987), is both too narrow and too broad. It is too broad in that the Texas statute does not purport to refer to rules of federal law, though federal rules may also constitute exceptions to Texas law. It is too narrow in its incomplete reference to agency relationships.

138. TEX. FAM. CODE ANN. § 5.61(a) (Vernon 1975).

139. *Id.* § 5.61(c).

140. *Latimer*, 715 S.W.2d at 827.

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

142. *Id.* § 5.61(b), (c).

143. 721 S.W.2d 897 (Tex. App.—Dallas 1986, no writ).

144. *Id.* at 904; TEX. FAM. CODE ANN. § 5.24 (Vernon 1975).

145. TEX. CIV. PRAC. & REM. CODE ANN. § 34.046 (Vernon 1986).

would have been such in dealing directly with the debtor. Thus, after having relied initially on the husband's authority to sell the whole property, the buyer was attempting to rely defensively on the husband's lack of authority to sell the wife's share. The buyer was, in effect, attempting to assert for his own benefit the wife's right to attack a sale to a bad faith purchaser. The court further pointed out that in spite of the Texas Supreme Court's comments concerning the demise of the doctrine of virtual representation in a situation involving jointly managed community property in *Cooper v. Texas Gulf Industries, Inc.*,¹⁴⁶ the principle is still applicable to cases of solely managed community property and consequently it is carried over into the context of liability when property held in one spouse's name only is sold to a good faith buyer at an execution sale.

For the collection of delinquent taxes the Internal Revenue Code gives the United States a lien on "all property and rights to property . . . belonging to such person,"¹⁴⁷ and that lien may be enforced by suit¹⁴⁸ or administrative levy and sale.¹⁴⁹ The Code further provides that the Revenue Service has the power to give to the buyer "all the right, title, and interest the party delinquent had in and to the real property,"¹⁵⁰ that is, to give a quit claim deed of the taxpayer's interest. These provisions are ordinarily interpreted as giving the Revenue Service access to the property interest of a taxpayer in community property even if that interest is subject to the sole management of the other spouse and thus is not subject to an ordinary creditor's claim.¹⁵¹ Nevertheless, on a few occasions the Revenue Service has successfully asserted that it might seize more than the ownership interest of a taxpayer in the community property if state law authorizes an ordinary creditor to do so.¹⁵² If the Service wishes to rely on state law in such cases, however, it should sue as an ordinary creditor and, if successful, "exercise the usual rights of a judgment creditor,"¹⁵³ because administrative levy does not authorize such broad powers.

In *Thomas v. Rhodes*¹⁵⁴ a tax deficiency had arisen not from a couple's failure to pay income taxes but from the husband's failure to discharge payroll taxes in the operation of his business. Evidently proceeding by way of

146. 513 S.W.2d 200, 202 (Tex. 1974).

147. I.R.C. § 6321 (1986) (emphasis added).

148. *Id.* § 7403.

149. *Id.* § 6331.

150. *Id.* § 6339(b)(2).

151. *Hollingshead v. United States*, 85-2 U.S. Tax Cas. (CCH) ¶ 9772 (N.D. Tex. 1985).

152. See *Babb v. Schmidt*, 496 F.2d 957, 960 (9th Cir. 1974). There is little clarity as to facts or holding in *Short v. United States*, 395 F. Supp. 1151, 1153 (E.D. Tex. 1975), but it appears that the Revenue Service was allowed to seize the entire community property for the husband's tax liability on the assumption that a husband's creditors under Texas law can reach all community property, subject to an exemption in favor of the wife, which exemption is inapplicable to the federal government. Though this might have been an accurate description of Texas law prior to January 1, 1968, the law was radically changed at that time by the passage of the Matrimonial Property Act of 1967, art. 4620, ch. 309, § 1, 1967 TEX. GEN. LAWS 738, now codified at TEX. FAM. CODE ANN. § 5.61 (Vernon 1975).

153. *United States v. Rodgers*, 461 U.S. 677, 682 (1983) (citing I.R.C. §§ 6502(a), 7401, 7402(a)).

154. 701 S.W.2d 943 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

administrative levy,¹⁵⁵ the Revenue Service had seized and sold not only the taxpayer-husband's interest in a particular piece of nonexempt community realty but the interest of the nontaxpayer-wife as well. Asserting that the Revenue Service could not seize and sell more than her husband's community half-interest in the property, the wife then brought suit in state court against the buyer to reclaim her community half-ownership interest in the land. The buyer did not rely on the right of the Revenue Service to reach the community property subject to the husband's sole or joint management under section 5.61(c) of the Family Code.¹⁵⁶ Rather, he seems to have relied on the fact that because the property was held in the name of the husband only, the buyer could get good title to the *whole* of it as a bona fide purchaser under section 5.24 of the Family Code.¹⁵⁷ The Fort Worth court of appeals concluded that the Service and the buyer should have been able to rely on section 5.24.¹⁵⁸ Such reliance seems wholly misplaced. The Service was not "dealing with" the husband, as the statute provides, and neither was the buyer. In a further effort to support its rejection of the wife's claim by showing that she was personally liable for the taxes, the court indulged in some extraneous observations that the tax was a community debt, that the wife was closely associated with the husband in his business, and that profits from the business were reported in the couple's joint income-tax return.¹⁵⁹ These comments did not help to clarify the legal issues involved. By holding, in effect, that the purchaser at a federal tax sale gets not only what the taxpayer had but also what the taxpayer could have sold to a bona fide purchaser, the court gave an unjustifiably broad reading of the powers of the Revenue Service arising out of its administrative levy.

In *Prewitt v. United States*¹⁶⁰ the Fifth Circuit Court of Appeals dealt with a post-divorce federal tax sale. In that instance, however, the ex-wife, as recipient of community property on divorce, had had an effective means of protecting herself: recordation of the divorce decree under section 12.005(a) of the Property Code.¹⁶¹ Because the ex-wife was awarded community property and failed to protect herself by recording her interest, the buyer of the ex-wife's separate interest at the Revenue Service's sale of the former community property (still recorded in the name of the ex-husband-taxpayer) was allowed to prevail.¹⁶² Again, the holding of the court treated the purchaser at the federal tax sale as though he was a bona fide purchaser

155. Under I.R.C. § 6331(a) (1986).

156. TEX. FAM. CODE ANN. § 5.61(c) (Vernon 1975).

157. *Id.* § 5.24.

158. 701 S.W.2d at 945.

159. *Id.* The fact that the wife also signed the mechanic's lien contract and deed of trust is relevant to the question of management, but management rights were not at issue. Counsel for the wife added to the confusion by pursuing the argument that the property was subject to joint management of the spouses in that the wife had previously joined the husband in executing a mechanic's lien contract and a deed of trust on the property.

160. 792 F.2d 1353 (5th Cir. 1986).

161. TEX. PROP. CODE ANN. § 12.005(a) (Vernon 1984).

162. 792 F.2d at 1356-58. Although the ex-wife moved to certify the question raised to the Texas Supreme Court under TEX. CONST. art. V, § 3-c, the Fifth Circuit court declined to make the reference. 792 F.2d at 1359 n.6.

from the record-title-holder.¹⁶³

Although many believe that the liability provisions of the Family Code¹⁶⁴ are too broad in making one spouse's solely managed community property answerable for the tortious liability of the other spouse,¹⁶⁵ the State Bar has not yet recommended statutory reform in this regard. All community property (however managed) is answerable for the torts of either spouse committed during marriage, but the separate property of the spouse who is not guilty of tortious acts is not liable for the torts of the other spouse.¹⁶⁶ In *Traweck v. Larkin*¹⁶⁷ the trial and appellate courts concluded that an ex-wife was not personally liable for her ex-husband's negligent act causing the injury of a third person. Except for her presence when the accident occurred, the ex-wife had been in no way involved in the ex-husband's negligent act. There was no agency relationship between the spouses, nor were they engaged in a joint enterprise at the time.¹⁶⁸

In *United States v. D.K.G. Appaloosas, Inc.*¹⁶⁹ the federal government sought the forfeiture of community realty because the couple had purchased the land with the proceeds of the husband's illegal drug trafficking activities. Without considering the authority of *Amrani-Khaldi v. State*,¹⁷⁰ in which a Texas appellate court ordered a forfeiture of community property used to perpetrate a state criminal offense,¹⁷¹ the federal district court ruled against forfeiture.¹⁷² Although the federal authority only sought to seize the husband's interest in the property as it is also authorized to do for purposes of satisfying federal tax deficiencies, the federal court held that the federal effort toward seizure failed because its objective could only be achieved by an involuntary partition of the property contrary to state law.¹⁷³ In *Amrani-Khaldi* the Corpus Christi appellate court supported the state's seizure of the wife's community interest as well as the husband's by referring to the husband's tortious liability that his criminal act included.¹⁷⁴ Although the federal court could have relied on the supremacy doctrine to support the seizure, the state court's analysis in *Amrani-Khaldi* still seems more appro-

163. 792 F.2d at 1358.

164. TEX. FAM. CODE ANN. § 5.61(d) (Vernon 1975).

165. For a discussion of the alternatives considered by the draftsmen of the statute, see *Commentary to the Matrimonial Property Act of 1967*, 17 TEX. TECH L. REV. 1319, 1334 (1986).

166. TEX. FAM. CODE ANN. § 5.61(a), (d) (Vernon 1975).

167. 708 S.W.2d 942 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).

168. "That [the husband] might have chosen another course had his wife suggested one falls short of proving that he was subject to her control and hence her agent. The facts in evidence fail[ed] to demonstrate a business or pecuniary purpose without which there can be no joint enterprise." *Id.* at 946.

169. 630 F. Supp. 1540 (E.D. Tex. 1986).

170. 575 S.W.2d 667 (Tex. Civ. App.—Corpus Christi 1978, no writ), *discussed in McKnight, 1979 Annual Survey, supra* note 42, at 149-50.

171. *Amrani-Khaldi*, 575 S.W.2d at 668-69.

172. *Appaloosas*, 630 F. Supp. at 1555.

173. *Id.*; see I.R.C. § 6321(a) (1986). In the *Appaloosas* case the court did not mention whether the spouses claimed the realty in issue as their homestead.

174. 575 S.W.2d at 668.

priate to the problem than does that of the federal court in *Appaloosas*.¹⁷⁵

Interspousal Torts Affecting Property. In the usual course of events the willful act of one spouse in disposing of or destroying the separate property of the other spouse gives the other spouse a cause of action for damages,¹⁷⁶ whereas similar treatment of the community interest of the other spouse merely give a right to reimbursement.¹⁷⁷ If the property is insured against wrongful taking or destruction, however, one may expect the insurer to raise defenses to enforcement of the policy based on the marital relationship of the perpetrator of the loss, even if the policy does not by its terms preclude recovery in such cases. In 1952 the Waco court of civil appeals followed precedents in other jurisdictions to enunciate a rule of policy (approved by the Texas Supreme Court in rejecting the writ of error as "refused") that when property is destroyed by a co-owner, the other insured owner cannot recover.¹⁷⁸ This conclusion stemmed from an argument rooted in the contractual nature of the relationship between the insured and the insurer: because the destructive co-owner-insured was mutually obligated under the policy and could not benefit by his own wrong, the innocent co-owner was also barred from recovery. The reasoning underlying the rule was therefore dubious at best. In recent years, however, many American jurisdictions have allowed the innocent co-owner to recover his share of the loss from the insurer,¹⁷⁹ and the Texas Supreme Court followed their example in *Kulubis v. Texas Farm Bureau Underwriters Insurance Co.*¹⁸⁰ The husband and wife were tenants in common of a mobile home that the wife's parents had given to them. Hence each spouse owned a separate interest in the property. Both spouses were named as insured parties to a policy of insurance against destruction of the mobile home. In a fit of anger the husband willfully destroyed the mobile home and all of its contents, and the wife claimed her share of the loss from the insurer. The Texas Supreme Court concluded that she should recover, because the innocent co-insured should not be punished

175. The federal judge cited no authority to support his conclusion.

176. Because the Texas Supreme Court has only recently lifted the bar to suit based on the doctrine of interspousal immunity for willful torts, *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977), there are no other authorities to be cited for this point.

177. *Carnes v. Meador*, 533 S.W.2d 365, 368 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (giving away community property); *Reaney v. Reaney*, 505 S.W.2d 338, 339-40 (Tex. Civ. App.—Dallas 1974, no writ) (squandering and wasting community property); see also *Belz v. Belz*, 667 S.W.2d 240, 247 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (fraudulently secreting community property rejected as an independent cause of action in conjunction with a divorce). A spouse's suffering loss by confiscation of community property should have the same effect. See *Amrani-Khaldi v. State*, 557 S.W.2d 667, 668-91 (Tex. Civ. App.—Corpus Christi 1978, no writ). There does not seem to be any appellate case in which one spouse was charged with *stealing* the community interest of the other spouse. Nor is there any appellate authority concerning a spouse's theft of the other spouse's separate property.

178. *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281, 283 (Tex. Civ. App.—Waco 1952, writ ref'd).

179. E.g., *Morgan v. Cincinnati Ins. Co.*, 411 Mich. 267, 307 N.W.2d 53, 54-55 (1981); *Hoyt v. New Hampshire Fire Ins. Co.*, 92 N.H. 242, 29 A.2d 121, 123 (1942); *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 326 N.W.2d 727, 740 (1982).

180. 706 S.W.2d 953 (Tex. 1986).

by being barred from recovery by the other spouse's act.¹⁸¹

The insurer in *Kulubis* apparently did not argue, as the insurer successfully argued in *Western Fire Insurance Co. v. Sanchez*,¹⁸² that the wife should be precluded from recovering because the property was the couple's homestead. But that additional consideration should not affect the innocent co-owner's recovery. One may ask, however, whether the same result would occur if the property were a community asset rather than the separate property of the innocent spouse. The court reserved that question for further consideration.¹⁸³ If destruction of the innocent victim's community interest gives that spouse a right of reimbursement against the wrongdoer, as it certainly should, there is no reason why the innocent spouse should not be able to recover from the insurer rather than the wrongful spouse on dissolution of the marriage. If the marriage is not dissolved, however, recovery from the insurer in that instance requires the conclusion that the innocent spouse has a cause of action for damages against the other spouse for destruction of the innocent spouse's interest in community property. A comparable cause of action has long been said to exist to set aside a fraudulent disposition of community property during marriage.¹⁸⁴ Hence, allowing the innocent spouse to recover the value of one-half of the community property under the insurance policy would not do violence to established concepts. Because the recovery would be presumed community property if the marriage still subsisted, to make the property the separate estate of the innocent spouse it would be necessary to conclude that the other spouse had forfeited his community half by his wrongful act, as indeed had already occurred.¹⁸⁵ Nevertheless, in ruling on this very situation the federal court of appeals in *Norman v. State Farm Fire & Casualty Co.*¹⁸⁶ did not embolden itself to reach such a conclusion.¹⁸⁷

The dispute in *Crawford v. Coleman*¹⁸⁸ arose out of two contracts of insurance on the life of a wife who was willfully killed by her husband. Hence, the husband was denied the proceeds as primary beneficiary, leaving the wife's parents as the taker of the proceeds under the terms of one policy and the husband's son of a prior marriage as the taker under the other policy.¹⁸⁹ The Texas Supreme Court concluded¹⁹⁰ that the proceeds of both policies

181. *Id.* at 955.

182. 671 S.W.2d 666 (Tex. App.—Tyler 1984, writ ref'd n.r.e.), criticized in McKnight, 1985 Annual Survey, *supra* note 2, at 19-20.

183. *Kulubis*, 706 S.W.2d at 955.

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

185. *Dickson v. Strickland*, 114 Tex. 176, 205-06, 265 S.W. 1012, 1023-24 (1924).

186. 804 F.2d 1365 (5th Cir. 1986) (per curiam).

187. "We are not the custodians of Texas's community property law, however; and even were we to conclude that such a rule would be a wise measure, confecting it would be an improper exercise for us." *Id.* at 1366.

188. 726 S.W.2d 9 (Tex. 1987).

189. *Id.*

190. *Id.* at 10-11.

passed under the provisions of section 21.23¹⁹¹ of the Insurance Code in favor of the decedent's next of kin rather than under the terms of the policies. The dissenting justices pointed out,¹⁹² however, that there was really no difference between the terms of the policy and the effect of the statute as to one of the policies. In the case of the other policy, giving the statutory language precedence over the provisions of the contract required not only overruling *Deveroex v. Nelson*¹⁹³ but also putting aside the terms of the policy that presumably expressed the decedent's wishes.¹⁹⁴

Homestead: Designation and Extent. In *re Hunt*,¹⁹⁵ a bankruptcy case involving a homestead claim, is somewhat reminiscent of *In re Claffin*,¹⁹⁶ because in both cases the issue was whether the homestead claimant had abandoned a former home and established a new homestead elsewhere. Unlike the situation in *Claffin*, in which the claimant asserted that she had not abandoned her first home, in *Hunt* the claimant insisted that a new homestead had been established by intent alone. While occupying their home in Midland, the husband and wife executed a deed-of-trust note for \$400,000 to a bank and gave as security a home in Houston that they would acquire the following day. When the couple acquired the home in Houston for \$180,000, the vendor reserved a lien and then assigned it to the bank. The couple did not move to the home in Houston until over a month later. The couple afterwards filed a voluntary petition in bankruptcy and asserted that only \$180,000 of their note to the bank was secured by the Houston home as purchase-money. They argued that the rest of the note could not be so secured by the Houston home, because it was their homestead at the time that they purported to give the home as security for the entire note. The bankrupt couple also asserted that the Houston property was acquired with the sole intent of making it their homestead and that their Midland home thereupon lost its homestead character. As the court pointed out, however, intention alone could not divest the existing home of its exempt character, and hence the new property could not acquire a homestead designation by intention alone.¹⁹⁷ Although the couple put particular reliance on a decision in which acquirers of a home were said to have had *constructive possession* of it from the date of purchase for homestead purposes,¹⁹⁸ the court emphasized that the authority relied on dealt with a couple who had no previous homestead; the decision was therefore inapplicable to the situation before the court.¹⁹⁹ The burden of showing that the Houston property had become

191. TEX. INS. CODE ANN. art. 21.23 (Vernon 1981).

192. 726 S.W.2d at 12 (Kilgarlin, J., joined by Campbell, J., concurring and dissenting).

193. 529 S.W.2d 510 (Tex. 1975).

194. *Crawford*, 726 S.W.2d at 13.

195. 61 Bankr. 224 (Bankr. S.D. Tex. 1986).

196. 761 F.2d 1088 (5th Cir. 1985), *discussed in McKnight, 1986 Annual Survey, supra* note 57, at 18-20.

197. 61 Bankr. at 228, 229.

198. *Vaughan v. Sterling Nat'l Bank & Trust Co.*, 124 S.W.2d 440, 445 (Tex. Civ. App.—El Paso 1938, writ ref'd).

199. *Hunt*, 61 Bankr. at 228.

their homestead as of the date of the mortgage was upon the claimants, and they therefore had to show abandonment of their Midland home prior to that time.²⁰⁰ Hence the claimants were unsuccessful in limiting their collateral on the \$400,000 note.²⁰¹

In a recent opinion²⁰² the Texas Attorney General considered whether the stock in a nonprofit corporation for cooperative housing is afforded homestead protection. The opinion concludes that neither the stock, which belongs to the resident, nor the living space, which belongs to the corporation, is protected from seizure for debt,²⁰³ and the person who occupies the cooperative apartment is not entitled to a residential homestead tax exemption.²⁰⁴ The resident owns only personalty beyond the scope of the homestead law, while the corporation is unable to claim a homestead exemption for any purpose.²⁰⁵ The opinion points out, however, that these conclusions are not applicable to the owners of condominiums.²⁰⁶ The condominium owner actually owns the residential space and shares common ownership of the other elements of the premises.²⁰⁷

In *In re Yamin*²⁰⁸ the debtor occupied a home under a lease from a wholly owned corporation. As president of the corporation the debtor negotiated a loan from a bank and gave a mortgage on the property with the assurance that it was not his homestead. After the debtor was adjudicated a bankrupt, he asserted that the property was his homestead. To sustain his position he offered into evidence an apparently unrecorded lease agreement between himself and the corporation by which agreement he was given an option to purchase the property. The debtor and the corporation were alleged to have entered into the agreement prior to negotiation of the loan with the bank. Apparently the bankruptcy court did not believe the debtor's evidence with respect to the prior execution of the lease with an option to purchase and held that the debtor was estopped from asserting any equitable right in the property because of his misrepresentation as to the homestead character of the property.²⁰⁹ Even if the unrecorded instrument had been in existence, but unknown to the bank, the homestead claim should not have prevailed against a bona fide mortgagee of the record-title-holder, regardless of misrepresentation. Although a leasehold interest is sufficient to protect improvements thereon from seizure by the lessee's creditors when the premises are occupied as a homestead,²¹⁰ neither a corporation nor a partnership can maintain a homestead claim, nor as a general rule can an individual

200. *Id.* at 229.

201. *Id.*

202. Op. Tex. Att'y Gen. No. JM-612 (1986).

203. *Id.* at 2752-54.

204. *Id.* at 2747-52, 2754.

205. *Id.* at 2753.

206. *Id.* at 2751.

207. *Id.*; TEX. PROP. CODE ANN. §§ 81.002(3), 81.104 (Vernon 1984); see *Dutcher v. Owens*, 647 S.W.2d 948, 949 (Tex. 1983).

208. 65 Bankr. 938 (Bankr. S.D. Tex. 1986).

209. *Id.* at 942-43.

210. *O'Neil v. Quilter*, 111 Tex. 345, 349, 234 S.W. 528, 529 (1921); *Capitol Aggregates, Inc. v. Walker*, 448 S.W.2d 830, 835 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

assert a homestead on corporate or partnership property against creditors of the corporation or partnership.²¹¹ If an individual should maintain a home on property subject to an option to purchase and the seller's purchaser takes title subject to the option, it would seem that the option-holder's homestead claim should prevail. If he has no other home, his misrepresentation to the seller's creditor as to his nonhomestead claim should not estop him from asserting his homestead right.²¹²

Tacitly rejecting the argument that ill-gotten gains invested in a homestead have the character of exempt property,²¹³ the court in *In re Lodek*²¹⁴ expressly rejected the assertion that the claimant of misapplied funds who successfully asserts a constructive trust and abstracts his judgment against the debtor does not hold a right based on a "judicial lien," which would be subject to avoidance under section 522(f)(1) of the Bankruptcy Code.²¹⁵ The provision of the bankruptcy law contemplates an incumbrance initially fixed on property by a judicial proceeding, whereas the claimant's right asserted in *Lodek* was a subsisting property interest existing prior to judgment.²¹⁶

Homestead: Establishing and Enforcing Liens. When homestead protection was extended generally to single persons in 1973,²¹⁷ the benefits and limitations for single claimants thereby became identical to those available to married couples, except that the legislature limited to one hundred acres the

211. Although the court found in *Yamin* that in acquiring the property the debtor had taken title in the name of the corporation in order to defraud his existing and future creditors, 65 Bankr. at 941, the court nevertheless treated the property as being owned by the corporation and not by the debtor. *Id.* at 942. In such a situation the title-holder's creditors will prevail over the creditors of the purchaser. *Biccoci v. Casey-Swasey Co.*, 91 Tex. 259, 272, 42 S.W. 963, 969 (1897). In *In re Brokmeyer*, 51 Bankr. 704 (Bankr. S.D. Tex. 1985), it was also asserted that an individual might maintain a homestead on corporate property and thus preclude the corporation from mortgaging the property. *Id.* at 705. The claimants there, however, had actually abandoned the property prior to its incumbrance; so no homestead issue was actually posed.

212. The court stated in *Yamin*: "Assuming that [the debtor] had established a homestead interest in and to the property, he abandoned it when he executed the deed of trust and security agreement . . . , which specifically stated that [the property] was not his homestead." 65 Bankr. at 942. This is a merely rhetorical assumption. In the absence of a subsisting option to purchase that would be valid against a subsequent corporate creditor, it cannot be assumed that the debtor established a homestead on the property of the corporation. It is therefore meaningless to talk of an abandonment by estoppel of something that the claimant did not have.

213. See *In re Hunter*, No. BK-4-350, slip. op. at 14 (Bankr. N.D. Tex. Apr. 7, 1967), discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 58-59 (1969); *Curtis Sharp Custom Homes, Inc. v. Glover*, 701 S.W.2d 24, 29 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (Akin, J., dissenting) (embezzled funds); *Baucum v. Texam Oil Corp.* 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (fraudulently obtained funds); *First State Bank v. Zelesky*, 262 S.W. 190, 192 (Tex. Civ. App.—Galveston 1924, no writ) (embezzled funds); *Smith v. Green*, 243 S.W. 1006, 1008 (Tex. Civ. App.—Amarillo 1922, writ ref'd) (wrongful use of partnership funds).

214. 61 Bankr. 66 (Bankr. W.D. Tex. 1986).

215. *Id.* at 67-68; 11 U.S.C.A. § 522(f) (West 1979 & Pam. Supp. 1986).

216. 61 Bankr. at 67-68.

217. TEX. CONST. art. XVI, § 50; see McKnight, *1982 Annual Survey, supra* note 131, at 124.

amount of rural land a single person might hold as exempt.²¹⁸ The point of equality of treatment is apparent from *Moray Corp. v. Griggs*²¹⁹ in which the court held that a lien for homestead improvement must be perfected in the same way against a single owner as against one who is married.²²⁰ The independent constitutional provision²²¹ for mechanics' and materialmen's liens is therefore subject to the provision for homestead protection just as it is in the case of family-homestead claimants.

Although a lien may not be judicially fixed on homestead property for purposes unrelated to purchase money, taxes, or improvements for the property itself,²²² in two recent divorce cases the appellate courts have indicated that a property owner must assert the property's continuing homestead character to a divorce court in order to preclude the fixing of a lien for other purposes.²²³ In *Smith v. Smith*²²⁴ the Texarkana court of appeals read the Texas Supreme Court's opinion in *Burk Royalty Co. v. Riley*²²⁵ as establishing that if a divorced spouse continued to maintain a home on a property that was established as the pre-divorce homestead, the homestead character is not presumed to continue.²²⁶ It must be remembered, however, that after the *Burk Royalty* case was decided, the Texas Constitution was amended to allow a single person without a family to maintain a homestead,²²⁷ and as a general rule a homestead once established continues until a contestant can show that it was abandoned. By way of a dictum in *Burk Royalty*, the court said that a homestead right does not survive a divorce of a childless marriage.²²⁸ Such a rule is now hard to defend after the constitutional grant of a homestead to single persons, especially in the light of the court's further observation in *Burk Royalty*²²⁹ that the homestead is maintained for members of a family who remain in a home after the parents have divorced. Thus to say, as the court does in *Smith*, that no presumption of a continuing homestead exists following divorce is to stretch the dubious dictum in *Burk Royalty* far out of context. The court also overlooked such earlier Texas Supreme Court cases as *Speer & Goodnight v. Sykes*²³⁰ and *Hall v. Fields*²³¹ in which the court clearly held that a parent of minor children, though out

218. Now TEX. PROP. CODE ANN. § 41.001(a)(1) (Vernon 1984).

219. 713 S.W.2d 753 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd).

220. *Id.* at 754-55.

221. TEX. CONST. art. XVI, § 37.

222. *Id.* § 50; see *Wren v. Wren*, 702 S.W.2d 250, 252-53 (Tex. App.—Houston [1st Dist.] 1985, writ dism'd w.o.j.). The rule is the same for contractual liens. See *In re Howard*, 65 Bankr. 498, 508-09 (Bankr. W.D. Tex. 1986).

223. *McIntyre v. McIntyre*, 722 S.W.2d 533, 538 (Tex. App.—San Antonio 1986, no writ); *Smith v. Smith*, 715 S.W.2d 154, 159-60 (Tex. App.—Texarkana 1986, no writ). In the latter case the lien fixed on the property was for improvements to that property; therefore, the court's observations are of little precedential value.

224. 715 S.W.2d 154 (Tex. App.—Texarkana 1986, no writ).

225. 475 S.W.2d 566 (Tex. 1972).

226. *Smith*, 715 S.W.2d at 159.

227. TEX. CONST. art. XVI, § 50.

228. 475 S.W.2d at 568.

229. *Id.*

230. 102 Tex. 451, 454, 119 S.W. 86, 87-88 (1909).

231. 81 Tex. 553, 558, 17 S.W. 82, 84 (1891).

of possession, did not lose his homestead right.²³²

In *In re Miller*²³³ the bankruptcy court dealt with the validity of a lien on an ex-wife's homestead. In their divorce the court awarded the community home to the wife and gave the husband a lien on it to the extent of his property interest. In order to purchase her former husband's interest, the ex-wife borrowed a sum of money from a bank and gave the bank a lien for the amount borrowed. Thus, the bank was subrogated to the ex-husband's vendor's purchase-money lien.²³⁴ Because the ex-husband's equitable lien was by its nature a vendor's lien, the court said that it was immaterial that the ex-husband had not recorded it.²³⁵ Hence, by advancing money to the ex-wife to buy the former husband's interest, the bank acquired an enforceable lien to the extent of the ex-husband's interest in the homestead property.²³⁶

Because of the operation of the supremacy doctrine,²³⁷ state exemption laws are not effective to protect property as exempt if federal law provides otherwise.²³⁸ But Congress can give state exemption laws effect and has done so in the federal Bankruptcy Code.²³⁹ In *In re Bubert*²⁴⁰ the Small Business Administration (SBA) asserted that its regulations²⁴¹ counteracted the provisions of the Bankruptcy Code. Hence, the SBA argued, a bankrupt couple who had given SBA a lien on their rural farm of 198 acres could not assert that the farm was their homestead and thus exempt from seizure. The bankruptcy court held that although Congress could enact a law making state exemptions ineffective as to SBA loans, the SBA Regulations could not supersede the Bankruptcy Code.²⁴²

232. In *Smith* the court rightly passed over the argument that a lien for reimbursement cannot be put on benefitted homestead property because the spouses did not contract for it in writing as prescribed in TEX. CONST. art. XVI, § 50. That provision applies to claims of third persons and not as between the spouses.

233. 58 Bankr. 192 (Bankr. S.D. Tex. 1985).

234. *Id.* at 199.

235. *Id.* at 197-98 (citing *In re Daves*, 770 F.2d 1363, 1370 (5th Cir. 1985)).

236. *Id.* at 200.

237. U.S. CONST. art. VI, § 4, cl. 2.

238. *Brodoy v. United States*, 455 F.2d 1097, 1100 (5th Cir. 1972).

239. 11 U.S.C.A. § 522(b) (West 1979 & Pam. Supp. 1986).

240. 61 Bankr. 362 (W.D. Tex. 1986).

241. Any person, corporation, or organization that applies for and receives any benefit or assistance from SBA, or that offers any assurance of security upon which SBA relies for the granting of such benefit or assistance, shall not be entitled to claim or assert any local immunity to defeat the obligation such party incurred in obtaining or assuring such Federal benefit or assistance.

13 C.F.R. § 101.1(d)(4) (1986).

242. 61 Bankr. at 363. The regulation relied on had been promulgated in response to *United States v. Yazell*, 382 U.S. 341 (1966), in which the Supreme Court held that Texas law of coverture then prevailing precluded a married woman from entering into a valid contract with the SBA, and thus the SBA was barred from proceeding against her property to enforce the contract. *Id.* at 358. "As a response to the *Yazell* decision, the limited impact of 13 C.F.R. § 101.1(d) is that state law *will* be disregarded [with respect to capacity to contract as provided by state law]. It goes no further . . . [I]t does not purport to fill the vacuum thus created by a positive federal rule of decision." *Bubert*, 61 Bankr. at 365 (emphasis in original). The *Yazell* case is commented on in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 Sw. L.J. 39, 46 (1967).

Homestead Abandonment. In *Ford v. Long*²⁴³ the Tyler court of appeals held that a man who willfully kills his wife forfeits his right to preclude partition of the former community property as well as losing his right of use to his wife's share of the household furnishings.²⁴⁴ The court relied principally on *Bounds v. Caudle*,²⁴⁵ in which the Texas Supreme Court imposed a constructive trust on property a murderer took under his victim's will.²⁴⁶ Support for the court's conclusion is also found in *Earle's Executors v. Earle*,²⁴⁷ in which the Texas Supreme Court held that a woman who abandoned her husband was precluded from claiming a homestead in his property after his death.²⁴⁸ If abandonment of a spouse can have the effect of losing homestead rights, murder of the spouse should surely have the same effect.

Exempt Personalty. In *Sloan v. Douglass*²⁴⁹ an assignee of an employee's judgment creditor sought turnover of his current wages in excess of \$30,000 in 1983 under what is now section 31.002 of the Civil Practice and Remedies Code.²⁵⁰ Under the contract of employment between the employer and the employee a part of the employee's annual salary earned during the years 1983-1985 was deferred and would be paid in monthly installments for ten years beginning in 1986. The court held that the deferred wages were therefore not even current wages.²⁵¹ As the funds should become due between 1986 and 1996, they would be current wages and would be exempt and protected from seizure under the turnover statute.²⁵² The Fort Worth court of appeals further noted that because current wages are absolutely protected from garnishment regardless of amount, their inclusion within the \$30,000 exemption ceiling in section 42.002(8) is unconstitutional.²⁵³

In applying Texas law to a determination of whether particular property could be claimed as exempt, the bankruptcy court of the Northern District of Texas concluded in *In re Cypert*²⁵⁴ that a fishing boat²⁵⁵ was not exempt. The court was emphatic. "There is no showing that the boat is reasonably necessary for the family of the debtor, and it is highly unlikely that any such showing could be made."²⁵⁶ Although the determination was easily reached in this instance by applying the "reasonably necessary" standard for "athletic and sporting equipment,"²⁵⁷ it has been suggested that a "regularly

243. 713 S.W.2d 798 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).

244. *Id.* at 799.

245. 560 S.W.2d 925 (Tex. 1977).

246. *Id.* at 929.

247. 9 Tex. 630 (1853).

248. *Id.* at 633-34.

249. 713 S.W.2d 436 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

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

251. 713 S.W.2d at 440.

252. *Id.* at 440-41.

253. *Id.* at 442; see McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 85-86 (1974).

254. 68 Bankr. 449 (Bankr. N.D. Tex. 1987).

255. A 1975 Glasspar boat.

256. 68 Bankr. at 452.

257. TEX. PROP. CODE ANN. § 42.002(3)(E) (Vernon 1984).

used" test might be more easily applied, and some have advocated that personality within the protected types and within the value of \$30,000 should be claimable regardless of need or regularity of use.

In *In re Allen*²⁵⁸ the Fifth Circuit Court of Appeals concluded that under the provisions of what is now Property Code section 42.001²⁵⁹ a Texas debtor who has chosen to assert state personal property exemptions in bankruptcy cannot avail himself of the benefits of section 522(f) of the Bankruptcy Code²⁶⁰ to invalidate contractual liens on that property.²⁶¹ Having concluded that the federal circuit court wrongly construed Texas law in its interpretation of section 522(f), Judge Ayres of the Western District of Texas declined to follow the interpretation of the higher court in two chapter 13 proceedings considered together in *In re Thompson*.²⁶² The court not only deemed the decision ill-considered when rendered, but concluded that the circuit court would decide the case differently if now called upon to do so in the light of opinions in other circuits, the 1984 amendments to the Bankruptcy Code, and regulations of the Federal Trade Commission and the Federal Reserve Board.²⁶³ No appeal was taken to Judge Ayres's decision, and the bankruptcy court of the Northern District followed *Thompson* in *In re Rodgers*,²⁶⁴ but the district judge reversed the lower court's judgment on appeal.²⁶⁵ A bankruptcy court in the Southern District of Texas later followed the *Allen* case without any discussion of contrary views.²⁶⁶ Rather than leaving debtors to do further battle in the courts on this issue, the Family Law Section of the State Bar favors an amendment to state law by which Texas debtors in bankruptcy will be able to claim the benefits of section 522(f).

IV. DIVISION ON DIVORCE

Property Settlement Agreements. In 1967 the Supreme Court of Texas held that the long-standing rule²⁶⁷ for the enforcement of a property settlement agreement between spouses in anticipation of divorce included a contract for payment of periodic support after divorce.²⁶⁸ If the terms of the contract are incorporated in the decree by quotation or by reference, or if the decree itself constitutes the agreement of the parties, they are not only bound contractu-

258. 725 F.2d 290 (5th Cir. 1984), noted in McKnight, 1984 Annual Survey, *supra* note 22, at 157.

259. TEX. PROP. CODE ANN. § 42.001 (Vernon 1984). Although the provision of which § 42.001(c) purports to be a nonsubstantive restatement did not necessarily support the construction given it in *Allen*, that section as it now stands clearly does so.

260. 11 U.S.C.A. § 522(f) (West 1979 & Pam. Supp. 1986).

261. 725 F.2d at 292-93.

262. 59 Bankr. 690 (Bankr. W.D. Tex. 1986).

263. *Id.* at 692-96. The applicable Federal Trade Commission regulation is 16 C.F.R. § 442.2(a)(2) (1986). That of the Federal Reserve Board is 12 C.F.R. § 227.13(b) (1986).

264. 63 Bankr. 686, 689 (Bankr. N.D. Tex. 1986).

265. *In re Rodgers*, 68 Bankr. 17, 18 (N.D. Tex. 1986).

266. *In re Graham*, 64 Bankr. 469, 472-73 (Bankr. S.D. Tex. 1986).

267. *Rains v. Wheeler*, 76 Tex. 390, 394-95, 13 S.W. 324, 325-26 (1890).

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

ally,²⁶⁹ but in the last instance they are also ordered to perform by the terms of the decree. During the last two decades nice questions have arisen with respect to such agreements: What defenses may be raised to their enforcement; what modes of enforcement are available; and is the meaning of the instrument to be determined under the law of contracts or the law of judgments?²⁷⁰ Although the old law concerning the enforceability of property settlements did not require that the agreement be in writing,²⁷¹ a number of recent statutes tend to produce that effect. The 1948 constitutional amendment on partitions of community property and its statutory counterpart²⁷² required a writing, as did the reenactments of that principle in 1967, 1969, 1973, and 1981.²⁷³ To facilitate the process of amicable settlement on divorce the legislature in 1981 provided that divorcing spouses may enter into written agreements with respect to property liability and future maintenance, and the court can alter the terms of agreement only if it finds that the agreement is not just and right.²⁷⁴ Rule 11²⁷⁵ on written agreements of parties to litigation also plays a part in the almost pervasive requirement of writing for agreements relating to division of property on divorce.

*Lohse v. Cheatham*²⁷⁶ dealt with a suit for enforcement of a divorce decree that the trial court mistook for an agreed judgment. The appellate court noted that since the parties had not agreed to the decree, contract law could not be used in construing it.²⁷⁷ The court of appeals therefore held that the trial court was incorrect in interpreting the divorce decree as an agreed judg-

269. *Buck v. Rogers*, 709 S.W.2d 283, 285 (Tex. App.—Corpus Christi 1986, no writ). If the contract is for the benefit of a third person, he may enforce the contract made for his benefit. See *Alexander v. Alexander*, 701 S.W.2d 48, 51 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

270. These matters are commented on in McKnight, *1986 Annual Survey*, *supra* note 57, at 28-31; McKnight, *1985 Annual Survey*, *supra* note 2, at 26-27; McKnight, *1983 Annual Survey*, *supra* note 119, at 90-92.

271. *Callicoatte v. Callicoatte*, 417 S.W.2d 618, 621 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.).

272. 1948 amend. to TEX CONST. art. XVI, § 15, and 1949 enactment of § 4624a.

273. Act of May 27, 1967, arts. 4610, 4624a, ch. 309, § 1, 1967 Tex. Gen. Laws 735, 738-39; Act of May 14, 1969, § 5.41, ch. 888, § 1, 1969 Tex. Gen. Laws 2729; Act of June 15, 1973, § 5.42(a), ch. 577, § 32, 1973 Tex. Gen. Laws 1608; Act of June 17, 1981, § 5.44, ch. 782, § 2 1981 Tex. Gen. Laws 2965.

274. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1987); see *Wheeler v. Wheeler*, 713 S.W.2d 148, 150 (Tex. App.—Texarkana 1986, writ dismiss'd w.o.j.); *McEntire v. McEntire*, 706 S.W.2d 347, 350 (Tex. App.—San Antonio 1986, writ dismiss'd w.o.j.); Oldham, *Premarital Contracts Are Now Enforceable Unless . . .*, 21 HOUS. L. REV. 757, 766-68 (1984).

275. TEX. R. CIV. P. 11. Rule 11 states: "No agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." In *Dehnert v. Dehnert*, 705 S.W.2d 849 (Tex. App.—Beaumont 1986, no writ), the Beaumont court of appeals dealt with a settlement agreement that, though unsigned by the husband, despite the requirement of rule 11, was returned by the husband's attorney to the wife's attorney with a written indication of agreement. The court held that because the husband had authorized his attorney to act on his behalf, the agreement complied with the requirements of rule 11. *Id.* at 851. As further support for its ruling the court noted that the husband had taken advantage of the agreement by receiving some of the property under it, and therefore he should not be allowed to attack the agreement. *Id.* See *infra* notes 394-95.

276. 705 S.W.2d 721 (Tex. App.—San Antonio 1986, writ dismiss'd).

277. *Id.* at 726.

ment and should have interpreted its literal language without looking to the testimony of the parties at the enforcement hearing.²⁷⁸

In *Mackey v. Mackey*²⁷⁹ the only written evidence of the parties' agreed judgment was the decree itself, in which the husband was ordered to pay the wife a monthly sum for support. The fact that the parties had not entered into an independent agreement in writing did not preclude subsequent reliance on the agreement as a contract.²⁸⁰ If the subject matter of the contract in issue must be in writing to be enforceable, however, the failure to plead the lack of writing will constitute waiver of that requirement.²⁸¹ In *Kartchner v. Kartchner*²⁸² the court held that what purported to be a partition agreement, which was not in writing and was not incorporated in the decree, could not be enforced because it was properly objected to as not being in writing.²⁸³ If the parole agreement had been assented to by the parties and entered as an agreed judgment, however, it would have been enforceable as such.

In *Conn v. Trow*²⁸⁴ the Texarkana court interpreted the terms of a divorce decree after the death of the former husband. It was stipulated at trial that the decree had reflected the couple's property settlement agreement. Although, pursuant to the agreement, the decree divested the wife of all interest in the husband's retirement plan, he failed to change the designation of his ex-wife as beneficiary of death benefits under the plan. In affirming the trial court's ruling against the ex-wife, who brought suit for the death benefits, the Texarkana court stated that the property settlement agreement that was incorporated in the decree was a contract "to be interpreted as a contract."²⁸⁵ The clear language of agreement, as expressed in the decree, clearly precluded the ex-wife's claim under the retirement plan. The court also noted that in this instance the death benefits payable on the employee's death were not meant as insurance but as property of the employee.²⁸⁶

In *Allen v. Allen*²⁸⁷ the Texas Supreme Court carried the doctrine of applying contractual rules to an agreed judgment to new heights. The court stated that although a property settlement agreement is incorporated in a divorce decree, "its legal force and meaning are governed by the law of con-

278. *Id.* A similar dispute was before the court in *Fox v. Fox*, 720 S.W.2d 880 (Tex. App.—Beaumont 1986, no writ), and was handled similarly. *Id.* at 882.

279. 721 S.W.2d 575 (Tex. App.—Corpus Christi 1986, no writ).

280. *Id.* at 578-79.

281. *Praeger v. Wilson*, 721 S.W.2d 597, 602 (Tex. App.—Fort Worth 1986, no writ); *cf.* *Elfeldt v. Elfeldt*, 30 Tex. Sup. Ct. J. 422 (May 6, 1987) (agreed order to support a nondisabled adult child was not enforceable as a contract because agreement did not specifically provide for contractual enforcement as required by TEX. FAM. CODE ANN. § 14.06(d) (Vernon 1986)).

282. 721 S.W.2d 482 (Tex. App.—Corpus Christi 1986, no writ).

283. The agreement was entered into prior to the enactment of TEX. FAM. CODE ANN. § 3.631 in 1981, and the court therefore construed the agreement under what is now TEX. FAM. CODE ANN. § 5.44 (Vernon Supp. 1987).

284. 715 S.W.2d 152 (Tex. App.—Texarkana 1986, no writ).

285. *Id.* at 153; *see* *Binkley v. Wade*, 703 S.W.2d 321, 324 (Tex. App.—Waco, 1985, writ ref'd n.r.e.) (dictum).

286. 715 S.W.2d at 153.

287. 717 S.W.2d 311 (Tex. 1986).

tracts, not the law of judgments."²⁸⁸ In giving full effect to this doctrine, the court went on to hold that a settlement agreement might be reformed to correct a mutual mistake of the parties in omitting particular property from its terms.²⁸⁹ At the time the couple entered into their settlement agreement, the husband was operating a community corporation located on land to which both spouses held title. By the settlement agreement the husband was awarded the corporation, but no provision was made for conveyance of the land. After the divorce the ex-husband brought suit for enforcement or clarification of the decree. There was evidence that each spouse entered into the property settlement mistakenly believing that the realty had already been conveyed to the corporation. The Supreme Court of Texas therefore concluded that the trial court might reform the decree in accordance with contractual principles and thus to correct the mutual mistake of the parties.²⁹⁰

In *Giddings v. Giddings*²⁹¹ the Austin court of appeals considered whether a party to a divorce can maintain a suit for breach of a settlement agreement incorporated in a divorce decree if it is subsequently asserted that compliance was waived. The agreement in issue vested the family residence in the wife, but allowed the husband to occupy the house temporarily in order to make repairs. The ex-husband fell behind in the repairs, and when he told his former wife of his intentions to employ someone else to do the work, she told him that she had already sold the house. Thereafter he made no further repairs, and the ex-wife sued him for his failure to comply with the agreement. At trial the ex-husband attempted to show that his former wife had waived her right of enforcement by stating that she had sold the house. The ex-wife sought to exclude the evidence concerning sale on the ground that its introduction would constitute a collateral attack on the decree. Sustaining the ex-wife's position, the trial court held that once a settlement agreement is approved, the agreement merges into the judgment of the court.²⁹² Hence, raising a contractual defense to the decree would constitute a collateral attack on the judgment.²⁹³ The Austin court first distinguished attacks on the initial validity of the underlying agreement from attacks based on subsequent events.²⁹⁴ The court said that a party to an agreed judgment has been uniformly prohibited from asserting defenses that operate as an attack on the agreement at its inception.²⁹⁵ The court noted a split of authority, however, as to defenses based on events subsequent to the execution of the agree-

288. *Id.* at 313.

289. The case was tried prior to the effective date of TEX. FAM. CODE ANN. §§ 3.70-77 (Vernon Supp. 1987).

290. 717 S.W.2d at 313; *cf.* *McEntire v. McEntire*, 706 S.W.2d 347 (Tex. App.—San Antonio 1986, writ *dism'd w.o.j.*). The implication of the court's language in *McEntire, id.* at 350, is that an agreed judgment is impervious to judicial alteration under TEX. R. CIV. P. 329b, whereas a court's approval of an agreement pursuant to TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1987) would presumably be subject to judicial alteration under that rule.

291. 701 S.W.2d 284 (Tex. App.—Austin 1985, writ *ref'd n.r.e.*).

292. *Id.* at 287.

293. *Ex parte Gorena*, 595 S.W.2d 841, 844 (Tex. 1979).

294. *Giddings*, 701 S.W.2d at 287-88.

295. The court stated that a party cannot raise a defense that attacks "the validity of the agreement at inception, execution, or at the time it is approved by the court in the divorce

ment.²⁹⁶ The court concluded that a party can raise contractual defenses only if they relate to events that occur subsequent to the execution of the agreement and only to the extent that the defenses are not contrary to the final judgment.²⁹⁷ The Austin court's analysis does not conform to that of the Fort Worth appeals court in *Towne v. Towne*²⁹⁸ with respect to the initial validity of an agreed judgment,²⁹⁹ and in *Herbert v. Herbert*³⁰⁰ the Fort Worth court also reached a contrary conclusion in considering an alleged breach of an agreed settlement.

In *Herbert* the ex-wife asserted breach of the settlement agreement, and her former husband defended on the ground that she had already materially breached the agreement, thereby relieving him of his duty to perform under general contractual principles. The trial court found for the ex-husband. The court of appeals reversed, holding that the evidence did not substantiate the jury's finding,³⁰¹ but added that, on remand, the ex-husband could not assert material breach of the property settlement agreement on the part of the ex-wife as an affirmative defense.³⁰² Such an assertion would be "an impermissible collateral attack on the finality of the property settlement agreement/judgment."³⁰³ This conclusion seems at variance with the supreme court's approach in *Allen v. Allen*.³⁰⁴

In *Miller v. Miller*³⁰⁵ the Texas Supreme Court dealt with a consent decree signed by both parties about eight months before being entered by the court. The decree provided that the husband would be entitled to a fixed sum on the sale of the family home. In resisting her former husband's suit for the agreed amount, the ex-wife asserted that the couple had altered their agreement prior to the entry of the decree. Despite the fact that the trial court awarded the ex-husband less than the decree awarded, the trial judge did not find that the parties had reached a new agreement. Although the court said that the law of contracts governs the interpretation of the decree based on a property settlement agreement,³⁰⁶ there was no agreement but the one evidenced by the consent decree. The court therefore rendered judg-

decree." *Id.* at 287 (emphasis in original). These defenses include lack of consideration, duress, and lack of capacity. *Id.*

296. See *Sorrels v. Sorrels*, 592 S.W.2d 692, 697 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (permitting defense); *Akin v. Akin*, 417 S.W.2d 882, 885 (Tex. Civ. App.—Austin 1967, no writ) (prohibiting defense).

297. *Giddings*, 701 S.W.2d at 289.

298. 707 S.W.2d 745 (Tex. App.—Fort Worth 1986, no writ).

299. *Id.* at 748-49.

300. 699 S.W.2d 717 (Tex. App.—Fort Worth 1985, writ granted).

301. *Id.* at 724; see *McKnight*, 1986 *Annual Survey*, *supra* note 56, at 30.

302. *Herbert*, 699 S.W.2d at 727.

303. *Id.*

304. 717 S.W.2d 311, 313 (Tex. 1986); see *supra* notes 287-90 and accompanying text.

305. 721 S.W.2d 842 (Tex. 1987). The supreme court took jurisdiction of the case as a dispute concerning an agreement incorporated in a divorce decree. *Id.* at 843; see *Cornell v. Cornell*, 413 S.W.2d 385, 387 (Tex. 1967). The court would have been precluded from taking jurisdiction under TEX. GOV'T CODE ANN. § 22.225(b)(3) (Vernon Pam. 1987). 721 S.W.2d at 843.

306. 721 S.W.2d at 844; see *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986).

ment for the ex-husband for the fixed amount provided in the decree.³⁰⁷

*Carreon v. Morales*³⁰⁸ concerned the meaning of terms of a settlement agreement that community property not specifically divided was the property of the party who managed the property. Stating that each provision of an agreement should be given some meaning and effect, the El Paso court of appeals held that the residuary clause of the settlement had the effect of awarding to the husband his retirement benefits and a life insurance policy in his possession.³⁰⁹

In *Powers v. Powers*³¹⁰ the husband and wife had entered into a property settlement agreement providing that the husband would pay alimony and child support, and the wife agreed that she would not claim their children as dependents for federal income tax purposes and that she would supply her husband with her federal income tax return at least a month before the filing deadline. The ex-wife did not comply with these requirements, and the ex-husband ceased paying the agreed alimony. In response to the ex-wife's suit for breach of the contract, the former husband asserted that the obligations of the ex-spouses were reciprocal. Both the trial and appellate courts refused to interpret the duties of the ex-wife as a condition precedent to the ex-husband's performance in the absence of a clear agreement to that effect.³¹¹ Further, if the ex-husband had sought to show mitigation of damages by the amount that the ex-wife's breach had increased his federal tax liability, it was his burden to prove that amount.³¹²

In an action to enforce terms of a property settlement agreement incorporated in a divorce decree the Fourteenth District court of appeals held in *Pettitt v. Pettitt*³¹³ that the ten-year statute for enforcement of judgments is the applicable statute of limitation.³¹⁴ Because the property dealt with in the agreement was the husband's separate property, the court rejected the applicability of the two-year provision of section 3.70³¹⁵ as a relevant only to division of community property under section 3.63³¹⁶ and not to divisions under section 3.631.³¹⁷ The court also rejected the four-year statute³¹⁸ as applying only to contracts and not to judgments.³¹⁹ The court's process of selection of the proper limitation statute is exceptionally contrived and illustrates a need for statutory overhaul of the entire scheme of the time allowed for enforcement of family law decrees.

The availability of state contractual rules for the interpretation of property

307. 721 S.W.2d at 844.

308. 698 S.W.2d 241 (Tex. App.—El Paso 1985, no writ).

309. *Id.* at 245.

310. 714 S.W.2d 384 (Tex. App.—Corpus Christi 1986, no writ).

311. *Id.* at 388.

312. *Id.* at 389.

313. 704 S.W.2d 921 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

314. *Id.* at 923-24 (applying TEX. CIV. PRAC. & REM. CODE ANN. §§ 31.006, 34.001 (Vernon 1986)).

315. TEX. FAM. CODE ANN. § 3.70(c) (Vernon Supp. 1987).

316. *Id.* § 3.63.

317. *Id.* § 3.631; 704 S.W.2d at 923.

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

319. 704 S.W.2d at 923.

settlement agreements does not necessarily make state enforcement mechanisms available to enforce the contract when federal interests are involved. In *Stubbe v. Stubbe*³²⁰ the Austin court of appeals declined to allow garnishment of military pay when the ex-husband failed to comply with his contractual obligations and his ex-wife recovered a money judgment against him.³²¹ Though the property settlement was incorporated in the divorce decree, the court held that what was to be enforced was not a court order to pay alimony but merely a contract.³²² It is submitted that this interpretation of section 3.631³²³ is unjustifiably narrow if the court actually orders compliance with the agreement. In spite of prior contrary judicial opinion,³²⁴ the language of the statute clearly allows a court to order the payment of alimony as agreed by the spouses.

Property Not Subject to Division. In *Eggemeyer v. Eggemeyer*³²⁵ the Texas Supreme Court held that separate realty is not divisible on divorce,³²⁶ and in *Cameron v. Cameron*³²⁷ the court stated that the same rule is applicable to separate personalty.³²⁸ That court has also treated nonassignable federal Veterans' Administration benefits in a like manner.³²⁹ Because a National Service Life Insurance policy is a Veteran's Administration entitlement,³³⁰ the Tyler court concluded that its cash value is not subject to division on divorce.³³¹

A most difficult question dealing with property subject to division was presented to the First District court of appeals in *Ismail v. Ismail*,³³² involving a suit for divorce of two Egyptian citizens. Only the petitioner was domiciled in Texas, though the couple had previously lived in Houston for six years before returning to Egypt. Thereafter the wife returned to Houston in 1981 and filed for divorce there in January 1982. After a further two months' trip to Egypt, the wife returned to Houston and remained there until the trial. Both parties were subject to the personal jurisdiction of the court. Of the spouses' marital property the trial court awarded the wife all the Texas real property, funds deposited in Texas banks, and personal property in her possession. The husband received all real and personal property in Egypt. At trial, and on appeal, the husband asserted that most of the

320. 710 S.W.2d 673 (Tex. App.—Austin 1986, writ granted).

321. *Id.* at 678.

322. *Id.* at 675-76.

323. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1987).

324. Klise v. Klise, 678 S.W.2d 545, 548 (Tex. App.—Houston [14th Dist.] 1984, no writ); see Powers v. Powers, 714 S.W.2d 384, 389 (Tex. App.—Corpus Christi 1986, no writ).

325. 554 S.W.2d 137 (Tex. 1977).

326. *Id.* at 142.

327. 641 S.W.2d 210 (Tex 1982).

328. *Id.* at 220.

329. Kamel v. Kamel, 721 S.W.2d 450, 453 (Tex. App.—Tyler 1986, no writ) (relying on *Ex parte* Burson, 615 S.W.2d 192, 194-96 (Tex. 1981); *Ex parte* Johnson, 591 S.W.2d 453, 454 (Tex. 1979)).

330. 38 U.S.C.A. §§ 701-726 (West 1979 & Supp. 1986); *Id.* § 3101 (West 1979).

331. Kamel, 721 S.W.2d at 453. The court might have also relied on *Wissner v. Wissner*, 338 U.S. 655, 658-59 (1950).

332. 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

property was not subject to division because it had been acquired by non-Texas domiciliaries. Thus, the husband argued, section 3.63³³³ did not authorize the division of the Texas realty because the husband had never been a Texas domiciliary and the petitioning wife had established her Texas domicile unilaterally. The implication of the husband's argument was that the Texas realty was properly characterized as his separate property, and that the Texas statute allowing its division or divestiture was federally unconstitutional as violative of the principle of due process and invalid under the Texas Constitution as an award of the husband's separate property to his wife.

The court rejected the federal attack as not demonstrated by any applicable precedential authority or any convincing argument that precludes Texas from determining whether Texas realty may be awarded to a Texas domiciliary on divorce.³³⁴ Further, from a due process perspective, the interest of Texas in the division of property located in the state coupled with the husband's contacts with Texas justified the application of the provisions of section 3.63(b).³³⁵ As to the husband's attack on the division under the Texas Constitution, the solution was easy: The Texas realty in this case did not meet the Texas constitutional definition of separate property that would therefore be precluded from divestiture.³³⁶ If, however, the divorce court lacks personal jurisdiction over a spouse, the court may be unable to adjudicate the spouse's interest in personal property either on general jurisdictional principles³³⁷ or on the basis of particular federal law that governs the personal property at issue.³³⁸

When a mischaracterization of property results in an improper division of property, as it almost certainly will,³³⁹ the reviewing court must remand the case for reconsideration.³⁴⁰ But unappealed instances of mischaracterization

333. TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1987).

334. 702 S.W.2d at 219-20. The court rejected the analysis of a California court to the contrary, see *In re Marriage of Roesch*, 83 Cal. App. 3d 96, 147 Cal. Rptr. 586, 592-93 (1978), cert. denied, 440 U.S. 915 (1979), as based on the minimal interest of California in the marital property there in issue as compared to the substantial interest of Pennsylvania from whence the wife alone had moved. *Ismail*, 702 S.W.2d at 219-20. The court also rejected as baseless the husband's argument that the Texas statute was inapplicable because its purpose was to deal with spousal moves from common law states, and Egypt employs neither a common law nor a community property handling of marital property. *Id.* at 219.

335. 702 S.W.2d at 219-20.

336. *Id.* at 220.

337. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 34 Sw. L.J. 115, 139 (1980).

338. See *Barrett v. Barrett*, 715 S.W.2d 110, 112 (Tex. App.—Texarkana 1986, no writ); *Dunn v. Dunn*, 708 S.W.2d 20, 22 (Tex. App.—Dallas 1986, no writ); *Kovacich v. Kovacich*, 705 S.W.2d 281, 282-83 (Tex. App.—San Antonio 1986, writ dismissed w.o.j.). All were unsuccessful post-divorce cases for partition of retirement benefits overlooked by the divorce court.

339. See McKnight, *1984 Annual Survey*, *supra* note 22, at 162; see also *Whorrall v. Whorrall*, 691 S.W.2d 32, 36-37 (Tex. App.—Austin 1985, writ dismissed w.o.j.) (divesting spouse of his .9% separate interest held harmful error), discussed in McKnight, *1986 Annual Survey*, *supra* note 57, at 35.

340. *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374-75 (Tex. App.—El Paso 1985, writ dismissed). In *Conroy v. Conroy*, 706 S.W.2d 745 (Tex. App.—El Paso 1986, no writ), the trial court awarded the husband Veterans' Administration disability pay (separate property) and ordinary military retirement pay (community property) and referred to both as separate prop-

cannot be attacked as void,³⁴¹ even those involving division of federal benefits, mischaracterized in the light of a later federal statute.³⁴²

Retirement Benefits. Over the last decade the problem of division of federal retirement benefits has produced a bewildering variety of responses from the Texas appellate courts. In spite of the demonstrated hostility of the United States Supreme Court to the principles of community property law,³⁴³ one wonders whether the Court would have interpreted the Railroad Retirement Act³⁴⁴ as it did in *Hisquierdo v. Hisquierdo*³⁴⁵ in 1979, if it had realized the sort of response its opinion would produce. Having dealt with that congressional act as it did, however, the Court could scarcely interpret the military retirement law differently when that issue came before it in *McCarty v. McCarty*³⁴⁶ two years later. Even in hindsight, one might not have predicted that Congress would react quite as it did in enacting the Uniformed Services Former Spouses' Protection Act³⁴⁷ (USFSPA) less than fifteen months later.

The reaction of the Texas courts to these developments has been strikingly inconsistent. From the first, the Texas Supreme Court's analysis of the problem has vacillated between the application of a variety of approaches, and the lower appellate courts' decisions have shown a remarkable volatility in dealing with (1) divisions of property and federal retirement benefits prior to *McCarty* but appealed thereafter, (2) divisions after *McCarty* but before the enactment of the USFSPA, (3) divisions of property both before and after *McCarty* that failed to deal with federal retirement benefits, and (4) cases brought after the enactment of the USFSPA that seek to change prior divisions of federal retirement benefits consistent with the purported intent of Congress to wipe away the precedential effect of *McCarty*. In *Cameron v. Cameron*³⁴⁸ the Texas Supreme Court initially emphasized one of the principal provisions of the USFSPA: that the change made by the act only affects

erty. The appellate court regarded the error as harmless. *Id.* at 748. It is not clear, however, whether the appellate court compounded a genuine error of the trial court with respect to the ordinary military retirement pay or merely put straight an inadvertent error of description on the part of the trial court.

341. *Jewell v. Jewell*, 723 S.W.2d 340, 242 (Tex. App.—Beaumont 1987, no writ); *Putegnat v. Putegnat*, 706 S.W.2d 702, 703-04 (Tex. App.—Corpus Christi 1986, no writ).

Although the vexing problem of dealing with a spouse's professional degree acquired at community expense, see *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Civ. App.—San Antonio 1980, writ dismissed), has not lately arisen in any Texas appellate case, a helpful discussion of the matter is found in Note, *Family Law: Professional Degrees in 1986—Family Sacrifice Equals Family Asset*, 25 WASHBURN L.J. 276, 301-03 (1986).

342. *Allison v. Allison*, 700 S.W.2d 914 (Tex. 1985) (per curiam); see also *Anderson v. Anderson*, 707 S.W.2d 166, 168-69 (Tex. App.—Corpus Christi 1986, writ refused n.r.e.).

343. See Reppy, *Community Property in the U.S. Supreme Court—Why Such a Hostile Reception?*, 10 COMM. PROP. J. 93, 118-19 (1983).

344. 45 U.S.C. §§ 231-231u (1982).

345. 439 U.S. 572, 590 (1979).

346. 453 U.S. 210 (1981).

347. 10 U.S.C. § 1408 (1982) (effective Feb. 1, 1983).

348. 641 S.W.2d 210 (Tex. 1982), discussed in McKnight, *1984 Annual Survey*, supra note 22, at 164-65. The interpretation of the decree in that matter was before an appellate court in *Cook v. Cameron*, 30 Tex. Sup. Ct. J. 293, 295 (Mar. 18, 1987).

pay-periods of recipients of benefits commencing after June 25, 1981.³⁴⁹ Recently in *Kamel v. Kamel*³⁵⁰ the Tyler court of appeals made the same point concerning the act of August 12, 1983, which allowed application of state law to divisions of that portion of Railroad Retirement Act annuities accruing after September 1, 1983.³⁵¹ In both instances, however, the number of months of marriage used to determine the amount of community-sharing in the benefit is not affected by the dates referred to in either act. In *Kamel* the court went on to indicate that the nonpensioner must therefore show how much of the federal annuity is subject to division under the 1983 act.³⁵²

A number of disputes have arisen with respect to adjudications of pension rights made during the period between the decision in *McCarty* (June 26, 1981) and the effective date of the USFSPA (February 1, 1983).³⁵³ In the case of a property division made immediately after *McCarty*, and in accordance with *McCarty*, but heard on appeal after the enactment of the USFSPA, the appellant is entitled to a new trial on all issues of property division on remand.³⁵⁴ Although the USFSPA indicates a congressional intent that the act apply to all funds payable after June 25, 1981,³⁵⁵ the Texas Supreme Court concluded in *Allison v. Allison*³⁵⁶ that an order expressly awarding retirement benefits during the defined period and not appealed must not be later disturbed.³⁵⁷ In *Wright v. Wright*³⁵⁸ the San Antonio court of appeals reached the same conclusion, adding that the case at hand had involved an agreed judgment that specifically bound the parties.³⁵⁹ On the other hand, in cases involving divorce decrees rendered after *McCarty*, but prior to the effective date of the USFSPA, the courts have partitioned the *undivided* community benefits that became a tenancy in common. The decision of the Austin court of appeals in *Eddy v. Eddy*³⁶⁰ is a recent instance; the principle of res judicata did not apply because there was no adjudication with respect to the retirement benefits.³⁶¹

The situation before the Waco court of appeals in *Powell v. Powell*³⁶² was somewhat more complicated. *Powell* was a case of a pre-*McCarty* divorce in which the divorce court did not divide the benefits. Further, also prior to the *McCarty* decision, the ex-wife had brought suit for partition of the bene-

349. 641 S.W.2d at 213; see 10 U.S.C. § 1408(c)(1) (1982).

350. 721 S.W.2d 450 (Tex. App.—Tyler 1986, no writ).

351. *Id.* at 453 (citing 45 U.S.C. § 231m(b)(2) (West Supp. 1986)).

352. 721 S.W.2d at 452-53.

353. Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, § 1006(a), 96 Stat. 730, 737 (1982).

354. *Gordon v. Gordon*, 704 S.W.2d 490, 492 (Tex. App.—Corpus Christi 1986, no writ). For previous appeal see *Gordon v. Gordon*, 659 S.W.2d 475 (Tex. App.—Corpus Christi 1983, no writ).

355. 10 U.S.C. § 1408(c)(1) (1982).

356. 700 S.W.2d 914 (Tex. 1985) (per curiam).

357. *Id.* at 915.

358. 710 S.W.2d 162 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

359. *Id.* at 166.

360. 710 S.W.2d 783 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

361. *Id.* at 785.

362. 703 S.W.2d 434 (Tex. App.—Waco 1985, writ ref'd n.r.e.), cert. denied, 106 S. Ct. 1489, 89 L. Ed. 2d 891 (1986).

fits, and the trial court had granted her petition. On the ex-husband's appeal following *McCarty*, the trial court's disposition was reversed. After the USFSPA became effective, the ex-wife again sought a partition. On appeal the Waco court held that the doctrine of res judicata did not preclude subsequent proceedings because the grounds for relief were not and could not have been litigated in the prior suit.³⁶³ The result, though salutary, seems to contradict the conclusion of the Texas Supreme Court in *Allison*. In allowing the judgment in *Powell* to stand, however, the Texas Supreme Court evidently did not think so.

If an employee's retirement benefits are increased subsequent to divorce, either as an adjustment for inflation in the cost of living or otherwise, a question arises whether the former spouse is entitled to share in the increase. In *Berry v. Berry*,³⁶⁴ in which the nonpensioner ex-wife sought a partition of an undivided pension interest after divorce, the Texas Supreme Court held that the ex-wife could not share in the increased benefits due to renegotiation of the employee's contract of employment, and hence the partitionable share of the benefits was valued at the time of the divorce.³⁶⁵ As intimated in *Berry*, the burden of proof to show the amount of the benefits belonging to the pensioner is upon the party who is in the better position to have that knowledge, normally the pensioner.³⁶⁶ In another post-divorce partition case³⁶⁷ the San Antonio court of appeals relied on *Berry* to exclude the nonpensioner from sharing in cost-of-living increases in the pensioner's benefits.³⁶⁸ While suggesting that such a strict interpretation of *Berry* produces unfairness to the nonpensioner, the Corpus Christi court of appeals in *May v. May*³⁶⁹ undertook to construct a new formula consistent with *Berry* for the purpose of computing the community interest in a pension plan of a spouse who has not retired or is still employed at the time of the divorce.³⁷⁰ In presenting its new method for computing the divisible community share of a pension interest in such cases, the court pointed out that the Texas Supreme Court's formula enunciated in *Taggart v. Taggart*³⁷¹ is only suitable for

363. *Id.* at 436. The result is the same as might have been achieved by allowing an ex-spouse the benefit of a new adjudication by bill of review after having been denied an interest in military retirement benefits as a result of *McCarty*. See McKnight, 1983 Annual Survey, *supra* note 131, at 103 n.319; Note, *Closing the McCarty-USFPA Window: A Proposal for Relief from McCarty-Era Final Judgments*, 63 TEXAS L. REV. 497, 518-31 (1984). A proposal for legislation that would have had the same effect did not appeal to the Legislature in 1985. H.B. 1145 did not reach the floor of the House of Representatives.

364. 647 S.W.2d 945 (Tex. 1983).

365. *Id.* at 947.

366. *Id.*; Jackson v. Green, 700 S.W.2d 620, 621-22 (Tex. App.—Corpus Christi 1985, no writ).

367. Dunn v. Dunn, 703 S.W.2d 317 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (civil-service retirement).

368. *Id.* at 321.

369. 716 S.W.2d 705 (Tex. App.—Corpus Christi 1986, no writ). In suggesting unfairness the court relied on Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Action: Cures for the Inequities in Berry v. Berry*, 37 BAYLOR L. REV. 107, 152-64 (1985). *May*, 716 S.W.2d at 711 n.4.

370. *May*, 716 S.W.2d at 710-11.

371. 552 S.W.2d 422, 423-24 (Tex. 1977).

cases involving a spouse who has retired or has terminated employment under a retirement plan at the time of the divorce.³⁷²

*Grier v. Grier*³⁷³ was a suit for the partition of an undivided community interest in military retirement benefits. At the time the spouses were divorced in 1975, the prospective pensioner had been placed on a promotion list but was not promoted in rank until eight months after the divorce. Hence, under *Berry*, the trial court erred in treating the pensioner as already promoted to a higher pension level prior to divorce in computing the value of the community interest in the soldier's retirement plan.³⁷⁴ The El Paso court of appeals noted that the USFSPA limits division of the benefits to "disposable retired pay."³⁷⁵ On further review the Texas Supreme Court made two additional points.³⁷⁶ First, the amount of the benefits that a Texas court may divide is not limited to fifty percent of disposable retired pay.³⁷⁷ That percentage is merely a limit on the amount that may be garnished and paid by the service secretaries pursuant to a court order.³⁷⁸ Second, as a sort of postscript, the court added that the nonpensioner's share may include "increases which may occur other than increases attributable to elevation in rank or services rendered by the military spouse after the date of the divorce."³⁷⁹ Thus, the court allowed an award to a nonpensioner to include cost-of-living or inflation increases in post-divorce benefits.

Making the Division. In making a division of property, the trial court must hear evidence on the nature and value of all the property about which there is dispute³⁸⁰ and then divide the property as is "just and right" under the circumstances.³⁸¹ The proper manner of questioning the exercise of a court's discretion in making a property division is by appeal and not by bill of review.³⁸²

All too often, but with little if any substantiating reason, an appellant will allege an abuse of discretion of a divorce court in dividing community property. As may be anticipated, the appellate court usually dismisses the plea as

372. *May*, 716 S.W.2d at 710. In *Anderson v. Anderson*, 707 S.W.2d 166 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.), the ex-husband had apparently completed his military service when the parties were divorced in 1971. The spouses had entered into a property settlement agreement, incorporated in the divorce decree, which gave the wife one-half of the husband's retirement benefits. The court construed the agreement as giving the ex-wife one-half of what the former husband received after he became eligible to receive benefits in 1981. *Id.* at 169; see *Ulmer v. Ulmer*, 717 S.W.2d 665, 668-69 (Tex. App.—Texarkana 1986, no writ).

373. 713 S.W.2d 213 (Tex. App.—El Paso 1986).

374. *Id.* at 215 (citing *Rankin v. Bateman*, 686 S.W.2d 707 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.)).

375. *Id.* at 216.

376. *Grier v. Grier*, 30 Tex. Sup. Ct. J. 416, 417-18 (May 6, 1987).

377. *Id.*

378. *Id.*; 10 U.S.C. § 1408(a)(4) (1982).

379. 30 Tex. Sup. Ct. J. at 418.

380. *Haley v. Haley*, 713 S.W.2d 801, 803 (Tex. App.—Houston [1st Dist.] 1986, no writ); *Mata v. Mata*, 710 S.W.2d 756, 758-60 (Tex. App.—Corpus Christi 1986, no writ).

381. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1987).

382. *Arndt v. Arndt*, 714 S.W.2d 86, 88 (Tex. App.—Houston [14th Dist.] 1986, no writ).

unfounded.³⁸³ In *Morrison v. Morrison*,³⁸⁴ for example, the husband appealed the court's award of over eighty percent of the community estate to the wife. The appellate court nevertheless presumed that the trial court was thereby "reimbursing" the wife for the husband's substantial diversion of the community estate in favor of other women and the husband's fault in the breakdown of the marriage by committing adultery.³⁸⁵

An abuse of discretion is nevertheless sometimes found. In one instance the trial court's mistake was attributed to an erroneous determination of paternity,³⁸⁶ whereas in others the error was said to rest on an insufficiency of evidence in the record as to the property and its value.³⁸⁷ In *Haley v. Haley*³⁸⁸ the wife-appellant did not appear at the trial, and the trial court awarded the husband the bulk of a community estate worth over one million dollars. Because there was no recorded evidence as to the value of the property, the appellate court remanded the property division for a new trial.³⁸⁹ In *Breeze v. Breeze*,³⁹⁰ in which the husband alleged that the unequal division was violative of the Texas Constitution in discriminating against him because of his sex,³⁹¹ the appellate court put the burden on the appellant to substantiate his allegation of an affirmatively abusive act.³⁹² In saying that the husband lacked *standing* to contest the prevailing interpretation of section 3.63³⁹³ that includes sex of the parties as a standard for making a "just and right" division,³⁹⁴ the Fort Worth court of appeals apparently meant that the husband had not raised the issue at trial and had offered no specific evidence that supported his position.

In *Smith v. Smith*³⁹⁵ the Texarkana court of appeals found error in achieving division if not in the division itself. The trial court had awarded the wife a money judgment at interest for reimbursement of her share of community funds used by the husband to benefit his separate property. The

383. See *Rafidi v. Rafidi*, 718 S.W.2d 43, 46 (Tex. App.—Dallas 1986, no writ); *Ulmer v. Ulmer*, 717 S.W.2d 665, 669 (Tex. App.—Texarkana 1986, no writ); *Morrison v. Morrison*, 713 S.W.2d 377, 379 (Tex. App.—Dallas 1986, writ *dism'd w.o.j.*); *Peery v. Peery*, 709 S.W.2d 392, 394 (Tex. App.—Fort Worth 1986, no writ); *Rutledge v. Rutledge*, 709 S.W.2d 389, 392 (Tex. App.—Fort Worth 1986, writ *ref'd n.r.e.*); *Breeze v. Breeze*, 707 S.W.2d 298, 300-01 (Tex. App.—Fort Worth 1986, writ *dism'd w.o.j.*); *Conroy v. Conroy*, 706 S.W.2d 745, 748 (Tex. App.—El Paso 1986, no writ); *Hernandez v. Hernandez*, 703 S.W.2d 250, 254 (Tex. App.—Corpus Christi 1985, no writ); *Wren v. Wren*, 702 S.W.2d 250, 253 (Tex. App.—Houston [1st Dist.] 1985, writ *dism'd w.o.j.*); *Beaupre v. Beaupre*, 700 S.W.2d 353, 357 (Tex. App.—Fort Worth 1985, writ *dism'd w.o.j.*); *Jones v. Jones*, 699 S.W.2d 583, 585 (Tex. App.—Texarkana 1985, no writ).

384. 713 S.W.2d 377 (Tex. App.—Dallas 1986, writ *dism'd w.o.j.*).

385. *Id.* at 379.

386. *W.K. v. M.H.K.*, 719 S.W.2d 232, 236 (Tex. App.—Houston [14th Dist.] 1986, no writ).

387. *Haley v. Haley*, 713 S.W.2d 801, 803 (Tex. App.—Houston [1st Dist.] 1986, no writ); *Mata v. Mata*, 710 S.W.2d 756, 758-60 (Tex. App.—Corpus Christi 1986, no writ).

388. 713 S.W.2d 801 (Tex. App.—Houston [1st Dist.] 1986, no writ).

389. *Id.* at 805.

390. 707 S.W.2d 298 (Tex. App.—Fort Worth 1986, writ *dism'd w.o.j.*).

391. TEX. CONST. art. I, § 3a.

392. 707 S.W.2d at 301.

393. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1987).

394. 707 S.W.2d at 300-01.

395. 715 S.W.2d 154 (Tex. App.—Texarkana 1986, no writ).

trial court also imposed a lien on the husband's separate property for payment of the award and required the husband to execute a deed of trust on all of his separate property in furtherance of that objective. The appellate court held that the trial court should not have put a judicial lien on property other than that which had been benefited through the use of community funds and that in ordering the husband to execute the deed of trust the trial court had exceeded its power.³⁹⁶ In *Stapler v. Stapler*,³⁹⁷ however, a lien on property awarded to one spouse was said to be implied by the agreement of the parties that one would pay certain debts of the other, with the result that the ex-spouse who paid the debt as agreed was entitled to foreclose the lien.³⁹⁸

Attorney's Fees. In *Cunningham v. Cunningham*³⁹⁹ the wife brought suit for divorce against her husband who was a domiciliary of another state. He appeared specially to contest personal jurisdiction over him, but in making a division of the community property the trial court nonetheless ordered him to pay certain debts incurred during the marriage, as well as the wife's attorney's fees. On the husband's appeal the court held that these aspects of the judgment were void because the court lacked personal jurisdiction to render such orders.⁴⁰⁰

In *Inman v. O'Donnell*⁴⁰¹ the award of attorney's fees was severed from the division of property when the trial court purported to enter a final judgment of divorce. Rather than appealing, the husband sought a writ of prohibition from the court of appeals to deter the trial judge from so proceeding. The appellate court held that the husband had chosen the wrong remedy and denied his petition.⁴⁰² While it was clearly improper for the court to sever the award of attorney's fees from the division of property in general, the Dallas court of appeals held that the husband's proper course of action was to object to severance and, if his objection was overruled, to appeal.⁴⁰³

In dividing the community estate in *Gervin v. Gervin*⁴⁰⁴ the trial court ordered the husband to pay his wife's attorney's and accountant's fees, and the husband challenged the property divisions as divesting his separate property interests and as excessive with respect to the fees. The parties then remarried, though the husband maintained his appeal. Over a strong dissent by the chief justice, the San Antonio court of appeals dismissed the appeal as moot but affirmed the trial court's judgment as to the fees.⁴⁰⁵ As Chief Justice Cadena pointed out, none of the case should have been treated as

396. *Id.* at 161; *cf.* *May v. May*, 716 S.W.2d 705, 712 (Tex. App.—Corpus Christi 1986, no writ), in which it was said that the trial court might award all community pension benefits to the pensioner-husband and order him to pay his wife a monetary amount in lieu of her interest.

397. 720 S.W.2d 271 (Tex. App.—Fort Worth 1986, no writ).

398. *Id.* at 272-73.

399. 719 S.W.2d 224 (Tex. App.—Dallas 1986, no writ).

400. *Id.* at 225, 228-29.

401. 722 S.W.2d 16 (Tex. App.—Dallas 1986, no writ).

402. *Id.* at 18.

403. *Id.*

404. 720 S.W.2d 150 (Tex. App.—San Antonio 1986, no writ).

405. *Id.* at 151-52.

moot.⁴⁰⁶ The judgment of the trial court had become final. To say that the rights of the parties were the same as before the divorce was inaccurate. But if that was so, how might the question as to fees be treated differently? In a sense, other parties (the attorney and the accountant) were involved, but without the division of property to support the award of fees as an element of the property-division, the claimants should have proved up their claims as necessities. It is very unlikely that they did so.

In *Abrams v. Abrams*⁴⁰⁷ a nice distinction was drawn between the handling of attorney's fees in a property division and other property subject to division. In *Carle v. Carle*⁴⁰⁸ the Texas Supreme Court held that an award of attorney's fees is an integral part of the division of property between divorcing spouses and, further, that a spouse's acceptance of benefits is a bar to appeal concerning the property division.⁴⁰⁹ Even so, the Corpus Christi court of appeals held in *Abrams* that an appeal of attorney's fees should not be affected by the rule as to enjoyment of benefits if the rest of the property division is not questioned.⁴¹⁰ In that the award of attorney's fees related to a division of the community property, it is difficult to understand how the award of attorney's fees could be dealt with independently.

Clarification and Enforcement. The 1983 provisions of the Family Code enacted to ease the process of enforcement of divorce decrees⁴¹¹ are designed to give ready access to the court for clarification of a prior order and its prompt execution. A modification of a decree may not be achieved by this process, and a jury trial is, therefore, not provided for.⁴¹² For example, in *McDowell v. McDowell*⁴¹³ the trial court's order provided for sale of the family home on the occurrence of any one of four events. Because none of these situations had occurred, the order was beyond the court's power of immediate enforcement.⁴¹⁴ Similarly, the appellate court held in *Griffith v. Griffith*⁴¹⁵ that the trial court could not impose new burdens on the ex-spouses' real property not anticipated by the decree.⁴¹⁶ On the other hand, because the divorce decree in *Griffith* provided that the ex-husband should maintain his former wife as beneficiary of his army benefit plan, it was appropriate that he should be required to redesignate his ex-wife as beneficiary of the plan and to pay annual premiums so that the plan would not lapse.⁴¹⁷

406. *Id.* at 152-53 (Cadena, C.J., dissenting).

407. 713 S.W.2d 195 (Tex. App.—Corpus Christi 1986, no writ).

408. 149 Tex. 469, 234 S.W.2d 1002 (1950); see *Dehnert v. Dehnert*, 705 S.W.2d 849, 851 (Tex. App.—Beaumont 1986, no writ).

409. 149 Tex. at 472, 234 S.W.2d at 1004. If the recipient has been the victim of fraud, however, the benefits doctrine is inapplicable. *Wheeler v. Wheeler*, 713 S.W.2d 148, 151 (Tex. App.—Texarkana 1986, writ *dism'd w.o.j.*).

410. 713 S.W.2d at 198.

411. TEX. FAM. CODE ANN. §§ 3.70-.77 (Vernon Supp. 1987).

412. *Garza v. Garza*, 713 S.W.2d 123, 126-27 (Tex. App.—San Antonio 1986, writ *dism'd w.o.j.*).

413. 705 S.W.2d 345 (Tex. App.—Dallas 1986, no writ).

414. *Id.* at 346-47.

415. 698 S.W.2d 729 (Tex. App.—El Paso 1985, no writ).

416. *Id.* at 732.

417. *Id.* at 731-32.

In *McEntire v. McEntire*⁴¹⁸ an agreed judgment had been entered providing that each spouse would execute any instrument necessary to give effect to the decree; further, the judgment ordered the husband to pay a particular note due to a third person. Although it was not clear whether the note was in existence at the time the decree was entered, it was consistent with the parties' agreement that the ex-husband should be ordered to execute a note to that person.⁴¹⁹

If the divorce decree fails to divide particular community property, the matter is beyond the enforcement powers of the divorce court, and a new suit must be brought for partition of the community property that had become a tenancy in common between the former spouses. In *Dunn v. Dunn*,⁴²⁰ for example, the divorce court had failed to deal with the husband's civil service retirement benefits by merely awarding him property that was in his possession.⁴²¹ The court seems incorrect, however, in saying that the divorce court had failed to divide the proceeds of the sale of certain livestock that the husband had sold in fraud of the wife's rights during the pendency of the suit, because the decree disposed of the rest of the property on hand.⁴²² If the husband had violated the provisions of section 3.57⁴²³ of the Family Code in giving good title to community property in fraud of the wife's rights, entry of the decree should not affect her suit for fraud.

In *Binkley v. Wade*⁴²⁴ the divorce court awarded the husband particular items of personalty on the basis of the spouses' agreement, but issued no order for delivery. Afterwards the ex-husband unsuccessfully sought delivery of the property by way of a motion for clarification. He was nevertheless allowed to pursue the same end by a new suit.⁴²⁵ Thus, the prior motion for clarification was not res judicata to a subsequent assertion of his property rights.⁴²⁶

Other Post-Divorce Disputes. The strict standards for maintaining a successful bill of review tend to limit that course of post-divorce relief.⁴²⁷ In *Borgerding v. Griffin*,⁴²⁸ for example, both ex-spouses filed petitions for bills of review to set aside a divorce decree. The ex-wife later dismissed her petition and the ex-husband failed to establish extrinsic fraud on the part of his ex-wife with respect to marital assets that he asserted had been secreted.⁴²⁹

418. 706 S.W.2d 347 (Tex. App.—San Antonio 1986, writ *dism'd w.o.j.*).

419. *Id.* at 351.

420. 703 S.W.2d 317 (Tex. App.—San Antonio 1985, writ *ref'd n.r.e.*).

421. *Id.* at 318.

422. *Id.* at 320.

423. TEX. FAM. CODE ANN. § 3.57 (Vernon Supp. 1987).

424. 703 S.W.2d 321 (Tex. App.—Waco 1985, writ *ref'd n.r.e.*).

425. *Id.* at 324.

426. *Id.*

427. In a recent nonfamily case the Texas Supreme Court reversed an attempt by the San Antonio court of appeals to loosen the requirements for maintaining a bill of review. *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987), *rev'g* 705 S.W.2d 288 (Tex. App.—San Antonio 1986).

428. 716 S.W.2d 694 (Tex. App.—Corpus Christi 1986, no writ).

429. *Id.* at 698-99.

In bringing her bill of review in *Yates v. Yates*⁴³⁰ the ex-wife sought unsuccessfully to rely on her attorney's unintentional (or negligent) acts beyond those authorized by his client.⁴³¹ In *Arndt v. Arndt*⁴³² the petitioner did not allege fraudulent concealment of assets, but that he was induced to agree to the decree while suffering from acute alcoholism. Further, at the pre-trial hearing he was unable to show that he would be able to prove a meritorious defense. His attack was thus directed merely to the divorce court's exercise of discretion in the division of property. Even if the court could have construed his being induced to sign the decree without consulting an attorney as a fraud, he would still have failed in meeting bill-of-review standards.⁴³³

In *Towne v. Towne*⁴³⁴ the ex-wife sought to impose a constructive trust on the proceeds of a Veterans' Administration life insurance policy of which the second wife of the ex-husband was named as beneficiary. In a property settlement agreement entered into prior to their divorce the spouses had agreed that the wife would own the life insurance policy, though the husband had secretly designated his wife-to-be as the beneficiary. In upholding the trial court's imposition of a constructive trust on all of the proceeds in favor of the first wife, the Fort Worth court of appeals was at great pains to distinguish *Ridgway v. Ridgway*,⁴³⁵ in which the United States Supreme Court had held that a constructive trust fixed on the proceeds of a similar life insurance policy by a Maine divorce court would not prevail over the right of the insured under federal law to change the beneficiary of the policy.⁴³⁶ The Fort Worth court distinguished *Ridgway* on the ground that the insured husband in that case was dealing with property over which he had exclusive ownership, whereas in *Towne* he was attempting to divest the ex-wife of her community property interest when he made the beneficiary designation and maintained it contrary to the property settlement agreement that was later incorporated in the decree of the divorce court.⁴³⁷ However much one would like to distinguish the authority of the *Ridgway* case, this effort cannot be regarded as wholly successful, because it does not account for the imposition of the constructive trust on the ex-husband's share of the proceeds. Whether the other spouse proves the managing spouse's actual intent to defraud, or proves a constructive fraud demonstrated by the managing spouse's unreasonable designation of a third person as the beneficiary of the other spouse's community interest, the other spouse is not able to recover the managing spouse's share of the community proceeds.⁴³⁸ To distinguish *Ridgway* effectively its authority must be acknowledged and then confined. The United States Supreme Court held in *Ridgway* that a state court is pow-

430. 714 S.W.2d 66 (Tex. App.—Dallas 1986, no writ).

431. *Id.* at 67.

432. 714 S.W.2d 86 (Tex. App.—Houston [14th Dist.] 1986, no writ).

433. *Id.* at 88.

434. 707 S.W.2d 745 (Tex. App.—Fort Worth 1986, no writ).

435. 454 U.S. 46 (1981).

436. *Id.* at 61-63.

437. *Towne*, 707 S.W.2d at 748.

438. *Carnes v. Meador*, 533 S.W.2d 365, 370-72 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

erless to restrain the insured from changing the beneficiary of *his* policy,⁴³⁹ and the earlier Supreme Court holding in *Wissner v. Wissner*⁴⁴⁰ had given him the power to deal with his spouse's community interest as well.⁴⁴¹ But neither of these authorities purports to allow the policy-holder to rescind his *contract* with his ex-wife to maintain her as beneficiary (and indeed owner) of the policy when he had entered into the contractual settlement to gain benefits from the other spouse. Making a secret designation of his wife-to-be as beneficiary prior to entering into the contractual settlement does indeed smack of fraud. In this context the ex-wife can rely on the Supreme Court's decision in *Yiatchos v. Yiatchos*⁴⁴² in which the court precluded the use of federal law to justify a fraud under state law.⁴⁴³

Once again an ex-husband sought to upset the award of a divorce court by becoming a voluntary bankrupt under chapter 7 of the Bankruptcy Code.⁴⁴⁴ In denying the serviceman-ex-husband relief from the court order partitioning his military retirement benefits, the Fifth Circuit Court of Appeals stated that the effect of the divorce decree was to partition a share of the benefits to the ex-wife as her separate property.⁴⁴⁵ Hence, there was no debt of the bankrupt to be discharged. The court did not cite *In re Nunnally*⁴⁴⁶ in its opinion. This is a neat solution to a vexing problem that avoids any discussion of the meaning of section 523(a)(5) of the Bankruptcy Code.⁴⁴⁷ In *In re Benich*,⁴⁴⁸ however, the wife had agreed to surrender her community property rights in the husband's pension benefits in return for the husband's agreement to pay her a portion thereof for her support. The court was forced to rely on *Nunnally* to declare that the husband's duty to carry out his obligations under the property settlement agreement were not dischargeable in bankruptcy.⁴⁴⁹

439. 454 U.S. at 60; see *Kamel v. Kamel*, 721 S.W.2d 450, 453 (Tex. App.—Tyler 1986, no writ), discussed *supra* notes 329-331.

440. 338 U.S. 655 (1950).

441. *Id.* at 658-59.

442. 376 U.S. 306 (1964).

443. *Id.* at 309.

444. *In re Chandler*, 805 F.2d 555 (5th Cir. 1986).

445. *Id.* at 557.

446. 506 F.2d 1024 (5th Cir. 1975).

447. 11 U.S.C.A. § 523(a)(5) (West Pam. Supp. 1986). For a discussion of less successful efforts toward solutions of the problem, see J. MCKNIGHT & W. REPPY, *TEXAS MATRIMONIAL PROPERTY LAW* 278-79 (1983); McKnight, *1986 Annual Survey*, *supra* note 57, at 49-50.

448. 811 F.2d 943 (5th Cir. 1987).

449. *Id.* at 945-46.