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Family Law: Husband and Wife

Joseph W. McKnight

FAMILY LAW: HUSBAND AND WIFE

by

*Joseph W. McKnight**

I. STATUS

CEREMONIAL Marriage. At its 1987 regular session, the Texas Legislature enacted a number of amendments to the Texas Family Code relating to the process of obtaining a license to marry. First, in order to dispose of the problem pointed out in a recent Attorney General's opinion,[1] the legislature amended sections 1.02,[2] 1.05,[3] and 1.51[4] of the Family Code to enable a person under eighteen whose prior marriage has been dissolved to marry without parental consent. Second, the legislature further amended sections 1.02[5] and 1.05[6] by deleting references to the medical examination requirements, repealed in 1985.[7] Third, the legislature amended sections 1.03,[8] 1.05[9] and 1.92[10] to conform with section 2.21(a)(4),[11] which prohibits a person from marrying an aunt or uncle. Fourth, the legislature repealed the portion of section 1.52[12] that required the parent consenting to the marriage of a child under eighteen to accompany the child when applying for a marriage license. Now, the parent instead may give consent at any time within thirty days of the child's application for the marriage license.[13] Fifth, the legislature amended section 1.82 to require three days to elapse between the granting of the license and a ceremonial marriage.[14] Section 1.82 provides an exception to this requirement if one of the applicants either serves in the armed forces or obtains a court order allowing an earlier mar-

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* B.A., The University of Texas; B.C.L., M.A., Oxford University; LL.M., Columbia University. Professor of Law, Southern Methodist University. The author gratefully acknowledges the assistance of Blake Berryman and David White in the preparation of this article.

1. Op. Tex. Att'y Gen. No. JM-359 (1986).
2. TEX. FAM. CODE ANN. § 1.02 (Vernon Supp. 1988).
3. *Id.* § 1.05.
4. *Id.* § 1.51.
5. *Id.* § 1.02.
6. *Id.* § 1.05.
7. Act of April 11, 1985, ch. 32, §§ 1, 2, 1985 Tex. Gen. Laws 407, 408. The three elements of an informal marriage are (1) the parties must agree to be married; (2) after the agreement, the parties must live together in Texas as husband and wife; and (3) represent to others that they are married.
8. TEX. FAM. CODE ANN. § 1.03 (Vernon Supp. 1988).
9. *Id.* § 1.05.
10. *Id.* § 1.92.
11. *Id.* § 2.21(a)(4).
12. *Id.* § 1.52, *amended by* Act of 1987, ch. 43, § 1, 1987 Tex. Sess. Law Serv. 1.52 (Vernon).
13. TEX. FAM. CODE ANN. § 1.52(a) (Vernon Supp. 1988).
14. *Id.* § 1.82.

riage ceremony.[15] The legislature added a new section 2.48, which makes a formal marriage performed in violation of section 1.82's three-days requirement voidable.[16] The legislature thus expressed its willingness to require a "cooling-off period" between the time of licensing and the celebration of marriage. By oversight, however, the legislature failed to prescribe a short time period within which the parties could bring an annulment proceeding if they did not comply with the cooling-off period. Sixth, the legislature amended section 1.83 to allow retired judges with only twelve, rather than fifteen, years of prior judicial service to perform marriage ceremonies.[17]

Informal Marriage. In *In re Estate of Giessel*[18] evidence was offered to show that a couple, who had lived together for twenty years prior to the man's death, had satisfied all three elements of an informal marriage.[19] The contestants of the marriage, however, introduced evidence showing that, during the period that the couple lived together, the man and the woman each executed at least one formal instrument reciting that he or she was single. The contestants also introduced evidence of the deceased husband's prior statements[20] indicating that he was not married and evidence that the man and the woman each filed federal income tax returns as a single person. On the basis of other evidence, however, the jury nevertheless concluded that the couple had been married, and the appellate court found that the trial court committed no error.[21]

In *Bolash v. Heid*,[22] another informal marriage case, the result turned on when the informal marriage commenced. All public representations of the marriage occurred after the purchase of particular realty, the disposition of which was at issue in a divorce suit brought by the woman against the man. Although the appellate court agreed with the trial court's conclusion that the couple had entered into an informal marriage, the appellate court concluded that the evidence failed to establish that the parties held the woman out to the public as a wife prior to the man's acquisition of the property.[23] Thus, the property could not have been the spouses' community property, and consequently it was not subject to division upon divorce.[24] In an obiter dictum, however, the appellate court rejected the man's further argument that his subsequent formal marriage to another woman raised a presumption

15. TEX. FAM. CODE ANN. § 1.82 (Vernon Supp. 1988).
16. *Id.* § 2.48.
17. *Id.* § 1.83.
18. 734 S.W.2d 27 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
19. *See* TEX. FAM. CODE ANN. § 1.91(a)(2) (Vernon 1975); *see also* Cain v. Whitlock, 741 S.W.2d 528, 530 (Tex. App.—Houston [14th Dist.] 1987, no writ). An agreement to cohabit at present and to marry in the future does not satisfy the statutory test. Leal v. Moreno, 733 S.W.2d 322, 323 (Tex. App.—Corpus Christi 1987, no writ).
20. TEX. R. EVID. 601(b), the "Dead Man's Statute," does not bar the admission of statements made by a deceased person in order to prove the existence of an informal marriage. Cain v. Whitlock, 741 S.W.2d 528, 530 (Tex. App.—Houston [14th Dist.] 1987, no writ).
21. *Giessel*, 734 S.W.2d at 32.
22. 733 S.W.2d 698 (Tex. App.—San Antonio 1987, no writ).
23. *Id.* at 699.
24. *Id.*; *see* TEX. FAM. CODE ANN. § 5.01(a)(1) (Vernon 1975).

against the validity of the prior alleged marriage.[25] The court pointed out that the only purpose of such a presumption is to preserve the validity of the subsequent marriage, which, in this case, the parties did not attack.[26]

Equal Protection. The draftsmen of the equal protection clause of the fourteenth amendment of the United States Constitution[27] probably did not intend to invalidate the principle of unity of spouses, which then prevailed in most of the states, or to give married or single women full citizenship status. Indeed, the United States Supreme Court waited until 1981 to condemn as unconstitutional a Louisiana husband's status as sole manager of the entire community estate and thus of his wife's interest in any community property without the wife's consent.[28] As recently as 1966, the Supreme Court refused to invalidate the principle that Texas married women lacked general contractual capacity.[29] In his opinion for the Court in *United States v. Yazell*[30] Justice Fortas ringingly affirmed the federal policy of not encroaching on a state's handling of essentially familial legal matters.[31]

Marital property law reformers from the 1950s through the 1970s sought a right for Texas married women to manage their separate property without their husband's interference. Married women attained full contractual capacity in 1963 when the legislature repealed article 1299,[32] which required a husband's consent to his wife's transfer of her separate land and securities. The legislature waited until 1967, however, to repeal articles 6605 and 6608, which required, respectively, the husband's acknowledgement and the wife's privy acknowledgement for recordation of conveyances of the wife's separate land and the couple's homestead.[33] Now, at very long last, a Texas wife has successfully attacked the constitutionality of a requirement that a husband join his wife's conveyance of her separate property.[34] In *Wessely Energy Corp. v. Jennings*[35] the Supreme Court of Texas held former article 1299 unconstitutional[36] under both the fourteenth amendment of the United States Constitution[37] and article I, section 3 of the Texas Constitution.[38] The Texas Supreme Court thus fully vindicated a 1954 conveyance by a

25. *Bolash*, 733 S.W.2d at 699.

26. *Id.*; *see* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 30 SW. L.J. 68, 70 (1976).

27. U.S. CONST. amend. XIV, § 1, cl. 4.

28. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

29. United States v. Yazell, 382 U.S. 341 (1966).

30. *Id.*

31. *Id.* at 352; *see also* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 SW. L.J. 39, 46 (1967) (discusses *Yazell*).

32. TEX. REV. CIV. STAT. ANN. art. 1299 (Vernon 1925), *repealed by* Act of May 24, 1963, ch. 473, § 1, 1963 Tex. Gen. Laws 1188, 1189.

33. TEX. REV. CIV. STAT. ANN. arts. 6605, 6608 (Vernon 1925), *repealed by* Act of May 27, 1967, ch. 309, § 6, 1967 Tex. Gen. Laws 735, 741.

34. Wessely Energy Corp. v. Jennings, 736 S.W.2d 624 (Tex. 1987).

35. *Id.*

36. *Id.* at 627, 629.

37. U.S. CONST. amend. XIV, § 1, cl. 4.

38. TEX. CONST. art. I, § 3.

Texas married woman without her husband's joinder.[39] In a pusillanimous postscript, however, the court stated that its conclusion only applied prospectively.[40] The court's decision, therefore, does not affect any other title taken under former article 1299.[41]

Spousal Agency. The draftsmen of the Matrimonial Property Act of 1967 perceived no need to address the issue of spousal agency statutorily except in cases of liability for necessaries. Nevertheless, a growing number of misinformed judicial conclusions, holding one spouse liable for debts contracted solely by the other spouse,[42] underscored the need for legislative strictures. The legislature therefore enacted a provision[43] that reiterates the long-standing rule that "the marital relationship does not in itself make one spouse the agent of the other."[44] Hence, an obligation incurred by one spouse during the marriage does not produce liability as to the other spouse unless the spouse who incurs the obligation acts as the agent of the other spouse.[45] By enacting this provision,[46] the legislature did not purport to change existing law in any way, but merely to clarify what they had previously regarded as virtually self-evident.[47] No one knows just how some members of the bench and bar developed the misconception that a spouse who was not a party to a contract could incur liability for it, unless the contract involved the acquisition of necessaries. Ordinarily a court terms a debt incurred by a spouse a community debt for the purpose of characterizing property bought on credit or with borrowed money.[48] With that description, however, a court does not thereby impute liability to the noncontracting spouse.[49] To dispose of misapprehensions concerning limits to the concept of community debt, the legislature enacted section 4.031(b)[50] with a cross-reference in section 5.61(b)[51] to make the point doubly clear.

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39. *Wessely*, 736 S.W.2d at 629.

40. *Id.*

41. *Id.*

42. *See* Dan Lawson & Assocs. v. Miller, 742 S.W.2d 528, 530 (Tex. App.—Fort Worth 1987, no writ); Wileman v. Wade, 665 S.W.2d 519, 520 (Tex. App.—Dallas 1983, no writ); Anderson v. Royce, 624 S.W.2d 621, 623 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); Brazosport Bank v. Robertson, 616 S.W.2d 363, 366-67 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Inwood Nat'l Bank v. Hoppe, 596 S.W.2d 183, 186 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

43. TEX. FAM. CODE ANN. § 4.031(c) (Vernon Supp. 1987).

44. Wilkinson v. Stevison, 514 S.W.2d 895, 898 (Tex. 1974); *see* Gravis v. Physicians & Surgeons Hosp., 427 S.W.2d 310, 311 (Tex. 1968); Coats v. Bockstein, 176 S.W.2d 968, 970-71 (Tex. Civ. App.—Eastland 1944, no writ); Gohlman, Lester & Co. v. Whittle, 254 S.W. 595, 598 (Tex. Civ. App.—Galveston 1923), *rev'd on other grounds*, 114 Tex. 548, 273 S.W. 808 (1925).

45. TEX. FAM. CODE ANN. § 4.031(a) (Vernon Supp. 1987).

46. *Id.* § 4.031(a) (Vernon Supp. 1988).

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

48. Gleich v. Bongio, 128 Tex. 606, 610, 99 S.W.2d 881, 883 (1937).

49. *In re* Karber, 25 Bankr. 9, 12 (Bankr. N.D. Tex. 1982); Latimer v. City Nat'l Bank, 715 S.W.2d 825 (Tex. App.—Eastland 1986, no writ); Miller v. City Nat'l Bank, 594 S.W.2d 823, 826 (Tex. Civ. App.—Waco 1980, no writ).

50. TEX. FAM. CODE ANN. § 4.031(b) (Vernon Supp. 1988). This provision, however, contains an ambiguity as to which spouse it refers and needs clarification.

51. *Id.* § 5.61(b).

Alienation of Affection. In 1975 the legislature abolished the tort of criminal conversation, a civil action against a third person for having sexual intercourse with the plaintiff's spouse.[52] At the 1987 regular session, the legislature went further by abolishing the broader tort of alienation of affection, which consisted of undermining the affection that the other spouse held toward the aggrieved spouse either by enticing the other spouse away from the aggrieved spouse or by other means.[53] The repeal's proponents argued that the other spouse ought to be able to make such choices without thereby giving the complaining spouse a cause of action. Thus, a third person, with impunity, may seek one spouse's breach of the marital contract of fidelity, though the defaulting spouse may pay through the unequal division of community property upon divorce.[54]

Loss of Consortium. Texas law clearly allows either spouse to recover for loss of companionship with the other spouse.[55] Texas law considers a couple's estrangement and contemplated divorce relevant to the determination of such a loss.[56] In *Perez v. United States*[57] a federal trial court had rejected a husband's loss-of-consortium claim because his wife had sued for divorce at the time of the trial.[58] The Fifth Circuit Court of Appeals held that the trial court did not err in concluding that the defendant's wrongful act did not cause a loss of consortium.[59]

Spousal Testimony. With the adoption of the Texas Rules of Criminal Evidence in 1985, Texas rejected the traditional rule that one spouse could not testify against the other spouse in a criminal prosecution, except in some specific instances in which the other spouse could come forward voluntarily to protect his or her own interests.[60] The federal common law rule has favored voluntary spousal testimony for some time.[61] The federal interception statute[62] addresses a somewhat different question: the right of a spouse to suppress any evidence gained by the other through unauthorized electronic

52. TEX. FAM. CODE ANN. § 4.05, *approved by* Act of June 19, 1975, ch. 637, § 1, 1975 Tex. Gen. Laws 1942.

53. TEX. FAM. CODE ANN. § 4.06, *amended by* Act of June 17, 1987, ch. 453, § 1, 1987 Tex. Sess. Law Serv. 4042 (codified at TEX. FAM. CODE ANN. § 4.06 (Vernon Supp. 1988)).

54. *See* Young v. Young, 609 S.W.2d 758, 761 (Tex. 1980). The tort of impairment of familial relationship, however, apparently still subsists. *See* Salinas v. Fort Worth Cab & Baggage Co., 725 S.W.2d 701, 704 (Tex. 1987).

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

56. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 636 (Tex. 1986).

57. 830 F.2d 54 (5th Cir. 1987).

58. *Id.* at 59-60.

59. *Id.*

60. TEX. R. CRIM. EVID. 504(2)(a) (supplanting TEX. CRIM. PROC. CODE ANN. art. 38.11 (Vernon 1979)); *see* Willard v. State, 719 S.W.2d 595, 600-01 (Tex. Crim. App. 1986) (en banc) (decided under old rule). For significant recent developments in this and related matters, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 SW. L.J. 131, 133 (1984) [hereinafter McKnight, *1984 Annual Survey*]; McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 37 SW. L.J. 65, 66 (1983).

61. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 35 SW. L.J. 93, 95 (1981) [hereinafter McKnight, *1981 Annual Survey*].

62. 18 U.S.C.A. § 2510 (West 1970 & Supp. 1987).

listening devices.[63] In *Kotrla v. Kotrla*,[64] a divorce case, the court held that the husband's tape-recorded evidence of a conversation between him and his wife was not inadmissible under the Texas interception statute.[65]

"The rule" is a courtroom procedure that prevents witnesses from hearing the testimony of other witnesses.[66] Texas courts traditionally have exempted parties' spouses from the rule when litigation involves the community property interests of both spouses, even when both spouses are not joined formally as parties to the litigation.[67] The new Texas Rule of Civil Procedure 267 expressly excludes a party's spouse from the rule, irrespective of whether a community interest is directly at stake.[68]

Interspousal Immunity. In *Price v. Price*[69] the Supreme Court of Texas announced what many members of the legal community had suspected for some time: the Texas doctrine of interspousal immunity has expired.[70] The case before the court involved a premarital tort. A motorcycle passenger brought suit for her injury against the motorcycle driver, her husband at the time of the suit but not as of the time of the motorcycle accident. Although a spouse probably would not maintain such a suit against his or her spouse, except for the purpose of recovering from the tortfeasor's insurer, the court held that a spouse may sue his or her spouse.[71] The decision's irony is that insurance companies in all likelihood will exclude coverage for interspousal liability under future policies of insurance.[72]

In choice-of-law cases, however, courts still may apply the spousal immunity doctrine. In *Robertson v. Estate of McKnight*[73] the Texas Supreme Court concluded that with respect to an action brought by a deceased New Mexican wife's estate against her husband's estate for a cause of action that occurred in Texas, a Texas court would apply the law of New Mexico, the marital domicile, under the most-significant-contacts doctrine.[74] The court,

63. *Id.*; *see* Nations v. Nations, 670 F. Supp. 1432, 1436 (W.D. Ark. 1987); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 107 (1977).

64. 718 S.W.2d 853 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

65. *Id.* at 855; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 123.002 (Vernon 1986).

66. *See* Bishop v. Wollyung, 705 S.W.2d 312, 313 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

67. *See* Southern Ice & Utils. Co. v. Richardson, 128 Tex. 82, 85, 95 S.W.2d 956, 958 (1936); *Bishop*, 705 S.W.2d at 314; Martin v. Burcham, 203 S.W.2d 807, 811 (Tex. Civ. App.—Fort Worth 1947, no writ).

68. TEX. R. CIV. P. 267(b)(1) (effective January 1, 1988); *see* TEX. R. EVID. 614(1) (parallel language). *But see* TEX. R. CRIM. EVID. 613 (does not explicitly exempt parties' spouses from rule).

69. 732 S.W.2d 316 (Tex. 1987).

70. *Id.* at 320. Though the injured passenger had also sued the driver and owner of the truck with which the cycle collided, those defendants settled their dispute with the plaintiff prior to trial.

71. *Id.* at 319. A person would more likely otherwise maintain a suit against his or her spouse if the marriage has been or is about to be dissolved.

72. *See id.* at 320 (Mauzy, J., concurring).

73. 609 S.W.2d 534, 535-36 (Tex. 1980); *see also* McKnight, *1981 Annual Survey*, *supra* note 61, at 96-97 (discusses *Robertson*).

74. *Robertson*, 609 S.W.2d at 536; *see also* Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979) (discusses most-significant-contacts doctrine).

therefore, did not apply the spousal immunity doctrine.[75] In *Mills v. State Farm Mutual Automobile Insurance Co.*[76] the Tenth Circuit Court of Appeals concluded that Oklahoma law should control application of the principle of interspousal immunity in a suit brought in tort by an ex-wife against her former husband.[77] The tort occurred in Texas, where the parties then lived. The parties later moved to Kansas and then to Oklahoma, where they obtained a divorce. When the ex-wife filed suit in an Oklahoma federal court, she lived in Oklahoma and the ex-husband lived in Kansas. Observing the principle that a federal court deciding a diversity case must apply the choice-of-law rules of the state in which the court is located,[78] the Tenth Circuit applied the Oklahoma conflict-of-laws rule, the "most significant relationship" rule.[79] The court concluded that Oklahoma maintained a closer relationship with the married couple than did either Texas or Kansas.[80] Consequently, the court applied Oklahoma domestic law and therefore did not apply the doctrine of spousal immunity.[81] The court clearly was hostile to the interspousal immunity doctrine, which had faltered, but still seemingly subsisted in both Texas and Kansas when the cause of action accrued.[82]

II. CHARACTERIZATION OF MARITAL PROPERTY INTERESTS

Premarital Agreements. Appellate courts dealt with two cases involving premarital agreements, each with rather unusual provisions. In *Bradley v. Bradley*[83] the court considered a written agreement entered into by a couple shortly before their marriage in 1982. The couple agreed to do any and all things necessary in order to establish or preserve the separate character of all revenues, increases, and income from "separate property, and from their respective personal efforts . . . ."[84] The agreement went on to provide specifically that in April of each year the spouses would make a partition in writing of all of the community estate accumulated during the prior calendar year.

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75. *Robertson*, 609 S.W.2d at 537.
76. 827 F.2d 1418 (10th Cir. 1987).
77. *Id.* at 1422.
78. *Id.* at 1420.
79. *Id.* at 1421.
80. *Id.* The court explained:

> [T]he marital domicile moved through three different states and never had an extended life in any of those three. Thus, the immunity question cannot be answered by looking simply at the law of the parties' domicile. Instead, the relationship that each state has to the parties' marriage must be evaluated in light of the purpose of each state's laws.

Id. By any balanced analysis of the facts, however, Texas maintained the most significant relationship to the cause of action. The decision's result under Texas law, however, would have remained the same.
81. *Id.*
82. *Id.* at 1420-22. The Tenth Circuit stated that the *Price* decision, which held that the doctrine of spousal immunity no longer constituted good law in Texas, established new "legislation." *Id.* The Tenth Circuit therefore seemed to be hesitant to follow *Price*. *See id.* at 1420 n.2. *Price*, however, merely declared the existing state of the law. Price v. Price, 732 S.W.2d 316, 320 (Tex. 1987).
83. 725 S.W.2d 503 (Tex. App.—Corpus Christi 1987, no writ).
84. *Id.* at 504.

The agreement further provided that the couple's failure to partition community property would not constitute a waiver of rights under the agreement. The form of the couple's agreement typified premarital agreements prior to the 1980 amendment of article XVI, section 15 of the Texas Constitution,[85] which allows future spouses to make a present written partition of future acquisitions that would otherwise constitute community property. Although no appellate court had interpreted such terms of a pre-1980 agreement, many members of the legal community thought that courts would not enforce such executory provisions of pre-1980 agreements.

In *Bradley* the Corpus Christi court of appeals held that the agreement did not constitute a partition and therefore failed in its purpose.[86] The instrument merely constituted an agreement to partition community acquisitions.[87] One wonders why the draftsman of the agreement did not choose to utilize the new means offered by the 1980 constitutional amendment. Having chosen the particular form of agreement, the draftsman might have anticipated the court's conclusion. The proponent of the agreement apparently did not argue that equity should treat as done what the couple agreed to be done. Although the pre-1980 law probably foreclosed such an equitable approach, if a party pleads the proper predicate, a court might order specific performance of a post-1980 unperformed agreement of this sort or treat such an agreement as performed in equity in accordance with its terms.

A more unusual written premarital agreement came before the court in *Hibbler v. Knight*.[88] In the agreement the husband-to-be agreed that his future wife's earnings during marriage would be her separate property and then declared that his future wife would be entitled to his estate, provided that the couple were neither separated nor divorced at the time of his death. The prospective husband evidently meant to make both of these provisions for his wife without exacting any benefits for himself. The agreement made no suggestion of a partition or an exchange. Because the instrument made no gift of present interest and contained no partition of a present or future community interest, the widow argued that the instrument constituted either a will or a contract to make a will. As a contract to make a will, the writing clearly failed[89] under the 1979 amendment to section 59A of the Probate Code, which requires that an executory contract to make a will be affirmed and summarized in an instrument constituting a will.[90] As a will, the instrument failed because it lacked the testamentary formalities of execution and was not holographic.[91]

The widow asserted alternatively that the object of the declaration could be achieved if the court treated it as a "nontestamentary" agreement under

85. TEX. CONST. art. XVI, § 15.
86. *Bradley*, 725 S.W.2d at 504.
87. *Id.*
88. 735 S.W.2d 924 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
89. *Id.* at 926.
90. TEX. PROB. CODE ANN. § 59A (Vernon 1980).
91. *Hibbler*, 735 S.W.2d at 927.

section 450 of the Probate Code, enacted in 1979.[92] Section 450 refers to various instruments that take effect at death not as wills, but as contracts or gifts and provides that such instruments are effective at death notwithstanding lack of testamentary formality.[93] A court simply carries out the instrument according to the decedent's directions for the disposition of his property.[94] The literal terms of section 450 clearly covered the writing before the court in *Hibbler*. Although the court might have construed the instrument as a will, the court held that the agreement merely stood as an instrument providing for a gift to take effect at death.[95] By contrast, a reciprocal will also constitutes a contract, but its contractual characteristics are secondary to its testamentary ones. Without making a thorough analysis of the nature and scope of section 450, the court held that the legislature, through its enactment of section 450, did not intend to give testamentary effect to an agreement that takes effect at death; such treatment would cause a contracting party's entire estate to pass without compliance with the formalities required of a will.[96]

Survivorship to Community Property. The court in *Hibbler* thus refused to construe section 450 as superceding the requirements of testamentary formalities with which a donor must comply for a gift to take effect at death.[97] Section 450, however, remains one of several provisions adopted over the years to simplify the process of succession.[98] The constitutional amendment approved by Texas voters in November 1987 is the latest provision of that type.[99] The amendment permits spouses to provide in writing that their community property will pass to the survivor.[100] The amendment does not obviate the need for a will, however, unless the spouses desire only this particular result.

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92. Section 450(a) provides:

> (a) [T]he following provisions in an insurance policy, . . . deposit agreement, . . . conveyance of real estate or personal property, or any other written instrument effective as a contract, gift, conveyance, or trust [are] deemed to be nontestamentary, and this code does not invalidate the instrument or any provision
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> . . . .
>
> (3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing
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> . . . .

TEX. PROB. CODE ANN. § 450(a) (Vernon Supp. 1988).

93. *Id.* § 450(a)(1).

94. *Id.* § 450(a)(3).

95. *Hibbler*, 735 S.W.2d at 927.

96. *Id.* This sort of reasoning is perverse.

97. *Id.*

98. *See, e.g.*, Law of Jan. 28, 1840, § 1, 1840 Tex. Gen. Laws 167, 2 H. GAMMEL, LAWS OF TEXAS 341 (1898) (enactment of concept of holographic will now embodied in TEX. PROB. CODE ANN. § 59 (Vernon 1980)); Act of Apr. 4, 1955, ch. 55, § 59, 1955 Tex. Gen. Laws 88, 107-08 (introduction of self-proving affidavit to shift burden of proof with respect to testamentary capacity).

99. TEX. CONST. art. XVI, § 15.

100. *Id.* "Spouses may agree on writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." *Id.*; *see* McKnight, *Legislation Affecting Marital Property Rights*, 87 STATE BAR OF TEXAS SECTION REPORT—FAMILY LAW 47.

The Family Law Section of the State Bar of Texas formulated this provision because Texas couples seem to want and need this sort of device. Since the mid-1940s Texas couples have used the joint tenancy with right of survivorship but found it wanting in several respects. First, the Texas Supreme Court imposed standards relating to the tenancy's creation, which evidently were not understood and which banks and other intermediaries seemed incapable of meeting.[101] Second, even if those standards were met, the created tenancy possessed certain undesirable characteristics. If spouses created the tenancy by a partition of community property followed by a recombination of the separate property produced by the partition, the joint tenancy became, by force of circumstances, a species of separate property with the following shortcomings: such property is not divisible on divorce,[102] it cannot be converted back into community property,[103] and its status is uncertain with respect to the discharge of spousal liabilities.[104] An agreement for survivorship in community property avoids all these shortcomings of the joint tenancy.

The new constitutional amendment underscores the immense and continuing need to distinguish between the joint tenancy with a right of survivorship and community property with a right of survivorship. If banks and their customer-spouses continue to use the old device and the forms concocted for its creation for the purpose of creating a right of survivorship in community property, the depositors may not achieve their objective. Compliance with the constitutional authority, however, is both easy and certain. The spouses need only join in a written agreement by which they give each other the right of survivorship with respect to all or a particular part of their community property. This sort of right of survivorship, however, applies only to community property. The joint tenancy remains a useful device in relation to separate property interests.

The premarital instrument by which the husband-to-be purported to dispose of all of his property at death in *Hibbler v. Knight*[105] provides a useful illustration. If the instrument in *Hibbler* were executed today, the terms of the 1987 constitutional amendment would not affect it for two reasons. First, the parties to the *Hibbler* instrument were not spouses but prospective spouses.[106] Second, even if the parties had been spouses, they did not purport to create a right of survivorship to their community property *in each*

101. *See* Maples v. Nimitz, 615 S.W.2d 690, 695 (Tex. 1981); Williams v. McKnight, 402 S.W.2d 505, 507 (Tex. 1966); Hilley v. Hilley, 161 Tex. 569, 574, 342 S.W.2d 565, 568 (1961); Tuttle v. Simpson, 735 S.W.2d 539, 544-45 (Tex. App.—Texarkana 1987, no writ); Allard v. Frech, 735 S.W.2d 311, 316 (Tex. App.—Fort Worth 1987, writ granted); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 40 SW. L.J. 1, 7-9 (1986) [hereinafter McKnight, *1986 Annual Survey*].

102. *See* McKnight, *The Constitutional Redefinition of Texas Matrimonial Property As It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY'S L.J. 449, 459-61 (1982).

103. *Id.*

104. *Id.* at 473.

105. 735 S.W.2d 924, 926 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *see supra* notes 88-96 and accompanying text.

106. *Hibbler*, 735 S.W.2d at 926.

other.[107] In *Hibbler* the prospective husband alone, though joined by his bride-to-be in executing the instrument, sought to make his prospective wife the taker at death of *all* of his property, community or separate.[108] Thus, the provision purported to cover separate as well as community property interests, but it was *not reciprocal*. The court, therefore, could not construe the provisions as a partition or exchange as the law then stood. For the unilateral purpose for which the instrument in *Hibbler* was executed, the constitutional amendment provides no better solution. The amendment also gives spouses the right to make *each other* the taker of all or a specified part of the community estate when one of them dies.[109] If only one of them wishes to dispose of his or her property at death, some other device must be used.

Some other qualities of this constitutional power require mention. Both spouses must join in making the written instrument in order to create a right of survivorship in community property.[110] Since the spouses have entered into a binding contract, arguably neither spouse may withdraw from it unilaterally, either orally or in writing.[111] Because, however, the maker of a contractual will with terms of mutual survivorship may withdraw from the contract by giving timely notice to the other party,[112] a similar handling of the spousal community-survivorship agreements would be appropriate. Dissipation of the agreement's subject matter would have the same effect. If the community property subject to the right of survivorship is a deposit in a particular account and is so identified by the instrument creating the right of survivorship, the right of survivorship will subsist only as long as the funds in, or added to, the account are still in the account when one of them dies. The terms of the instrument should not apply to funds removed in the meantime, though traceable to other assets, unless the spouses specifically so provide.

The provision for survivorship to community property does not interfere with the division of such property on divorce. Division upon divorce destroys the community character of property along with the right of survivorship. Similarly, if the property remains undivided upon divorce, the property becomes a tenancy in common, thereby destroying the right of survivorship. As long as the marriage subsists, however, and the property subject to the right of survivorship remains intact, the property remains community property with a right of survivorship until the couple terminates their spousal agreement. If the courts allow a timely unilateral withdrawal from the agreement, either spouse's filing of a petition for divorce or annulment, or a permanent separation of the spouses, should constitute notice. To avoid uncertainty, couples entering into such agreements should provide, as

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107. *Id.*
108. *Id.*
109. TEX. CONST. art. XVI, § 15; *see supra* note 100.
110. TEX. CONST. art. XVI, § 15.
111. *But see* Annotation, *Antenuptual Contracts: Parties' Behavior During Marriage as Abandonment, Estoppel, or Waiver Regarding Contract Rights*, 56 A.L.R.4th 998, 1014 (1987).
112. 2 E. BAILEY, TEXAS LAW OF WILLS 170 (1968).

the instrument in *Hibbler* provided,[113] that the right of survivorship becomes inoperative if one spouse sues for divorce or if the parties separate and are living apart from each other at the time one spouse dies.

The proposal of a constitutional amendment customarily spawns correlative legislation. The Texas Legislature enacted various provisions at the 1987 regular session to become effective when and if Texas voters should ratify the community-survivorship amendment in the November election.[114] The legislature decided not to enact a proposed addition to the Family Code that would have reflected the terms of the prospective amendment, but chose merely to add a new subsection to Probate Code section 46, which relates to joint tenancies.[115] The legislature awkwardly included this provision under the section heading "Joint Tenancies," rather than "Right of Survivorship."[116] No misunderstanding should result, however, because the language of section 46(b) deals with spousal agreements concerning community property,[117] whereas section 46(a) deals with joint tenancies,[118] which cannot be created out of community property.

The derogation from the constitutional grant of spousal power in subsection 46(b) raises a more serious problem.[119] As enacted, the provision extends only to "community property which is titled or held with indicia of title."[120] Thus, the statute covers interests in land held by formal title, including automobiles, airplanes, boats, earth-movers, securities, and bank accounts if they are "titled." The statute excludes from coverage lands acquired by adverse possession without color of title, household furnishings, securities held in a broker's name, jewels, and cash. Although article XVI, section 15 of the Texas Constitution gives the legislature power to make supplementary rules with respect to community property,[121] the legislature lacks the power to restrict constitutional rights. The legislature purportedly diminished the constitutional power of spouses to provide a written agreement of survivorship to any or all of their community property in existence when a spouse dies.[122] The limiting effect of this statutory provision, therefore, does not operate effectively.

A spousal agreement that designates the survivor to take the community share of the first to die forms a mutual designation of heirship. Thus, the survivor will hold the entire community estate, or a defined part of it, as

113. Hibbler v. Knight, 735 S.W.2d 924, 926 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

114. Act of June 18, 1987, ch. 678, §§ 2-3, 1987 Tex. Sess. Law Serv. 5063 (Vernon).

115. TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1988) provides:

> (b) Spouses may agree in writing that all or part of their community property which is titled or held with indicia of title becomes the property of the surviving spouse on the death of a spouse.

116. *Id.*

117. *Id.*

118. *Id.* § 46(a).

119. *Id.* § 46(b).

120. *Id.*

121. TEX. CONST. art. XVI, § 15 (as amended 1980) states that "laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property . . . ."

122. TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1988).

separate property. The agreement obviates the need for a will with respect to the property covered by the agreement, but the ownership interests in the community and its management continue unaffected for the duration of the marriage. Hence, such reciprocal agreements are not suitable will substitutes unless the parties seek to dispose of the entire community estate or designated community property holdings subject to such agreements remain static. If community property investments are apt to change, this sort of agreement does not provide an appropriate substitute for a will, unless the parties describe the properties intended to be covered by the agreement with some particularity.

Marital Partition. Because a community-survivorship agreement must be between spouses and concerns only the community property of their marriage, the agreement cannot extend beyond the duration of the couple's marriage and its immediate aftermath. Although couples use a marital partition primarily for the purpose of division rather than succession, the marital partition also cannot extend beyond the duration of the marriage. In *Marshall v. Marshall*,[123] for example, spouses entered into a marital partition, obtained a divorce, and subsequently remarried each other. In a divorce proceeding to dissolve the second marriage, the husband argued that their partition of community property to be acquired in the future included community property acquired during their second marriage. The court rejected this argument.[124] The partition applied only to the community property acquired during the marriage subsisting at the time the couple entered into the partition agreement.[125]

One must distinguish a marital partition from a mere spousal agreement on the one hand and a spousal contract on the other. In *Carter v. Carter*,[126] for example, the wife argued in a divorce suit that because land that the husband contracted to purchase before marriage was conveyed to both spouses during marriage, a presumption arose that the spouses agreed to acquire the property during marriage as community property.[127] The court rejected this assertion, noting that the two cases cited to support the argument each involved property that the spouses acquired during marriage.[128] The higher authority cited by the court, however, also does not stand for this proposition.[129] Such a presumption simply does not exist. Although the Waco court of civil appeals made such an assertion in 1976,[130] the statement is erroneous. Spouses cannot convert separate property into community

123. 735 S.W.2d 587 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

124. *Id.* at 592.

125. *Id.*

126. 736 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1987, no writ).

127. *Id.* at 780.

128. *Id.*; *see* Ray v. United States, 385 F. Supp. 372, 377 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976); Lindsay v. Clayman, 151 Tex. 593, 254 S.W.2d 777, 780 (1952).

129. *Carter*, 736 S.W.2d at 780 (citing Belkin v. Ray, 142 Tex. 71, 78, 176 S.W.2d 162, 165-66 (1943)).

130. Gonzalez v. Guajardo de Gonzalez, 541 S.W.2d 865, 868 (Tex. Civ. App.—Waco 1976, no writ).

property by agreement.[131] Although the Texas Constitution allows a partition or exchange to transform community property into separate property,[132] the converse is not available either by agreement or by contract.[133] In a situation such as that presented in *Carter*, a presumption arises that one spouse has made a gift of one-half of the property to the other spouse when separate property is used to acquire property in the names of both spouses. The ex-wife, however, evidently did not raise this argument.[134]

The facts of *Harrington v. Harrington*[135] lent themselves to a different solution in a somewhat similar situation. Though not yet married, the couple had lived together for three years in premises that they had leased in the names of both persons. The couple then discussed buying a house. The man undertook the obligation of the purchase-money note and took title in his name because the woman had significantly more modest earnings. Both parties contributed to improving the house. The couple later married. The spouses always referred to the house as "ours," and the husband presented no evidence that he ever claimed it as his own until the wife sued him for divorce. Under these facts, the court concluded that the parties had intended to purchase the house as partners, and that each spouse owned an equal share in it.[136]

While the constitutional amendment[137] primarily addresses community-survivorship agreements, the amendment also includes a significant clarification. Some attorneys who had not read the provisions of article XVI, section 15 with care found the section unclear as to whether spouses could partition their future earnings. Although the provision clearly provided that persons about to marry *and spouses* might partition *all or any part* of their community property,[138] these lawyers were puzzled by the constitutional provision that allowed spouses to agree that the income from the separate property of one spouse would be the separate property of the owner.[139] The omission of a reference to earnings in the latter provision suggested to casual readers that spouses might not partition earnings as separate property. This sort of argument perhaps in some degree resulted from wishful thinking. This latter provision does not deal with partitions and exchanges at all. Instead, it deals with written spousal agreements by which the income from the property of *one* of the spouses becomes the separate property of the owner of the prop-

131. *See infra* note 133 and accompanying text.

132. TEX. CONST. art. XVI, § 15.

133. Forbidden transformations of property are enumerated in J. MCKNIGHT & W. REPPY, TEXAS MATRIMONIAL PROPERTY LAW 20 (1983).

134. The court mentioned the issue but incorrectly observed that evidence of a gift to change the character of the property must exist. Carter v. Carter, 736 S.W.2d 775, 780 (Tex. App.—Houston [14th Dist.] 1987, no writ). Although evidence to rebut the gift presumption must exist, the evidence need not be very strong. *See* Cockerham v. Cockerham, 527 S.W.2d 162, 167 (Tex. 1975) (Reavley, J., dissenting); Carter v. Carter, 736 S.W.2d at 781.

135. 742 S.W.2d 722 (Tex. App.—Houston [1st Dist.] 1987, no writ).

136. *Id.* at 724.

137. TEX. CONST. art. XVI, § 15.

138. *Id.*

139. *Id.*

erty.[140] The drafters intended this clause to complement the provision by which a gift by one spouse to the other spouse causes the income from that property to be the separate property of the donee spouse unless the donor otherwise provides. The draftsmen designed the provision with respect to spousal agreements to allow spouses to agree as to future income from property given by one spouse to the other spouse prior to the effective date of the 1980 amendment. The 1987 amendment clarified this provision.[141] So that no one will conclude that the provision deals generally with agreements as to income from the separate property of both spouses, section 15 now refers specifically to the income from the separate property of *only one* of the spouses.[142] The amendment thus serves to distinguish the prior provision dealing with marital partitions from the later clause allowing a spousal agreement that the income from the separate property of only one spouse will be that spouse's separate property.

One must also distinguish the marital partition from a divorce-property-settlement agreement. Even though the latter may be in the form of a partition, the divorce court will review its terms under section 3.631 of the Family Code,[143] whereas a marital partition not made in anticipation of divorce is not subject to such review. In *Matthews v. Matthews*[144] the couple executed a community partition just prior to the filing of the divorce petition. The wife had contemplated filing a divorce petition for two months. The agreement partitioned certain community assets to the husband, who undertook to discharge some mutual debts and to hold the wife harmless for them. In the divorce proceeding that later ensued, the wife asserted that the partition was a nullity, but she did not rely on the provisions of section 3.631. Instead, the wife relied on the provisions of former section 5.45[145] to assert that she entered into the partition as a consequence of her husband's duress. As section 5.45 then stood, the husband had the burden of disproving duress.[146] The trial court held that the husband had failed to satisfy his burden by clear and convincing evidence, as required by the statute.[147] In order to make his wife comply with his wishes for partition of community assets, the husband had threatened to seek sole custody of their son. Despite the lawfulness of the husband's demands and threats to initiate custody proceedings if the wife did not execute the agreement, the appellate court held that the husband had not rebutted the use of duress and overreaching to obtain the marital partition.[148]

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140. *Id.*

141. *Id.*

142. *Id.*; *see* McKnight, *supra* note 102, at 461-62. Other minor word changes were made to the text of the provision. *See* TEX. CONST. art. XVI, § 15.

143. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1988).

144. 725 S.W.2d 275 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

145. TEX. FAM. CODE ANN. § 5.45, *amended and renumbered by* Act of June 17, 1981, ch. 782, § 2, 1981 Tex. Gen. Laws 2964, *as* TEX. FAM. CODE ANN. § 5.55 (Vernon Supp. 1988).

146. *Id.*

147. *Matthews*, 725 S.W.2d at 279.

148. *Id.*

Amendments of Premarital and Marital Partition Statutes. As the *Matthews* case illustrates, the husband had a very heavy burden to discharge when disproving duress.[149] Once the trial court had ruled against the husband in *Matthews*, the husband found prevailing on appeal virtually impossible. To dispose of this burden of proof, the legislature enacted the Uniform Premarital Agreement Act and supplemented it with adaptations of the prior statutes dealing with marital partitions and other spousal agreements.[150] Regrettably, the draftsmen of the uniform act did not tailor the act to the needs of Texas constituents. The enactment of the uniform law, therefore, has created some new problems. The amendment covers both premarital and marital partitions and exchanges. As in other cases of alleged civil fraud, the new enactment places the burden of proof on the party who asserts duress or fraud. The party asserting duress must prove that the agreement was "unconscionable when it was executed" and that the other party failed to disclose relevant facts.[151] The language of the statute does not seem to provide an objective standard of fairness or lack of fairness, but one can equate unconscionability with lack of fairness. One of the major functions of the community property doctrine, however, is to provide for the surviving spouse. Therefore, stripping one's spouse of his or her share of prospective community property without a reasonable substitute strongly suggests unconscionability.

Because the draftsmen of the uniform act failed to take account of article XVI, section 15 of the Texas Constitution,[152] on which the validity of most Texas premarital and marital partitions rests, application of the act causes difficulty. Most agreements will take the form of partitions or exchanges of community property that the couple will acquire in the future. The new premarital agreement statute[153] nowhere alludes to such agreements, and although the provisions for marital partitions mirror the constitutional provisions on that subject, no provision of the new act adequately replaces the provisions of repealed section 5.41, which dealt with premarital agreements made by minors.[154] The provision for amendment and revocation of premarital agreements[155] also seems to promise more than one can possibly attain. As a matter of constitutional principle, a couple cannot reverse the process of partition of future acquisitions of community property into separate property to recreate the community.[156] The constitution does not allow the creation of community property from separate property and, as a distinct

149. *See supra* notes 144-48 and accompanying text.

150. Act of June 18, 1987, ch. 678, §§ 2-3, 1987 Tex. Sess. Law Serv. 5063 (Vernon).

151. TEX. FAM. CODE ANN. § 5.46 (premarital agreements), § 5.55 (other property agreements) (Vernon Supp. 1988); *see* Annotation, *Enforceability of Premarital Agreements Governing Support of Property Rights Upon Divorce or Separation as Affected by Fairness or Adequacy of Those Terms—Modern Status*, 53 A.L.R.4th 166, 196-99 (1987).

152. TEX. CONST. art. XVI, § 15.

153. TEX. FAM. CODE ANN. § 5.46 (Vernon Supp. 1988).

154. Act of June 17, 1981, ch. 782, § 2, 1981 Tex. Gen. Laws 2964, 2964-65, *repealed by* Act of June 18, 1987, ch. 678, § 1, 1987 Tex. Sess. Law Serv. 5063, 5067 (Vernon).

155. TEX. FAM. CODE ANN. § 5.45 (Vernon Supp. 1988).

156. *See supra* note 133.

proposition, a partition amounts to a divestiture analogous to a conveyance.[157] Hence, an amendment or revocation of a partition operates prospectively only.[158] A partition of future community property occurs at the time of the agreement. The couple can curb its future effects most effectively by inserting a term into the present agreement providing that the parties may terminate the effect of the partition by mutual agreement at some future time. So understood, the provisions of new section 5.45 are unexceptionable.

The amendment contains other unintentional omissions or misplaced provisions. The subchapter on premarital agreements[159] does not include a fraudulent transfer provision or a recordation provision. Although section 5.56 covers both of these matters, they are put under the second part of the subchapter labeled "Other Property Agreements."[160] The subchapter on marital property agreements contains no provision on limitation of actions.[161] Otherwise both subchapters have largely parallel provisions that the draftsmen could have consolidated. At the next regular session, the legislature should recast the entire subchapter.

Community Presumption. Section 5.02 of the Family Code presumes that all acquisitions made during a marriage and all property on hand at the dissolution of a marriage are community property.[162] A person who claims property as part of his or her separate estate bears the burden of proving the assertion. The standard of proof, however, has long been in doubt.[163] Because of this doubt, the legislature amended section 5.02 of the Family Code in 1987 to define the standard of proof as clear and convincing evidence.[164]

The Texas Constitution clearly states, however, that premarital acquisitions constitute separate property.[165] Thus, if a spouse can show that he or she acquired property prior to his or her marriage, that spouse can satisfactorily prove the property's separate character. In *Carter v. Carter*,[166] as in *Wierzchula v. Wierzchula*,[167] the husband, prior to his marriage, entered into an earnest money contract to purchase realty. In both instances the husband closed the transaction during the marriage, and thus the grantor conveyed the property during the marriage. The courts in both cases concluded that the inception-of-title doctrine caused separate title to attach to the

157. *Id.*

158. *See* McKnight, *supra* note 102, at 460-61.

159. TEX. FAM. CODE ANN. §§ 5.41-.50 (Vernon Supp. 1988).

160. *Id.* § 5.56.

161. *Id.* §§ 5.51-.54. Such a provision existed in the part of the subchapter devoted to premarital agreements. *Id.* § 5.48.

162. *Id.* § 5.02 (Vernon 1975).

163. *See* Hilliard v. Hilliard, 725 S.W.2d 722, 723 (Tex. App.—Dallas 1985, no writ); J. MCKNIGHT & W. REPPY, *supra* note 133, at 31-32; Tindall, *supra* note 47, at 1179; *cf.* Sampson, *Amendments to Title 1 and Title 2, Texas Family Code*, 87-5 STATE BAR OF TEXAS SECTION REPORT.

164. TEX. FAM. CODE ANN. § 5.02 (Vernon Supp. 1988).

165. TEX. CONST. art. XVI, § 15.

166. 736 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1987, no writ).

167. 623 S.W.2d 730 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

property.[168]

The Texas Constitution also defines donative acquisitions as separate property.[169] Acquisitions from family members commonly are considered gifts, but unless the acquiring spouse proves the donative separate character of the acquisition, the community property presumption prevails. In *Castle v. Castle*[170] the wife's father purchased an insurance policy on the life of each of the spouses and later transferred each policy to each respective insured spouse. The court found a gift to the insured spouse in each instance.[171] *Ellebracht v. Ellebracht*[172] presented a more complex situation. The husband asserted that ranch land conveyed to him by his mother was his separate property. When the mother conveyed the western half of her ranch to her son in 1961, the ranch was worth at least $90,000. The deed to the husband, without any recital of separate ownership, stated a nominal consideration. The husband, however, also assumed an indebtedness of $30,000, secured by the property, and two unsecured notes for $10,000 each. The husband also agreed to manage both halves of the ranch. In asserting the donative character of the acquisition, the husband relied on *Kiel v. Brinkman*,[173] which rested on a jury finding of a gift in circumstances similar to those before the court in *Ellebracht*. The court distinguished *Kiel* on the basic facts of the contract supporting the transfer and arrived at the conclusion that should have been reached in *Kiel*.[174]

Most often, but least successfully, divorcing spouses seek to rebut the community property presumption by tracing separate assets either through a succession of permutations or after their combination with community property. In *Hilliard v. Hilliard*[175] the effort to trace a house to its alleged premarital source failed for lack of evidence.[176] The husband in a divorce proceeding asserted that prior to his marriage he owned stock in a corporation engaged in buying, repairing, and reselling houses. He testified that the corporation dissolved during the marriage and that he received a house as part of his share of the corporate assets upon liquidation. If the husband had established these allegations by the introduction of evidence showing the nexus between his separate corporate shares and the house, he would have succeeded in tracing the acquisition to its alleged source. The trial court, however, did not find the uncorroborated assertion convincing, and the appellate court found no basis for upsetting the lower court's conclusion.[177]

The court in *Carter v. Carter*,[178] examined another tracing effort. The

168. *Carter*, 736 S.W.2d at 780-81; *Wierzchula*, 623 S.W.2d at 732.
169. TEX. CONST. art. XVI, § 15.
170. 734 S.W.2d 410 (Tex. App.—Houston [1st Dist.] 1987, no writ).
171. *Id.* at 411.
172. 735 S.W.2d 658 (Tex. App.—Austin 1987, no writ).
173. 668 S.W.2d 926, 929 (Tex. App.—Houston [14th Dist.] 1984, no writ); *see also* McKnight, *1986 Annual Survey*, *supra* note 101, at 6 (discusses *Kiel*).
174. *Ellebracht*, 735 S.W.2d at 659.
175. 725 S.W.2d 722 (Tex. App.—Dallas 1987, no writ).
176. *Id.* at 724.
177. *Id.*
178. 736 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1987, no writ).

facts and conclusions stated in the opinion, however, are too fragmentary to indicate any sort of clear holding. The husband's father gave him securities, which a stock-exchange and a stock-split during the marriage transformed into a different holding of securities, though still clearly the husband's separate property. The husband pledged these shares as collateral for a broker's margin account. The facts, however, do not reveal whether the shares secured an existing indebtedness or a new indebtedness, and the court does not recount the contractual terms of the margin agreement. Ultimately, the husband liquidated the separate shares and paid the debt on the margin account with the sale proceeds. The facts do not indicate that the husband incurred any separate debts. If the husband did not incur separate debts, the husband simply used separate property to secure and pay community obligations.[179] The appellate court, however, sustained the trial court's finding that corporate securities and an automobile bought from funds in the margin account were the husband's separate property.[180] The court's explanation is singularly unconvincing. The facts and the court's reference to the clear-and-convincing-evidence rule indicate that the court did not think that rules of law affect the process of tracing assets through an account, as long as a spouse denominates the account as his "separate account" and the assets initially deposited in the account constituted separate property.[181] The court totally ignored the apparent fact that the husband used borrowed money to pay for the shares bought through the account. The husband apparently pledged separate property as collateral to secure the loan, but the Texas Supreme Court clearly held in *Heidenheimer Bros. v. McKeen*[182] in 1885 that such a pledge does not make the borrowed money separate property. The court in *Carter* did not cite the supreme court's holding. Must we conclude that the court's holding in *Heidenheimer* has been forgotten and that the rule it stated has been lost through desuetude?[183]

Over the years lower courts have struggled with the recurrent problem of attempting to identify separate funds deposited with community funds in bank accounts, brokerage accounts, and other modes of deposit from which spouses make withdrawals and investments. The Supreme Court of Texas rarely attempts to grapple with this problem. In *McKinley v. McKinley*[184] the court dealt with a deposit of separate funds in an account that bore periodic interest. Because the owner of the separate funds withdrew amounts identical to the interest amounts, the court deemed the owner to have withdrawn the community increments of interest.[185] That process of keeping separate funds segregated has come to be known as the identical-sum infer-

179. That is, if the husband's creditor did not agree to look to the husband's separate property as the sole source of satisfaction, the indebtedness is customarily called a "community debt," although the creditor can seek satisfaction from either community or separate assets.

180. *Carter*, 736 S.W.2d at 780.

181. *Id.* at 778-79.

182. 63 Tex. 229, 230 (1885).

183. In every recent reported appellate case dealing with separate property security, the court has shown no awareness of *Heidenheimer Bros.*

184. 496 S.W.2d 540 (Tex. 1973).

185. *Id.* at 543.

ence.[186] This inference is based on the depositor's supposed intention.[187]

Most recently, in *Estate of Hanau v. Hanau*,[188] the Texas Supreme Court dealt with a somewhat similar situation. The husband maintained an account with a securities broker. At the time of his marriage, the account contained 200 shares of Texaco stock; the Texaco shares were, therefore, the husband's separate property. The account also held other shares of various corporations, which the husband bought during the marriage. The husband could not trace the source of these other securities to premarital property. During the marriage, the husband sold the 200 Texaco shares for $5,755 and on the same day purchased 200 shares of a different security for $6,170. The court identified the source of the purchase-money as the sales proceeds from the Texaco stock, the husband's separate property.[189] Although the court did not explain its line of reasoning, the court's conclusion must rest on an inference of intent on the part of the depositor acting through his broker. The sale and purchase during the same day for a similar sum implies an identity of subject matter. The enactment, however, of the clear-and-convincing evidence standard during the 1987 special legislative session throws the precedential value of the *McKinley* and *Hanau* cases into considerable doubt. Whether a fact finder could exercise inferences such as those indulged in *McKinley* and *Hanau* within the clear-and-convincing evidence standard is open to doubt.

Tort Recovery. Reviewing the course of legal development of tortious recovery when both spouses seek to recover for injuries arising out of the same facts, Justice Countiss in *Johnson v. Holly Farms*[190] provided the best current summary of the subject[191] and restated the matrimonial property rules for parental recovery for the loss of their child.[192] In *Johnson* an employee of the husband-father drove the car in which the couple's daughter rode as a passenger. The car collided with a truck driven by the defendant's agent, and the daughter was killed in the collision. The father and mother sought damages for their pecuniary loss, loss of companionship of their daughter, and their mental pain and anguish. The jury found the father's driver sixty percent responsible for the accident, thus precluding either community or separate recovery by the father. With respect to the mother, however, the court did not impute the father's agent's negligence to her with respect to her separate property claim.[193] The parent's pecuniary loss consisted of the care, support, advice, and other similar contributions of pecuniary value that

186. *See* Holloway v. Holloway, 671 S.W.2d 51, 60 (Tex. App.—Dallas 1983, no writ).

187. *Id.*

188. 730 S.W.2d 663 (Tex. 1987). Another aspect of *Hanau* is noted in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 41 SW. L.J. 1, 5 (1987) [hereinafter McKnight, *1987 Annual Survey*].

189. *Hanau*, 730 S.W.2d at 667.

190. 731 S.W.2d 641 (Tex. App.—Amarillo 1987, no writ).

191. *Id.* at 646.

192. *Id.* at 645-46.

193. *Id.* at 646.

the daughter would have given to the parent.[194] Hence, the mother based her loss on a separate property claim and submitted the issue of damages accordingly. The mother's loss of her daughter's companionship and her own mental pain and anguish were, of course, personal to her. The mother's recovery for those losses therefore constituted her separate property.[195]

Interest in Business Entities. Only in rare instances of actual or constructive fraud might a court analyze a spouse's management of a separate interest in a business entity and brush aside the entity's existence as a sham.[196] The Fort Worth court of appeals found one of those extreme situations in *Zisblatt v. Zisblatt.*[197] In *Zisblatt* the husband had handled all of his personal-service contracts through a corporation, which he controlled through his ownership of separate shares. In *Robbins v. Robbins*[198] the Eastland court of appeals also examined allegations of a corporate alter ego but found nothing that smacked of fraudulent objectives or even sloppy business practices.[199] The evidence before the court did not lead to the conclusion that the deceased husband, as separate shareholder of a controlling interest in a corporation, made him and the corporation identical in law.[200] The deceased husband had worked intensely and had devoted his full attention to his business. The husband had held and exercised control of the corporation, served as its board-chairman and president, and made all major decisions for the corporation. The evidence also showed that management operated the corporation in a manner strictly consistent with its existence as a distinct and independent entity. The board of directors observed all corporate formalities and never intermingled corporate assets with those of the husband. Furthermore, the corporation owned all the assets it used in the business, accounted for and paid all of its tax obligations, and hired its own employees. The corporation did not furnish the husband-president with any goods or services except for a car, which he used at least partially for business purposes. The evidence, therefore, did not establish that the decedent used the business in a self-serving manner or established the business as his alter ego.[201]

The character of a family business was at issue before the Houston first court of appeals in *Thomas v. Thomas.*[202] The husband had inherited shares of a subchapter S corporation, which he operated. During the marriage the husband had taken advantage of the provisions of the Internal Revenue Code enabling him to pay income taxes on the corporate income as though

194. *Id.*
195. *Id.*
196. *See* Goetz v. Goetz, 567 S.W.2d 892, 896 (Tex. Civ. App.—Dallas 1978, no writ).
197. 693 S.W.2d 944, 955-56 (Tex. App.—Fort Worth 1985, writ dism'd).
198. 727 S.W.2d 743 (Tex. App.—Eastland 1987, writ ref'd n.r.e.).
199. *Id.* at 747.
200. *Id.*
201. *Id.*
202. 738 S.W.2d 342 (Tex. App.—Houston [1st Dist.] 1987, no writ).

the corporation were a partnership.[203] In the course of the marriage, the corporation had retained a sizeable amount of profits. At the time of divorce, the corporation had decided to distribute these profits to its stockholders. The character of these retained, but already taxed, earnings was at issue in the divorce suit.[204] A divided court concluded that, in spite of the federal tax treatment of the business income, the business operated as a corporate entity, and the retained profits constituted the corporation's property.[205] A dissenting judge, however, concluded that since the corporation paid taxes on the retained profits as though the business were a partnership, the court should treat the profits as those of a partnership, rather than of a corporation.[206] In light of the Uniform Partnership Act of 1961,[207] however, whether the status of the business as a corporation or as a partnership should make any difference in characterizing the retained earnings is questionable. In either case, the retained earnings should constitute the business entity's property. The dissenting judge apparently was thinking of pre-1962 partnership law, which considered a partnership as simply an aggregate of partners, rather than as an entity.[208] Under the post-1961 law, however, most authorities agree that partnerships are entities like corporations, and hence partnership assets belong to the entity, not to the partners.[209]

When and if a corporation distributes the retained profits to its stockholders, however, their characterization as the stockholders' marital property presents a distinct question. The answer to this question does not necessarily follow from the conclusion that an entity owns the profits. On this point the *Thomas* majority opinion is not altogether clear. If the corporation merely distributes its profits to its shareholders as a cash dividend, a married shareholder will receive community property. If the entity distributes capitalized earnings, the dividend might constitute a partial liquidating dividend, which holders of separate shares would receive as separate property. In *Hilliard v.*

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203. I.R.C. §§ 1361-1379 (West Supp. 1988); *see also id.* §§ 701-709 (partnership provisions).

204. *Thomas*, 738 S.W.2d at 344-45.

205. *Id.*

206. *Id.* at 348 (Bass, J., dissenting and concurring).

207. TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1970 & Supp. 1988) (effective January 1, 1962).

208. In Swope v. Swope, 112 Idaho 974, 739 P.2d 273 (1987), the court reached a conclusion similar to that of the dissenting judge in *Thomas*, though not because the court failed to consider the partnership as an entity, but because the earnings were community property whether distributed or retained. *Id.*, 739 P.2d at 279. This conclusion rested on the court's interpretation of Idaho's statute defining community property and on previous judicial precedents. Less than six months before *Swope*, however, the Idaho Court of Appeals had reached a contrary conclusion in Brazier v. Brazier, 111 Idaho 692, 726 P.2d 1143 (Ct. App. 1986). The court analogized a partnership to a corporation. *Id.* at 1147. The court went on to say, however, that corporate concepts do not carry over to a partnership setting because partners, unlike corporate officers, have direct and immediate control over the partnership's assets and income. *Swope*, 739 P.2d at 281.

209. *See* Bromberg, *Commentary on the Texas Uniform Partnership Act*, 17 TEX. REV. CIV. STAT. ANN. 300-01, 321 (Vernon 1970) and other authorities cited in Marshall v. Marshall, 735 S.W.2d 587, 594 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). For a recent comment on the subject from a national perspective, see Goldstein & Goode, *Entity and Aggregate Theories of Partnership: The Need for Clarification*, 1 PROB. & PROP., Nov.-Dec. 1987, at 15, 16-18.

Hilliard[210] the facts did not indicate clearly whether the husband received a salary, a monetary dividend, or a liquidating dividend in kind, as he asserted. But if a corporation does not distribute its capital, the value of retained corporate earnings will enhance the value of separate shares. A nondistribution of earnings causes the separate shareholder to owe reimbursement to the community estate for the earnings retained that otherwise would have been distributed as community cash dividends.[211]

This analysis of the corporate business activities in *Thomas v. Thomas* comports with the Dallas appeals court's handling of partnership dealings in *Marshall v. Marshall*.[212] In *Marshall* the husband participated in a partnership, which the court denominated as an entity under the Partnership Act of 1961.[213] Thus, property transferred by each partner to the partnership as partnership capital became partnership property, and income from that property later distributed to a married partner constituted community property.[214] In *Marshall* the partnership had acquired mineral interests prior to the spouses' marriage. The husband, therefore, argued that the royalties received by the partnership and passed on to him as partnership distributions remained his separate property, just as if he had owned the mineral interests as his own separate property. The court held, however, that the partnership owned the mineral interests, and the profits from them were merely partnership income, which, when paid to the married partner, constituted community property.[215] The partnership constituted an intervening entity, not a mere conduit.[216]

Termination of Community Interest. In two recent cases courts discussed the possible extinguishment of spousal interests by events other than divorce. *Stubbs v. Metropolitan Life Insurance Co.*[217] presented the situation of a widow whose remarriage caused a temporary cessation of her receipt of death benefits under her first husband's employment plan. The federal district court held that, by obtaining an annulment of her second marriage, the widow once again became entitled to receive monthly payments under the benefit plan.[218] In *Allard v. Frech*[219] the Fort Worth court of appeals refused to adopt the terminable interest rule, which would cause a dying spouse to lose his or her community interest in a pension earned by the other

210. 725 S.W.2d 722, 722-23 (Tex. App.—Dallas 1985, no writ).

211. *See* McKnight, *Reimbursement for Uncompensated Labor Rendered for a Closely-Held Corporation and Some Other Comments on* Jensen v. Jensen, 3 ADVOC., Dec. 1984, at 8, 12-13.

212. 735 S.W.2d 587 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

213. *Id.* at 593-94; *see* TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1970 & Supp. 1988).

214. *Marshall*, 735 S.W.2d at 594-95.

215. *Id.* at 593-95.

216. *Id.*

217. 653 F. Supp. 299 (S.D. Tex. 1986).

218. *Id.* at 300.

219. 735 S.W.2d 311 (Tex. App.—Fort Worth 1987), *aff'd*, 31 Tex. Sup. Ct. J. 371 (May 4, 1988).

spouse.[220] The terminable interest rule effectively precludes the deceased nonpensioner spouse from transferring his or her community interest in the pension by will or intestacy.[221] The court of appeals noted that a question so fraught with competing policy considerations is best left to the state legislature or supreme court.[222] The Texas Supreme Court affirmed.[223]

Reimbursement. In *Gay v. Gay*[224] the El Paso court of appeals reiterated and applied the principle that the Texas Supreme Court initially espoused in *Vallone v. Vallone*:[225] one must plead a reimbursement claim in order to realize any recovery.[226] In divorce proceedings spouses also may plead claims for tortious injury and breach of contracts. In pleading for reimbursement, however, a spouse will lose consequential damages and prior interest. Although a separate right of reimbursement, like other separate interests, is not subject to division upon divorce, a community right of reimbursement may be divided or awarded to one spouse in full. If only a small amount of community property is to be divided and the spouse against whom recovery is sought has significant earning power or separate property, pleading a wrong as an independent cause of action is usually advisable if the cause of action exists as such. A money judgment may be attained more readily for an independent cause of action than for reimbursement.

The right of reimbursement arises in a number of varied circumstances, such as when the marital estate has benefited at the expense of one spouse or when the marital estate has suffered a detriment as a consequence of one spouse's act. Thus, when one spouse makes a gift of community property to a third person without the consent of the other spouse, the donor-spouse must reimburse the other spouse's share, but only if the donor made the gift unreasonably under the circumstances.[227] In *Marshall v. Marshall*[228] the court deemed reasonable the husband's gifts of community property to his child of a prior marriage and to her son.[229] Thus, a right of reimbursement did not arise.[230] On the other hand, the husband's use of community property to discharge his premarital debts gave rise to a right of reimbursement.[231] A court will not apply a reasonableness test in that context.

220. *Id.* at 315.

221. In *Allard* the surviving husband argued for adoption of the terminable interest rule in objecting to the probate court's approval of the inventory prepared by the deceased wife's executrix. The inventory included his late wife's community interest in her husband's retirement plan.

222. *Allard*, 735 S.W.2d at 315.

223. Allard v. Frech, 31 Tex. Sup. Ct. J. 371, 373 (May 4, 1988).

224. 737 S.W.2d 94 (Tex. App.—El Paso 1987, no writ).

225. 644 S.W.2d 455 (Tex. 1982).

226. *Gay*, 737 S.W.2d at 96; *Vallone*, 644 S.W.2d at 459; *see* Morgan v. Morgan, 725 S.W.2d 485, 487 (Tex. App.—Austin 1987, no writ); McKnight, *supra* note 188, at 10.

227. *See* J. MCKNIGHT & W. REPPY, *supra* note 133, at 170.

228. 735 S.W.2d 587 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

229. *Id.* at 596-97.

230. *Id.* The Austin court of appeals reached a similar conclusion in Tabassi v. NBC Bank—San Antonio, 737 S.W.2d 612, 616-17 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

231. *Marshall*, 735 S.W.2d at 595-96.

Similarly, in *Carter v. Carter*[232] the court required the separate estate to reimburse the community for community funds used to discharge a purchase-money note secured by separate property.[233] The court there also awarded reimbursement for community improvements on separate property.[234]

In *Kotrla v. Kotrla*[235] the court also distinguished between a reimbursable claim for a contribution to enhance the community estate[236] and a nonreimbursable claim for separate funds used for the support of a family.[237] No reason exists, however, for this distinction; it is out of step with the modern concept of reimbursement enunciated by the Texas Supreme Court.[238] In *Kotrla* the wife brought what amounted to a claim for her husband's conversion of her separate property. The wife's evidence apparently was so meager and conflicting, however, that the trial court was unable to conclude that the husband owed compensation to the wife. Although spouses commonly use each other's separate personalty in a marriage, the fact that marriage offers the opportunity for such use does not necessarily preclude a spouse's recovery for conversion. If a spouse proves an unauthorized taking or destruction of his or her separate personalty, a court should award damages for such loss. Misuse of community property or its fraudulent disposition, however, is a different matter. In such a case, reimbursement is the proper remedy for a spouse's loss. In *Mazique v. Mazique*,[239] however, the court not only awarded damages for a fraudulent disposition of community property, but exemplary damages as well.[240]

Removing the bar of interspousal immunity has produced a degree of misunderstanding of interspousal causes of action. At the threshold, the term "interspousal immunity" has caused some of the confusion. The existence of a bar to suit between spouses tended to obscure the further fact that certain marital wrongs do not constitute causes of action between spouses, even if no law bars such a suit. Hurt feelings, even severe ones, losses of community property, and wrongful dispositions of community property inevitably result from a marital relationship. The parties must bear these injuries without recovery at law or seek any relief from the divorce court in the division of

232. Carter v. Carter, 736 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1987, no writ).

233. *Id.* at 780.

234. *Id.* at 779, 781.

235. 718 S.W.2d 853, 856-57 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

236. *See* Schmidt v. Huppmann, 73 Tex. 112, 116, 11 S.W. 175, 176 (1889); Horlock v. Horlock, 533 S.W.2d 52, 56-58 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd w.o.j.).

237. *See* Norris v. Vaughan, 152 Tex. 491, 502-03, 260 S.W.2d 676, 683 (1953); Oliver v. Oliver, 741 S.W.2d 225, 228 (Tex. App.—Fort Worth 1987, no writ); Trevino v. Trevino, 555 S.W.2d 792, 802 (Tex. Civ. App.—Corpus Christi 1977, no writ).

238. The Houston court of appeals [14th Dist.] made a significant inroad upon this distinction in Hilton v. Hilton, 678 S.W.2d 645, 648 (Tex. App.—Houston [14th Dist.] 1984, no writ). *See also* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 39 Sw. L.J. 1, 10 (1985) [hereinafter McKnight, *1985 Annual Survey*] (discusses *Hilton*). But the distinction itself is irrational and the Texas Supreme Court ought to repudiate it.

239. 742 S.W.2d 805 (Tex. App.—Houston [1st Dist.] 1987, no writ).

240. *Id.* at 808. This conclusion constitutes a serious conceptual error.

property upon the winding up of marriage.[241] Alternatively, the spouses may recover for such injuries by way of reimbursement when a marriage is dissolved by death.

Through the removal of the bar of interspousal immunity, one spouse is subject to suit by the other spouse for causes of action that any third person might bring. Wrongs arising from the marital relationship, however, have not become actionable because of the removal of the bar. Courts have never recognized such wrongs as arise from breaches of marital vows as general causes of action. The remedy for marital breach is divorce. In the course of granting relief, the court may take improper acts into account in the division of community property,[242] of which the right of community reimbursement is an integral part.[243]

In a rare instance in which a spouse has wantonly wasted or misappropriated community property, a court has in the past awarded a money judgment to the deprived spouse.[244] Opinions may differ as to the propriety of such awards. The fact that such decisions are rare indicates the doubt that trial courts entertain concerning such a remedy. In *Mazique* the court awarded a money judgment for constructively fraudulent dispositions of community property. While such an award may be a proper exercise of judicial power, a court cannot properly term the award "*damages*." Furthermore, an additional award of exemplary damages certainly is not appropriate.

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

Solely or Jointly Managed Community Property. By a literal application of section 5.22(a) of the Family Code,[245] the joint acquisition of community property in the names of both spouses makes the property subject to their joint management.[246] Analogy to section 5.22(b),[247] which deals specifically with the mixing of property already acquired and subject to the respective sole control of each spouse, leads to the same conclusion. At any rate, a purchaser would be foolish to accept a transfer of property from only one of the spouses if the title is held in the names of both spouses. Such title suggests either that the spouses jointly manage the community property or that the nonjoining spouse may possess a separate property interest in it. If property is held in the name of only one spouse, however, section 5.24(a)[248] protects a good faith purchaser who deals only with the title-holding spouse. In addition, as the court said in *Fajkus v. First National Bank*,[249] as between

241. *See* Belz v. Belz, 667 S.W.2d 240, 246-47 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).
242. *Id.*
243. *Id.*
244. Reaney v. Reaney, 505 S.W.2d 338, 340 (Tex. Civ. App.—Dallas 1974, no writ).
245. TEX. FAM. CODE ANN. § 5.22(a) (Vernon 1975).
246. *See* Cockerham v. Cockerham, 527 S.W.2d 162, 170-71 (Tex. 1974); Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200, 202 (Tex. 1974).
247. TEX. FAM. CODE ANN. § 5.22(b) (Vernon 1975).
248. *Id.* § 5.24(a).
249. 735 S.W.2d 882 (Tex. App.—Austin 1987, writ denied).

that spouse and a third person, a presumption arises that the title-holding spouse solely manages the property.[250] Further, the fact that the spouses in *Fajkus* subsequently joined in transactions concerning the property did not necessarily mean that the spouses jointly managed the property, though such acts may have evidenced a spousal agreement to manage the property jointly.[251]

Disposition of Solely Managed Community Property. Because each spouse possesses full authority to manage the community profits of his or her separate property and the products of individual labor without any interference by the other spouse,[252] the spousal manager may dispose of such community property gratuitously during marriage. Prior to the enactment of the Matrimonial Property Act of 1967, courts intimated that the other spouse might bring suit to deter the wasting of community assets.[253] Although this remedy may still subsist, spouses seldom pursue it.[254] Instead, on dissolution of marriage by divorce, annulment, or death, the other spouse will seek reimbursement for his or her share of the donated property in settlement of marital accounts between the spouses.

As a corollary to a spouse's right of sole management of the profits of his or her property and labor, the law allows a spouse to make gratuitous dispositions of reasonable amounts of solely managed community property without reimbursing the other spouse for his or her share of the property given away.[255] The burden of showing the reasonableness of a particular disposition, nonetheless, falls on the donor or the donee, rather than upon the spouse claiming reimbursement.[256] Whether a gift is reasonable depends on the "size and adequacy of the estate remaining to support the [surviving spouse], . . . the community estate, and the relationship of the donor to the donee."[257] Except in cases of a relatively small community estate, the burden of showing that the gift was reasonable is not onerous.[258] Regardless of the reasonableness of the transfer, the donee is always entitled to the donor's share of such gifts of community property.[259] In *Tabassi v. NBC Bank—San*

250. *Id.* at 886.

251. *Id.*

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

253. *See* Stramler v. Coe, 15 Tex. 211, 215 (1855); Mahoney v. Snyder, 93 S.W.2d 1219, 1221 (Tex. Civ. App.—Amarillo 1936, no writ); Bettis v. Bettis, 83 S.W.2d 1076, 1078 (Tex. Civ. App.—El Paso 1935, no writ).

254. *But see* Salvato v. Volunteer State Life Ins. Co., 424 S.W.2d 1, 3-4 (Tex. Civ. App.—Houston 1968, no writ); Moore v. California-W. States Life Ins. Co., 67 S.W.2d 932, 933 (Tex. Civ. App.—Amarillo 1934, writ dism'd).

255. Murphy v. Metropolitan Life Ins. Co., 498 S.W.2d 278, 282 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); Givens v. Girard Life Ins. Co., 480 S.W.2d 421, 425 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

256. *Givens*, 490 S.W.2d at 425-26.

257. Tabassi v. NBC Bank—San Antonio, 737 S.W.2d 612, 617 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

258. *Id.*; *cf.* Horlock v. Horlock, 533 S.W.2d 52, 60-61 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ dism'd w.o.j.).

259. *Tabassi*, 737 S.W.2d at 617.

Antonio[260] the deceased donor-husband had made inter vivos gifts of nearly half a million dollars to his two sons by a prior marriage. The spouses had entered into an agreement prior to their six-year marriage in which they acknowledged the husband's duty to support his two sons. Out of other property, the decedent adequately provided for the widow and one child of the second marriage. The appellate court affirmed the trial court's conclusion that the decedent's gratuitous dispositions were not "unfair" to the widow.[261]

In *Tabassi* the surviving spouse's right to recover for constructive fraud was in the nature of a claim for reimbursement,[262] which a spouse can assert only upon marital dissolution.[263] In this type of case, therefore, the court must determine the adequacy of the community estate left for the surviving spouse at the time of marital dissolution, not at the time the gift was made.[264] In *Tabassi*, in light of the survivor's undertaking in the premarital agreement, the court concluded that the decedent had not committed a constructive fraud against the surviving spouse.[265]

Liability of a Spouse for Obligations Incurred by the Other Spouse. The principal issue in *Tabassi* was not the alleged constructive fraud, but rather the effect of a liability for nearly $950,000 of past due federal income taxes on the husband's testamentary dispositions.[266] During the decedent's lifetime, neither he nor his wife realized that they owed taxes on community income from the decedent's foreign separate property. The widow contended that the husband's testamentary direction to "pay all my taxes" from his residuary estate reflected the husband's intention that his estate relieve the widow's share of the community property from liability for half of the taxes due. Both the trial and the appellate courts approached the question as one of testamentary construction.[267] Both courts considered the will clear and unambiguous on its face and presumed that the husband knew the applicable state and federal law when making his will.[268]

As a fundamental proposition, both Texas law and federal tax law attribute liability to persons, rather than property. The federal rule differs from the Texas rule, however, with regard to what marital property the taxing authority may reach to satisfy liability. For the collection of federal income taxes, the law attributes half of the community income to each spouse.[269] Texas law, on the other hand, makes community property available for the discharge of liability on the basis of its management.[270] The law allows the

260. *Id.* at 612.
261. *Id.* at 616.
262. *Id.* at 616.
263. Burton v. Bell, 380 S.W.2d 561, 565 (Tex. 1964).
264. *See id.*
265. *Tabassi*, 737 S.W.2d at 617.
266. *Id.* at 615-16.
267. *Id.*
268. *Id.*
269. I.R.C. § 6321 (West Supp. 1988).
270. TEX. FAM. CODE ANN. § 5.61 (Vernon 1975).

spouse who did not incur the liability nevertheless to move for marshalling so that the burden of liability may fall on the particular property most closely related to the spouse incurring liability.[271] Although the Probate Code lacks a provision for marshalling of decedents' estates, the surviving spouse still may be able to invoke the marshalling provisions of the Family Code[272] in fixing liability for an inter vivos obligation. As the *Tabassi* case indicates, how a surviving spouse might employ the marshalling statute to improve his or her position in the case of federal tax liability remains unclear.[273]

Prior to the clarification of the spousal liability principles at the 1987 special legislative session,[274] a bankruptcy court again dealt with the issue of spousal liability in connection with the extent of the debtor's estate. In *In re Ewald*[275] the husband's bankruptcy trustee sought to include in the husband's bankruptcy estate his community share in his wife's noncontributory pension plan maintained by her employer.[276] Assuming that the wife's entire interest in the pension constituted community property, the court concluded that because the wife's interest was subject to her sole management and therefore was not liable for the husband's nontortious debts,[277] the trustee could not include the pension interest in the husband's bankruptcy estate.[278] In order for the pension interest to have been includable in the estate, it must have been "liable for an allowable claim against the debtor."[279] In this instance, all of the husband's debts apparently were nontortious. Even if the husband had incurred tortious liabilities, however, the spendthrift clause of this typical pension trust would have protected the pension interest.[280]

Homestead: Designation and Extent. In *In re Niland*[281] a couple had established their home on a urban tract of 1.5 acres in 1971. In order to procure a business loan in 1982, the homeowner gave a deed of trust on the property, falsely representing that the property was not a homestead even though the debtor had maintained a homestead on the property since purchasing it. Thus, the lender's mortgage was valid only as to the nonhomestead portion of the realty.[282] In August, 1983 the lender purportedly sold the entire property at a foreclosure sale. The homestead claimant refused to vacate the

271. *Id.* § 5.62.
272. Estate of Fulmer v. Comm'r, 83 T.C. 302, 308 (1984). There the court applied the marshalling statute so that the decedent's tortious liability fell on his share of the community before reaching the surviving spouse's share, thus entitling the decedent's estate to an estate tax deduction for the entire amount of the judgment debt. *Id.*
273. *Tabassi*, 737 S.W.2d at 615-16.
274. *See supra* text accompanying notes 42-51.
275. 73 Bankr. 792 (Bankr. W.D. Tex. 1987).
276. *See* 11 U.S.C. § 541(a) (1982 & Supp. III 1985).
277. TEX. FAM. CODE ANN. §§ 5.22, 5.61 (Vernon 1975).
278. *Ewald*, 73 Bankr. at 795.
279. 11 U.S.C. § 541(a)(2)(B) (1982).
280. *Ewald*, 73 Bankr. at 795.
281. 825 F.2d 801 (5th Cir. 1987).
282. *See* TEX. CONST. art. XVI, § 50.

premises, however, and the purchaser at the foreclosure sale brought suit for possession in 1984. One month later, the homestead claimant filed for bankruptcy, and the bankruptcy trustee instituted an action against the purchaser to set aside the foreclosure sale. The trustee removed the purchaser's suit for possession to the bankruptcy court and consolidated it with the trustee's action against the purchaser.

In November 1983 the Texas Constitution was amended to allow the legislature to redefine the urban homestead as not more than one acre,[283] instead of a lot worth $10,000 at the time of designation, as it had been defined since 1970.[284] The legislature had already implemented the amendment with a statute that became effective upon approval of the amendment.[285] The statute redefined the urban homestead as one acre and further provided that the definition applied "to all homesteads in this state regardless of the date they were created."[286] The provision's purpose was to redefine all homesteads then in existence so that homestead claims would not be interrupted. The legislature did not intend that the new definition affect the validity or extent of any prior transaction; the statute was to attach prospectively to existing homesteads only. Thus, in *Niland*, a prospective application of the statutory definition would have resulted in the purchaser's acquiring what the lender had: a secured interest in the nonhomestead portion of the premises, as defined by the law in effect when the homestead was designated in 1971.[287]

On no basis other than the language of the statute applying the definition to "all homesteads in this state *whenever created*," the Fifth Circuit Court of Appeals concluded that the legislature meant to redefine existing homesteads *from their date of designation* and thus to affect all transactions antedating the amendment.[288] By this analysis, therefore, the purchaser would take the nonhomestead excess of the property as defined more than three months after his purchase. No one has produced a shred of evidence that the legislature intended the words, "homesteads . . . whenever created" to mean *existing homesteads from the date of their designation*, rather than *homesteads already existing or to be acquired in the future*. Furthermore, proponents of the amendments to the Texas Constitution had assumed that the contract clause of the United States Constitution[289] precluded a state from changing

283. *Id.* § 51.

284. *Id.* § 51 (1970, amended 1983).

285. Act of June 19, 1983, ch. 976, § 1, 1983 Tex. Gen. Laws 5309 (codified at TEX. PROP. CODE ANN. § 41.001 (Vernon 1984)).

286. *Id.* § 2. In Op. Tex. Att'y Gen. No. JM-612 (1986) the Attorney General concluded that neither a cooperative apartment nor the corporate stock by which ownership is evidenced is exempt under Texas homestead law.

287. *See* Hoffman v. Love, 494 S.W.2d 591, 596 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam*, 499 S.W.2d 295 (Tex. 1973).

288. *In re* Niland, 825 F.2d 801, 807 (5th Cir. 1987) (citing *In re* Starns, 52 Bankr. 405, 413 (S.D. Tex. 1985) (Randall, Circuit Judge, sitting by designation)). A bankruptcy court reached the same conclusion in *In re* Barnhart, 47 Bankr. 277, 283 (Bankr. N.D. Tex. 1985).

289. U.S. CONST. art. I, § 10. The correlative provision of TEX. CONST. art. I, § 16, would of course give way to a later provision of the same document if that was the intent of the later amendment. Giving the legislature power to redefine the urban homestead in terms of size, rather than value, of an amount of "not more than one acre" is certainly not indicative of any such intent, however.

exemption laws to leave less of the debtor's property available for the contract's enforcement than when the parties made the contract. The United States Supreme Court had held in two cases that the contract clause protected even *unsecured* creditors in such instances.[290] That the contract clause did not protect a secured creditor in this instance seems unimaginable! Of course, in 1934 the United States Supreme Court had allowed the exercise of state police power to overcome the strictures of the contract clause in order to defer payment of mortgages in a time of economic emergency.[291] No one, however, suggested any need for the exercise of Texas's police power in 1983 to cause mortgagees to lose part of their security through subsequent redefinition of the property subject to mortgage. An enormous difference exists between deferring enforcement of security and causing it to be lost entirely.

Apart from this fundamental objection to the court's application of the 1983 constitutional amendment and legislative enactment to existing, valid mortgages of nonhomestead property, the *Niland* court's summary of Texas homestead law is exemplary in every respect.[292] The homestead claimant's waiver of his homestead interest in the property that he purported to mortgage was clearly ineffective.[293] The fact that the homestead claimant had recorded an instrument stating that other property that he did not occupy constituted his homestead was also irrelevant.[294] Further, the claimant's remaining in possession of the premises at all times prior to the foreclosure sale put the purchaser at the sale on constructive notice of the possible homestead claim.[295] In *Niland* the court reiterated the conclusion of *In re Daves*[296] that a purchaser under these circumstances is not entitled to any equitable lien on the homestead property to secure his purchase price.[297] Rather, the purchaser merely assumes the rights of the lender against the borrower through subrogation as a result of acquiring the lender's security in the property.[298]

At the time of the trial in 1984 statutory authority existed for a rural-homestead claimant to designate his homestead out of a larger rural acreage.[299] By analogy to that statutory right, the federal district court in *Niland* held that an urban claimant might also designate one acre of the 1.5 acres as his urban homestead, and the appellate court affirmed that conclusion.[300] The Fifth Circuit court also pointed out a number of very cogent reasons for not binding a homestead claimant to certain misrepresentations

290. Edwards v. Kearzey, 96 U.S. 595, 607 (1877); Gunn v. Barry, 82 U.S. (15 Wall.) 610, 623-24 (1872).
291. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447-48 (1934).
292. *In re* Niland, 825 F.2d 801, 808-12 (5th Cir. 1987).
293. *Id.* at 808.
294. *Id.* at 809.
295. *Id.* at 812.
296. 770 F.2d 1363 (5th Cir. 1985).
297. *Niland*, 825 F.2d at 814; *Daves*, 770 F.2d at 1369.
298. *Niland*, 825 F.2d at 813.
299. TEX. PROP. CODE ANN. § 41.002 (Vernon 1984).
300. *Niland*, 825 F.2d at 815-16.

as to the claimed homestead property.[301]

In 1985, when the legislature extended to urban claimants the statutory right to designate a homestead from a larger tract,[302] the legislature repealed the provisions for recording designations in such instances.[303] The legislature repealed those provisions for the very reasons that the Fifth Circuit court suggested, as well as the fact that a recorded designation causes confusion when a homestead is changed.[304] Nevertheless, at its 1987 session the legislature restored the record-designation provision.[305] Lenders must remember, however, that such recorded designations do not estop the claimant from asserting a true homestead claim contrary to the designated homestead, unless the facts of property use make the designated tract as much a homestead as some other tract.[306]

As exemplified by *Fajkus v. First National Bank*,[307] the usual manner of designating property as a homestead is by use.[308] Hence, rural acreage may be so designated, though the family may actually live on a nearby parcel.[309] Use of the entire property for the family's benefit is the test for establishing a homestead.[310] If a family cannot use a real property interest for its benefit, then the family cannot claim the interest as part of a homestead. In *In re Poer*[311] the debtor resided on a four-acre rural tract adjoining another tract on which he owned one-half of the subsurface, but no interest in the surface. In a situation in which the debtor showed no actual use of the minerals for family purposes, the bankruptcy court held that the debtor could not claim the mineral interest as part of his homestead.[312]

In *In re Moody*[313] the court first addressed the question whether the unmarried debtor's one-hundred-acre home carved out of a larger tract of 575 acres of undeveloped land on the western end of Galveston Island constituted a rural, rather than an urban, homestead as of the date of the debtor's bankruptcy petition. The debtor acquired the large tract during the 1960s and had continuously maintained his home at the east end of the property since 1965. In 1977 the land was brought within the incorporated boundaries of the city of Galveston, which extends twenty-five miles to the west of the tract and provides water and fire protection to the property. The debtor had used the land for raising cattle, as other land owners had done on lands

301. *Id.* at 809.
302. TEX. PROP. CODE ANN. § 41.022 (Vernon Supp. 1988).
303. *Id.* §§ 41.021-.024 (Vernon 1984), *repealed by* Act of 1985, ch. 840, § 1, Tex. Gen. Laws 2906-07.
304. See McKnight, *Commentary on Texas Homestead Law*, 17 TEX. TECH L. REV. 1307, 1315 (1986), which recites almost verbatim the commentary presented to the legislature in the proposed statutory amendments of 1985.
305. *See* TEX. PROP. CODE ANN. § 41.005 (Vernon Supp. 1988).
306. *See* Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 89-90, 13 S.W. 12, 13-14 (1890).
307. 735 S.W.2d 882 (Tex. App.—Austin 1987, writ denied).
308. *Id.* at 884.
309. *Id.*
310. *Id.* at 887.
311. 76 Bankr. 98 (Bankr. N.D. Tex. 1987).
312. *Id.* at 100.
313. 77 Bankr. 580 (S.D. Tex. 1987).

to the east and south of the debtor's tract. Although beach houses and a heavily travelled road lay to the south of the tract, all considered, the court concluded that the property constituted a rural homestead.[314]

Motivated by an intent to defraud his creditors, the debtor in *Moody* had from time to time made sham transfers of parts of the property, but these transfers and retransfers from the recipients did not affect the maintenance of the homestead.[315] Likewise, temporary holding of the property by a wholly owned corporation did not alter the debtor's homestead rights.[316] The court, however, rejected the debtor's argument that an exemption of merely one hundred acres of realty for unmarried persons as compared to two hundred acres for families violated the equal protection clause of the fourteenth amendment of the United States Constitution.[317] Thus, in spite of the fraudulent motive behind his acts, the debtor's dealings with his homestead could not defraud his creditors.[318] In a companion case, *Smith v. Moody*,[319] the court concluded that the debtor's creditors were not entitled to any equitable lien on his homestead.[320] If the debtor diverted nonexempt assets into the homestead, the creditors' remedy is to move for denial of his discharge.[321]

Homestead: Fixing and Enforcing Liens. The Texas Constitution allows fixing of liens on homestead property for purposes of purchase money, cost of improvements, and the payment of taxes against the property.[322] In order to establish a lien for improvements, the Constitution requires that both spouses execute the lien in writing *before* the contractor commences work.[323] In *Hruska v. First State Bank*[324] the lender discovered, after making an interim loan for homestead improvements, that the borrowers had failed to

314. *Id.* at 592-93.
315. *Id.* at 589-90.
316. *Id.* at 594-95.
317. *Id.* at 593; *see* U.S. CONST. amend. XIV, § 1, cl. 4.
318. *Id.* at 595. The creditors did not argue, however, that the homestead lost its exempt status by voluntary transfer under 11 U.S.C. § 522(g) (1982).
319. 77 Bankr. 566 (S.D. Tex. 1987).
320. *Id.* at 576-77.
321. *Id.* at 580; *see* 11 U.S.C. § 727(a)(2) (1982); First Texas Sav. Ass'n v. Reed (*In re* Reed), 700 F.2d 986, 991 (5th Cir. 1983). *But see* Panuska v. Johnson (*In re* Johnson), 80 Bankr. 953, 963-64 (Bankr. D. Minn. 1987).
322. TEX. CONST. art. XVI, § 50. Although a lien put on a homestead is void unless for purchase money, improvements, or taxes, *id.*, a conveyance of a homestead to discharge any debt of the owner is valid, Huizar v. Bank of Robstown (*In re* Huizar), 71 Bankr. 826, 830 (Bankr. W.D. Tex. 1987).

In 1987 the legislature amended the Texas Human Resources Code to provide that government payments for medical assistance create a lien encumbering the "property and estate" of the recipient. TEX. HUM. RES. CODE ANN. § 32.0331(a) (Vernon Supp. 1988). Apparently the "property and estate" includes the recipient's homestead property as well. The Texas Department of Human Resources cannot enforce such a lien during the recipient's life, however, nor can the Department enforce the lien if the recipient is survived by his or her spouse or by the recipient's dependent or disabled child. *Id.* § 32.0331(b). This provision presents no evident constitutional infirmity.

323. TEX. CONST. art. XVI, § 50; Kepley v. Zachry, 131 Tex. 554, 557, 116 S.W.2d 699, 700-01 (1938).
324. 727 S.W.2d 732 (Tex. App.—Houston [1st Dist.] 1987, writ granted).

execute a lien because they had fraudulently misrepresented to the lender that they had already executed such a lien at the time the loan was made. For their fraud the court entered judgment against the borrowers in an amount equal to the amount of the loan plus interest, and the court placed an equitable lien on the homestead property.[325] The court achieved this seeming circumvention of the constitutional rule[326] by relying on *Lincoln v. Bennett*,[327] in which the Texas Supreme Court dealt with a similar situation. At first glance the result in *Hruska* may seem inconsistent with the supreme court's holdings concerning homestead claimants' misrepresentations in connection with a lien fixed on homestead property that the claimant had misrepresented as not having homestead character.[328] The difference, the court said, is that the misrepresentation that gives rise to an estoppel, as in *Lincoln* and *Hruska*, is that associated with a lien that would be *properly* fixed on a homestead,[329] whereas the other line of cases deals with a lien that cannot attach to homestead property.[330]

In *Inwood Homeowners' Association v. Harris*[331] the Texas Supreme Court enunciated a further exception to the rule against establishing liens on homesteads. In *Inwood* the developers of a tract of homes created a homeowner's association, of which each buyer of a home within the tract became a member and agreed to be bound by the association's declaration. The association's declaration contained a number of covenants, restrictions, and agreements. These terms included an undertaking to pay certain assessments and charges for services, maintenance, and improvements of common facilities owned by the association. The agreement further provided that nonpayment of such assessments and charges would give the association a lien on the property of the delinquent homeowner. Without giving any specific reason for its conclusions[332] and with two judges dissenting, the court held that the agreement was binding on the homeowners, who thereby subjected their homesteads to liens for future debts.[333] One might seek to justify the court's holding as stemming from the proposition that a lien fixed on homestead property prior to its achieving homestead character continues to burden the property. Such a lien, however, must secure a present, rather than a future, indebtedness. The difficulty with the court's conclusion is that it does not fit established legal concepts. The court appears to have been

325. *Id.* at 736-37.

326. *Id.* at 735-36.

327. 138 Tex. 56, 59, 156 S.W.2d 504, 505 (1941).

328. *See* Burkhardt v. Lieberman, 138 Tex. 409, 415, 159 S.W.2d 847, 852 (1942); Hughes v. Wruble, 131 Tex. 444, 448-49, 116 S.W.2d 368, 370 (1938); Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 89, 13 S.W. 12, 13 (1890).

329. *Hruska*, 727 S.W.2d at 736-37; *Lincoln*, 138 Tex. at 62, 156 S.W.2d at 507.

330. *See supra* note 322.

331. 736 S.W.2d 632 (Tex. 1987).

332. In reversing the decision of the court below, Inwood North Homeowners' Ass'n v. Harris, 707 S.W.2d 127 (Tex. App.—Houston [1st Dist.] 1986), the supreme court merely cited Johnson v. First Southern Properties, Inc., 687 S.W.2d 399 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.), *noted in* Note, Johnson v. First Southern Properties, Inc.: *The Texas Homestead and Condominium Assessments*, 38 BAYLOR L. REV. 987 (1986).

333. *Inwood*, 736 S.W.2d at 637.

simply legislating and, more seriously, legislating to insert a further exception into the homestead provisions of the Texas Constitution.[334] The Texas Constitution clearly provides that a person can encumber his or her homestead for *improvement* of the property, provided both spouses agree to such a lien in writing prior to the commencement of the work.[335] Thus, the constitution allows an agreement for an improvement lien, if made with sufficient particularity to meet the constitutional requirement. Although the concepts of maintenance and services related to maintenance are closely related to the concept of improvement, the Texas Constitution does not allow liens for maintenance.[336] The appropriate means for amending the Texas Constitution is to submit such a proposal to the people.

A frequently discussed amendment to the Texas Constitution is a provision that would allow owners to mortgage their homesteads in order to use homestead equity as collateral for business loans.[337] In times of business recession, however, this proposal is mentioned less often because unpaid mortgages always entail foreclosures. In spite of the lack of such a provision and the fact that both the lender and borrower know such mortgages are unenforceable, homeowners often execute sham mortgages on homestead property so that the homeowner can take advantage of federal income tax deductions for the interest paid.[338] At the legislature's last regular session, a bill was introduced to give statutory sanction for such "unenforceable deeds of trust."[339] The House passed the proposal,[340] though nothing further came of it. Ultimately, the legislature enacted a very different bill, declaring that sham sales of homesteads for less than fair market value with lease-back of the premises to the seller are invalid.[341]

In *McSpadden v. Moore*[342] the spouses conveyed their home to their son in 1979 so that he might use it as collateral for a loan that he would negotiate for the benefit of his parents' business. The spouses apparently continued to live in the home, and the son, with record title to the property reciting an acquisition for value, negotiated the loan. The spouses later filed for bankruptcy, listing the lender as a creditor in the bankruptcy schedules. The debtors claimed the property as their homestead, though they did not disclose to the court the transfer to the son and his subsequent mortgage of the property. The son was not a party to the bankruptcy proceeding. The bankruptcy court held no formal hearing concerning the homestead property,

334. The court did not say that the homeowners' agreement to put future encumbrances on their homesteads constituted a covenant that ran with the land, however. Such an argument would have shown not only a misunderstanding of the nature of such covenants, but also a flagrant disregard for the constitutional inhibition against putting liens on homestead property except for specified purposes.

335. TEX. CONST. art. XVI, § 50.

336. *Id.*

337. The draft constitution rejected by the voters in 1974 contained such a provision. *See* J. MCKNIGHT & W. REPPY, *supra* note 133, at 234.

338. I.R.C. § 163(h)(3) (West Supp. 1988).

339. *See* 39 AUSTIN REPORT, May 17, 1987, at 2.

340. *Id.*

341. TEX. PROP. CODE ANN. § 41.006 (Vernon Supp. 1988).

342. 728 S.W.2d 439 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.).

and the opinion does not reveal the court's reasoning nor the procedure followed. The son, however, defaulted on the loan, and the lender prepared to foreclose its lien. At that point the spouses and their son sued to cancel the spouses' deed to the son and the son's deed to the lender. The petitioners sought an injunction against foreclosure. The trial court granted summary judgment for cancellation of the deeds over the lender's objection that a substantial fact issue was in dispute with respect to the lender's notice of the validity of the son's title to the property.[343] The appellate court reversed the summary judgment, noting that no binding adjudication had been made of all parties' interests in the bankruptcy proceeding and that a fact issue as to the lender's notice had been unresolved.[344] Even so, if the lender had no notice of the simulated quality of the parents' conveyance to their son, the son's deed of trust to the lender would have been valid, regardless of the spouses' continued occupancy of the premises as their home.[345]

Exempt Personalty. As the Attorney General of Texas has pointed out,[346] apart from those special provisions found elsewhere in the statutes, section 42.001[347] of the Property Code contains an exclusive list of Texas's personal property exemptions, strictly capped as to value. The legislature significantly expanded that catalogue of exemptions in 1987 by adding pension benefits without limitation as to amount.[348] In interpreting the provisions enacted in 1973, the Fort Worth court of appeals construed the exemption for a "camper truck"[349] to include an automobile chassis to which the owner had welded a unit containing sleeping compartments.[350] Citing no authority, the execution creditor asserted that the exemption law is meant to protect only "utilitarian vehicles" rather than "luxury vehicles."[351] Apart from the fact that the debtor's vehicle seems to fall clearly within the former rather than the latter category, the argument contains absolutely no substance.[352] Furthermore, the court pointed out that in order for a claimant of seized exempt property to put the cost of the storage of the vehicle before the court, the claimant must fully plead that issue.[353]

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343. *Id.* at 441; *cf.* Fuller v. Preston State Bank, 667 S.W.2d 214, 217 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

344. *McSpadden*, 728 S.W.2d at 442, 443.

345. *See* Bicocchi v. Casey-Swasey Co., 91 Tex. 259, 264-65, 42 S.W. 963, 965 (1897).

346. Op. Tex. Att'y Gen. No. JM-807 (1987).

347. TEX. PROP. CODE ANN. § 42.001 (Vernon 1984).

348. *Id.* § 42.0021 (Vernon Supp. 1988); *see* Hall, *Retirement Benefits: Texas Property Code Amendment*, 50 TEX. B.J. 993, 994 (1987).

349. TEX. PROP. CODE ANN. § 42.002(4)(G) (Vernon 1984).

350. Stephenson v. Wixon, 727 S.W.2d 747, 749-50 (Tex. App.—Fort Worth 1987, no writ).

351. *Id.*

352. This opinion is expressed with full knowledge of the holding in *In re* Rowe, No. 284-20097, slip op. at 19-20 (Bankr. N.D. Tex., Mar. 19, 1984), *discussed in* McKnight, *1986 Annual Survey*, *supra* note 101, at 25, which distinguished ordinary household furnishings from those acquired as an "investment."

353. *Stephenson*, 727 S.W.2d at 749-50.

As is now very apparent,[354] the legislature must amend the provisions of Texas Property Code section 42.001[355] before Texas debtors in bankruptcy can take advantage of Bankruptcy Code section 522(f).[356] That section, under certain circumstances, allows a debtor to avoid liens on exempt personal property.[357] A proposed omnibus revision of chapter 42 of the Property Code, which legislators offered for enactment at the 1987 regular legislative session, would have removed the bar to section 522(f)'s benefits, but the bill died in the Calendar Committee of the House of Representatives at the end of the session.

Section 522(b) of the Bankruptcy Code[358] allows an individual debtor to avail himself of either federal law exemptions listed in section 522(d)[359] or state law exemptions. If a bankrupt chooses federal rather than state exemptions, his asserted exemptions must conform to the definitions in subsections 522(g) and (h) of the Bankruptcy Code.[360] In *In re Weaver*[361] the court concluded that, while a television set and a videocassette recorder are "household goods" within section 522(f), guns and minibikes are not.[362] Although the court was inclined to treat firearms as "household goods" by applying a Texas standard, the court concluded that Congress had not meant to include them.[363]

In *In re Poynor*[364] spouses filed a joint bankruptcy petition and claimed state exemptions. After the husband died, however, the wife claimed federal exemptions, rather than those provided by state law, in an effort to secure the proceeds she received from the insurer of the husband's life on a term policy. The court held[365] that the wife was precluded from bringing her claim within subsections 522(d)(7) and (8),[366] which deal with interests in unmatured life insurance contracts. The wife, therefore, was relegated to claiming the policy proceeds as exempt under section 522(d)(11)(C),[367] which limits the protected beneficial interest to an amount "reasonably necessary for [the debtor's] support . . . ."[368]

IV. DIVISION ON DIVORCE

Receivership. Although Family Code section 3.58(c)[369] does not define the

354. *See* Bessent v. United States (*In re* Bessent), 831 F.2d 82, 83 (5th Cir. 1987); Petro Bank, N.A. v. Graham (*In re* Graham), 64 Bankr. 469, 472-73 (Bankr. S.D. Tex. 1986).
355. TEX. PROP. CODE ANN. § 42.001(a), (c) (Vernon 1984).
356. 11 U.S.C. § 522(f) (1982).
357. *Id.*
358. *Id.* § 522(b) (Supp. III 1985).
359. *Id.* § 522(d) (1982 & Supp. III 1985).
360. *Id.* § 522(g), (h).
361. 78 Bankr. 135 (N.D. Tex. 1987).
362. *Id.* at 139.
363. *Id.* at 139 n.6.
364. 68 Bankr. 919 (N.D. Tex. 1987).
365. *Id.* at 922-23.
366. 11 U.S.C. § 522(d)(7), (8) (1982).
367. *Id.* § 522(d)(11)(C).
368. 68 Bankr. at 922-23.
369. TEX. FAM. CODE ANN. § 3.58(c) (Vernon 1975).

grounds that will support the appointment of an interlocutory receiver, the court in *Readhimer v. Readhimer*[370] held that before the court appoints a receiver for the marital estate, the petitioner must offer evidence showing that the appointment is necessary in order to preserve and protect the property.[371] The court recognized that it was in effect disapproving of some earlier holdings that did not require such a showing to be made.[372] The court went on to note, however, that in any case such an order could not give the receiver control of land outside the court's jurisdiction.[373]

In *Harmon v. Schoelpple*[374] the wife petitioned for divorce, joining as a party a corporation of whose shares a third person owned one-half and spouses each owned one-quarter. The trial court appointed the wife as receiver of the corporation but failed to require her to take the appropriate oath or to make a bond. The third shareholder appealed the appointment of the receiver. The appellate court held that section 3.58(g)[375] did not preclude the interlocutory appeal.[376] The provision bars only "parties" from appealing such orders,[377] and "parties" in that section means "spouses."[378] The court went on to hold that such a receivership is specifically governed by the provision of the Civil Practice and Remedies Code that precludes a party to a suit from acting as a receiver.[379] The appointment was also irregular in that the receiver failed to assume her duties under oath, as required by statute,[380] and failed to give the statutorily required bond.[381]

In *Texas American Bank/West Side v. Haven*[382] the divorce court appointed a receiver to sell the couple's home. The receiver sought and obtained a temporary injunction against a mortgagee of the property from foreclosing its deed of trust. The mortgagee appealed. The appellate court sustained the injunction, but failed to indicate the standard by which it evaluated the trial court's power to enjoin the sale.[383] The implication of the court's decision is that the court can enjoin foreclosure in such instances for a reasonable time (eight months in this instance) in order to protect the couple's equity in the house. The house constituted the largest asset of the community estate. Although the court appointed the receiver a month before the parties signed the divorce decree, the court granted the injunction after the signing of the decree. The appellate court nonetheless spoke of the

370. 728 S.W.2d 872 (Tex. App.—Houston [1st Dist.] 1987, no writ).
371. *Id.* at 874.
372. *Id.* at 873 (citing Sparr v. Sparr, 596 S.W.2d 164 (Tex. Civ. App.—Texarkana 1980, no writ); Jones v. Jones, 211 S.W.2d 269 (Tex. Civ. App.—El Paso 1944, no writ); Hursey v. Hursey, 147 S.W.2d 1968 (Tex. Civ. App.—Dallas 1941, no writ)).
373. *Id.* at 874.
374. 730 S.W.2d 376 (Tex. App.—Houston [14th Dist.] 1987, no writ).
375. TEX. FAM. CODE ANN. § 3.58(g) (Vernon Supp. 1988).
376. *Harmon*, 730 S.W.2d at 381.
377. TEX. FAM. CODE ANN. § 3.58(g) (Vernon Supp. 1988).
378. *Harmon*, 730 S.W.2d at 381.
379. *Id.* at 379; TEX. CIV. PRAC. & REM. CODE ANN. § 64.021 (Vernon 1986).
380. TEX. CIV. PRAC. & REM. CODE ANN. § 64.021 (Vernon 1986).
381. *Id.* § 64.023.
382. 728 S.W.2d 102 (Tex. App.—Fort Worth 1987, writ dism'd w.o.j.).
383. *Id.* at 103.

property as being within the trial court's control[384] and referred to the injunction as an interlocutory order.[385] What the appellate court probably meant, however, was that the order was final, but the court maintained continuing jurisdiction through the device of the receivership.

In another dispute a divorce court instituted a receivership in its final decree for the purpose of liquidating the marital estate.[386] Thereafter, creditors attempted to foreclose a lien on certain property, and third parties intervened to invalidate the asserted lien. This receivership thus was in no sense interlocutory, but merely a device that the court used to collect and liquidate the marital estate and distribute the property in accordance with the divorce decree.[387] Consequently, although the decree was final, the court nevertheless maintained its jurisdiction through the means of the receivership.[388]

Property Not Subject to Division. Section 3.63 of the Family Code[389] provides for the division of "the estate of the parties," and the supreme court has interpreted that phrase to mean only the spouses' community estate.[390] Thus, the division process requires a preliminary characterization of the spouses' property in order to determine the divisible estate. If, however, the court mischaracterizes community property as separate property and therefore leaves it undivided, the case must be remanded to the trial court for redivision.[391] In *Iglinsky v. Iglinsky*[392] the divorce court attempted to compute the community interest in two funds by applying the *Berry*[393] formula,[394] when an exercise in subtraction would have produced the proper result. The court's miscalculation, therefore, greatly exaggerated the separate portion of the fund. Hence, the Beaumont court of appeals required the trial court to reconsider its division.[395] Similarly, in *Marshall v. Marshall*[396]

384. *Id.* at 104-05.
385. *Id.* at 105.
386. Citizens State Bank v. Caney Invs., 733 S.W.2d 581, 584-85 (Tex. App.—Houston [1st Dist.] 1987, no writ).
387. *Id.* at 586.
388. *Id.*
389. TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).
390. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977) (realty); Cameron v. Cameron, 641 S.W.2d 210, 214 (Tex. 1982) (personalty). For support of the constitutional argument in *Eggemeyer* from an unlikely source, see Fratangelo v. Fratangelo, 360 Pa. Super. 487, 520 A.2d 1195, 1200 (Pa. Super. 1987).
391. *See* McKnight, *1987 Annual Survey*, *supra* note 188, at 34; McKnight, *1984 Annual Survey*, *supra* note 60, at 162.
392. 735 S.W.2d 536 (Tex. App.—Tyler 1987, no writ).
393. *See* Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983), *discussed in* Brown, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 39 BAYLOR L. REV. 1131, 1170-97 (1987). In a habeas corpus case, the court concluded that a party could not plead the *Berry* formula defensively in respect of a 1978 final judgment. *Ex parte* Lucher, 728 S.W.2d 823, 826-27 (Tex. App.—Houston [1st Dist.] 1987). In Head v. Head, 739 S.W.2d 635 (Tex. App.—Beaumont 1987, writ denied), on the other hand, the court rejected a clarification of a 1979 order because it failed to comply with *Berry*. *Id.* at 637.
394. *Iglinsky*, 735 S.W.2d at 537.
395. *Id.* at 539.
396. 735 S.W.2d 587 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

the Dallas court of appeals remanded the case because the trial court mischaracterized assets and liabilities as having a separate character and thereby skewed the division.[397] In *Castle v. Castle*[398] the trial court had awarded separate property of one spouse to the other spouse as a result of mischaracterization. Although the trial court's exercise of discretion was only indirectly at issue, the appellate court compounded the error by reforming the judgment, rather than remanding the case to the trial court.[399]

In *Marshall* the trial court also mischaracterized household furnishings as community property. The furnishings either belonged to a partnership of which the husband was a member or, as a result of the partnership's distribution of the furnishings to the spouses, were the separate property of each spouse in equal shares.[400] In *Rathmell v. Morrison*,[401] on the other hand, the shares of stock in corporate entities were community assets and therefore subject to division. In valuing those shares, however, the court impermissibly included business goodwill attributable to the personality of the husband, who was a key employee of the corporations.[402] Thus, not only mischaracterization of assets but misvaluation of assets may require remand to the trial court for a redivision of the property.

Retirement Benefits. In recent months the number of reported cases dealing with disputes concerning federal retirement benefits of a spouse divorced prior to the decisions of the United States Supreme Court in *Hisquierdo v. Hisquierdo*[403] and *McCarty v. McCarty*[404] seems to have abated somewhat. Thus, the consequences of those unfortunate rulings and the congressional reactions to them may have almost run their course.[405]

In two instances Texas spouses asserted constitutional attacks against the validity of the federal Uniformed Services Former Spouses' Protection Act of 1982 (USFSPA).[406] In *Brannon v. Randmaa*[407] a 1977 Texas divorce decree had failed to dispose of the future military retirement benefits of the husband. The ex-wife brought a suit for the right to entitlement to future benefits. The husband-serviceman argued that because he had served in the Air Force from 1964 until 1984, he had a vested right of sole enjoyment of the military pension rights pursuant to *McCarty*.[408] The USFSPA, the hus-

397. *Id.* at 594-95, 597, 600.
398. 734 S.W.2d 410 (Tex. App.—Houston [1st Dist.] 1987, no writ).
399. *Id.* at 414.
400. *Marshall*, 735 S.W.2d at 597-98, 600.
401. 732 S.W.2d 6 (Tex. App.—Houston [14th Dist.] 1987, no writ).
402. *Id.* at 17-18.
403. 439 U.S. 572 (1979). In *Ex parte* Lucher, 728 S.W.2d 823 (Tex. App.—Houston [1st Dist.] 1987), the court refused to apply the decision in *Hisquierdo* to a decree of divorce that had theretofore become final. *Id.* at 825.
404. 453 U.S. 210 (1981).
405. For a brief summary of these developments and their resolution, see Campbell & McKelvey, *Partitioning Military Retirement Benefits: Mapping the Post-*McCarty *Jungle*, 49 TEX. B.J. 970, 971-74 (1986).
406. 10 U.S.C.A. § 1408 (West Supp. 1988).
407. 736 S.W.2d 175 (Tex. App.—Austin 1987, writ denied).
408. McCarty v. McCarty, 453 U.S. 210, 225-26 (1981).

band argued, could not abrogate that right.[409] The court found no need to respond to the pensioner's constitutional argument because past acquisitions under the congressional pension scheme were not in issue.[410] In effect, the Austin court of appeals held that the husband had not acquired a vested right to receive benefits as his own, but rather as an entitlement that Congress might redefine from time to time.[411]

In *Goad v. United States*[412] a serviceman divorced in Texas in 1980 challenged the USFSPA's authority to require withholding of the portion of his retirement pay awarded to his ex-wife. The serviceman had refused to pay the amount ordered by the court, and in 1985 the ex-wife applied for withholding of funds and payment to her pursuant to the USFSPA.[413] After proper notice to the ex-serviceman and an administrative determination that his objections to withholding were unfounded, the federal finance center began withholding the husband's pension payments in favor of the ex-wife. The ex-husband brought suit in federal court,[414] asserting that the *McCarty* case invalidated part of the divorce court's order. The district court reiterated the proposition that *McCarty* had no effect on the prior state-court decree[415] and that the USFSPA did not, therefore, resuscitate that decree.[416] Responding to the ex-serviceman's argument that the USFSPA unconstitutionally delegated federal legislative power to the states, the court noted that the ex-husband had standing to attack the USFSPA only insofar as it sanctioned withholding of the ex-wife's share of retired pay as determined by the divorce court.[417] In addition to pointing out that the ex-husband's assertion lacked substantive merit, the court commented that the state court's decree had always remained valid and that the ex-husband could not complain of the federal act's implementation of the decree.[418]

In *Goad* the court also addressed the ex-husband's argument that with-

409. The pensioner relied principally on Pennsylvania v. Wheeling & Bellmont Bridge Co., 59 U.S. (18 How.) 421 (1855), in which the Supreme Court held that a subsequent act of Congress could not undo the Court's prior adjudication, *id.* at 436.

410. *Brannon*, 736 S.W.2d at 176-77.

411. *Id.* at 177-79.

412. 661 F. Supp. 1073 (S.D. Tex. 1987).

413. *See* 10 U.S.C.A. § 1408(d) (West Supp. 1988).

414. Because the ex-serviceman sought monetary recovery in an amount exceeding $10,000, the Court of Claims had exclusive jurisdiction over that remedy. Graham v. Henegar, 640 F.2d 732, 723-35 (5th Cir. 1981). The district court, however, declined to transfer the action to the Court of Claims because the United States could not be held liable for making payments under the USFSPA pursuant to a state court order that was regular on its face. *Goad*, 661 F. Supp. at 1077. The district court, therefore, proceeded to adjudicate the ex-husband's petition for declaratory relief involving questions over which the court had jurisdiction. *Id.*

415. *Goad*, 661 F. Supp. at 1079-80. A Texas appellate court reached a similar conclusion with respect to the effect of the decision in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), on a prior Texas divorce decree dividing Railroad Retirement Act benefits. *Ex parte* Lucher, 728 S.W.2d 823, 826 (Tex. App.—Houston [1st Dist.] 1987).

416. *Goad*, 661 F. Supp. at 1079-80 (citing Wilson v. Wilson, 667 F.2d 497, 499 (5th Cir.), *cert. denied*, 458 U.S. 1107 (1982); Brown v. Robertson, 606 F. Supp. 494, 496 (W.D. Tex. 1985); Segrest v. Segrest, 649 S.W.2d 610, 613 (Tex.), *cert. denied*, 464 U.S. 894 (1983)).

417. *Id.* at 1080.

418. *Id.* For what the court deemed a "patently frivolous" action the court imposed monetary sanctions under FED. R. CIV. P. 11 on the ex-husband, who appeared *pro se*. *Id.* at 1080-

holding his retirement pay amounted to garnishment of wages and was therefore contrary to the Texas Constitution.[419] In rejecting this argument, the court pointed out that Texas authorities have uniformly held that military retirement pay is not properly classified as current wages not subject to garnishment.[420] Even if the ex-husband's share of the retired pay were his wages, the portion awarded to his ex-wife are *her* wages and the antigarnishment defense is irrelevant.[421]

In another case[422] an ex-wife of a prospective pensioner under the Texas Teacher's Retirement Act[423] sought to use a writ of garnishment to reach an interest in her former husband's pension plan that the divorce court had awarded to her as her share of community property. Under the statute, however, such interests are not subject to withdrawal on behalf of the pensioner until death, retirement, or termination of employment.[424] Hence, the same restraints apply to the pensioner's ex-wife.[425] These consequences merely result from the ex-husband's employment contract and handling of his wages, of which he is the sole manager by operation of law.[426]

Making the Division. In making the division of the community estate that is "just and right,"[427] the divorce court has broad discretion in achieving the partition of assets and in ordering one or the other spouse to pay debts for which both spouses may be liable to a creditor.[428] The Texas Supreme Court has provided a catalogue of criteria and standards to guide trial courts in these circumstances.[429] An appellate court will not disturb the trial court's exercise of its power unless the appellant shows a clear abuse of dis-

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82. For an earlier bout in the same controversy see *Ex parte* Goad, 690 S.W.2d 894 (Tex. 1985), *discussed in* McKnight, *1986 Annual Survey*, *supra* note 101, at 45.

419. *Goad*, 661 F. Supp. at 1080; *see* TEX. CONST. art. XVI, § 28; TEX. CIV. PRAC. & REM. CODE ANN. § 63.004 (Vernon 1986).

420. *See Goad*, 661 F. Supp. at 1078 and Texas authorities cited therein.

421. *See* Chandler v. Chandler (*In re* Chandler), 805 F.2d 555, 556-57 (5th Cir. 1986).

422. Dyer v. Investors Life Ins. Co., 728 S.W.2d 478 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

423. TEX. REV. CIV. STAT. ANN. tit. 110B, ch. 36 (Vernon Pam. 1987).

424. *Id.* § 31.005.

425. 728 S.W.2d at 479; *see Dyer*, 728 S.W.2d at 480.

426. TEX. FAM. CODE ANN. § 5.22(a) (Vernon 1975); *see* Valdez v. Ramirez, 574 S.W.2d 748, 750-51 (Tex. 1978).

427. TEX. FAM. CODE ANN. § 3.63 (Vernon 1975). Section 3.63 is not unconstitutionally vague. Oliver v. Oliver, 741 S.W.2d 225, 227 (Tex. App.—Fort Worth 1987, no writ).

428. *See* Coggin v. Coggin, 738 S.W.2d 375, 377-78 (Tex. App.—Corpus Christi 1987, no writ); Annotation, *Right to Jury Trial in State Court Divorce Proceedings*, 56 A.L.R.4th 955, 979-84 (1987). Dividing a community interest in a business entity involves unique considerations. *See* Note, *Proving the Value of Goodwill of a Spouse's Closely-Held Commercial Corporation in a Divorce Proceeding*, 25 J. FAM. L. 549, 553-57 (1987); Annotation, *Divorce: Propriety of Property Distribution Leaving Both Parties With Substantial Ownership Interest in Same Business*, 56 A.L.R.4th 862, 869-75 (1987). Related problems include the characterization and divisibility of intangible assets such as copyrights and professional degrees. *See In re* Worth, 195 Cal. App. 3d 768, 241 Cal. Rptr. 135, 136-38 (Ct. App. 1987); VALUING PROFESSIONAL PRACTICES AND LICENSES: A GUIDE FOR THE MATRIMONIAL PRACTITIONER 109-208 (R. Brown ed. 1987); Abrams, *Equitable Distribution: Dividing Professional Status*, 92 CASE & COM. 2, 6 (1987); Shelburn & Chastain, *Career Assets and the Equitable Apportionment of Marital Property*, 38 S.C. L. REV. 755, 759-62 (1987).

429. Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981); *see* Coggin v. Coggin, 738 S.W.2d

cretion.[430] When the divorce court does not file findings of facts and conclusions of law, an appellate court will affirm the judgment of the trial court on the basis of any facts in the record that support the divorce court's conclusions.[431] If, however, a party made a timely request for findings of fact and conclusions of law and the trial court failed to prepare them, the appellate court must reverse the judgment unless the record shows affirmatively that no prejudice resulted from the trial court's failure to act.[432] In this and other situations, a party nevertheless may be estopped from making an appellate challenge to the trial court's order if he or she has taken the benefits of the judgment by disposal of assets awarded, unless under compulsion of necessity to do so.[433]

Attorney's Fees. In *Carle v. Carle*[434] the Supreme Court of Texas stated that the award of attorney's fees is but one element in the trial court's exercise of its discretion in making a division of the community estate.[435] One must bear in mind, however, that at the time the court decided *Carle*, in 1950, a married woman lacked a general power to contract with an attorney or anyone else.[436] The agency principle of necessity, therefore, governed the validity of the wife's contracts, and the agreed amount in such cases was subject to a test of reasonableness.[437] Thus, even if the parties did not plead the necessaries doctrine, they nevertheless tried the case with a tacit understanding of the principle. Because of the wife's lack of capacity to contract, the court in *Carle* was therefore addressing the *amount* that the husband might be ordered to pay or the *manner of payment*. Since 1963, a Texas married woman has had full power to contract,[438] and the doctrine of necessaries, though specifically referred to in the Family Code,[439] is rarely pled and seems to be disappearing from the general consciousness of the bench and bar.[440] Thus, if the parties do not affirmatively plead the doctrine of neces-

375, 376 (Tex. App.—Corpus Christi 1987, no writ); Koons & Holmes, *Division of Property at Divorce*, 39 BAYLOR L. REV. 977, 1018-26 (1987).

430. In the great majority of cases in which the exercise of the trial court's discretion is questioned, the court's division is affirmed. *See, e.g.*, Oliver v. Oliver, 741 S.W.2d 225, 228-29 (Tex. App.—Fort Worth 1987, no writ); Coggin v. Coggin, 738 S.W.2d 375, 376 (Tex. App.—Corpus Christi 1987, no writ); Castle v. Castle, 734 S.W.2d 410, 413 (Tex. App.—Houston [1st Dist.] 1987, no writ); Simpson v. Simpson, 727 S.W.2d 662, 664-65 (Tex. App.—Dallas 1987, no writ); McIntyre v. McIntyre, 722 S.W.2d 533, 535 (Tex. App.—San Antonio 1986, no writ); Annotation, *Divorce: Excessiveness or Adequacy of Trial Court's Property Award—Modern Cases*, 56 A.L.R.4th 12, 19-20 (1987).

431. Allen v. Allen, 717 S.W.2d 311, 313 (Tex. 1986).

432. Joseph v. Joseph, 731 S.W.2d 597, 598 (Tex. App.—Houston [14th Dist.] 1987, no writ); *see* Castle v. Castle, 734 S.W.2d 410, 412 (Tex. App.—Houston [1st Dist.] 1987, no writ).

433. Carle v. Carle, 149 Tex. 469, 472, 234 S.W.2d 1002, 1004 (1950); *see* Morgan v. Morgan, 725 S.W.2d 485, 487 (Tex. App.—Austin 1987, no writ).

434. 149 Tex. 469, 234 S.W.2d 1002 (1950).

435. *Id.* at 474, 234 S.W.2d at 1005.

436. *See supra* note 32 and accompanying text.

437. *Carle*, 149 Tex. at 472, 234 S.W.2d at 1004.

438. Act of June 10, 1963, ch. 472, § 6, 1963 Tex. Gen. Laws 1188, 1189 (codified at TEX. FAM. CODE ANN. § 4.03 (Vernon 1975)).

439. TEX. FAM. CODE ANN. §§ 4.02, 4.03 (Vernon 1975 & Supp. 1988).

440. An occasional aberrant judicial comment occurs with respect to liability for attorney's

saries today and the court does not order either spouse to pay all or part of the other spouse's attorney's fees as part of the division, each attorney is left to pursue his or her contractual or quasi-contractual remedies in a separate suit. The Dallas court of appeals, however, has recently interpreted the *Carle* decision to mean that a divorce court's award is the exclusive means of recovering attorney's fees from an opposing party.[441] Thus, in that court's view, if the attorney does not pursue those attorney's fees recoverable against the opposing party in the suit for divorce, the attorney is barred from later suit on the matter.[442] For a divorce court to sever the question of attorney's fees for a separate trial, therefore, is clearly improper.[443] The Fort Worth court of appeals expressed a diametrically opposite view in *Petrovich v. Vautrain*.[444] In *Petrovich* the court sustained the trial court's severance of an attorney's claim against both spouses for attorney's fees on the ground that the attorney can always maintain a separate suit in that regard.[445]

Without citing the extremely dubious conclusion of the Texarkana court of appeals to the same effect,[446] the San Antonio court of appeals concluded that a spouse's failure to assert and prove his homestead claim in a divorce case permits the court to order that the homestead be sold for purposes of division and that attorney's fees be paid from the proceeds of the sale.[447] The conclusion is questionable on grounds both of policy and precedent.

Undivided Property. Frequently, as a result of oversight, concealment by one of the spouses, or a carelessly drawn judgment, the divorce court leaves some of the community estate of the spouses undivided. Interests in insurance policies and retirement benefits are among the types of property most commonly overlooked. After divorce, as a matter of law, the undivided community becomes a tenancy in common of the former spouses.[448] Under this rule, authoritatively enunciated in *Busby v. Busby*,[449] the parties have undivided, equal interests in separate property.[450]

While courts frequently overlook life insurance policies when making a property division, even when the divorce court deals with the ownership of a policy, further problems emerge when the recipient fails to designate a new beneficiary. The most common situation has been that of the insured who

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fees, which may stem from a hazy recollection of the necessaries doctrine. *See* Wileman v. Wade, 665 S.W.2d 519, 520 (Tex. App.—Dallas 1983, no writ), *discussed in* McKnight, *1985 Annual Survey, supra* note 238, at 15.

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

442. *Id.*

443. Inman v. O'Donnell, 722 S.W.2d 16, 18 (Tex. App.—Dallas 1986, no writ).

444. 730 S.W.2d 857 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

445. *Id.* at 861 (citing Gunther v. Gunther, 301 S.W.2d 207, 208-09 (Tex. Civ. App.—Dallas 1957, writ dism'd); Roberts v. Roberts, 193 S.W.2d 707, 709 (Tex. Civ. App.—Dallas 1945, no writ)).

446. Smith v. Smith, 715 S.W.2d 154, 159 (Tex. App.—Texarkana 1986, no writ), *discussed in* McKnight, *1987 Annual Survey, supra* note 188, at 24-25.

447. McIntyre v. McIntyre, 722 S.W.2d 533, 538 (Tex. App.—San Antonio 1987, no writ).

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

449. *Id.*

450. *Id.*

failed to replace his former spouse as designated beneficiary. In the past courts most commonly solved this problem in one of two ways. One line of cases broadly construed the divorce decree to give the ownership of the policy to the insured and to terminate the beneficial interest of the other spouse.[451] The second approach narrowly construed the decree, thereby leaving the beneficiary designation undisturbed with the result that the owner of the policy was presumed to maintain the designation unless he changed it.[452] In *Novotny v. Wittner*[453] the court followed the broad approach.[454] In *Nichols v. Nichols*,[455] however, the language of the decree exacerbated the problem. The court's judgment awarded the insured the cash surrender value of the policy but said nothing of the beneficial interest of the ex-wife. The insured failed to change the beneficial interest of the ex-wife, though he made inconclusive efforts to do so in compliance with the terms of the policy. After a jury trial to determine the beneficiary of the deceased insured, the trial court directed a verdict in favor of the ex-wife, and the Beaumont court of appeals affirmed the judgment.[456] The court thus arrived at a narrow interpretation of the decree.

To dispose of these disparities of approach, at its last regular session the legislature laid down statutory rules to cover the most common problems affecting undivided interests in insurance contracts. Following the pattern set forth by section 69 of the Probate Code,[457] Family Code subsections 3.632(a) and (b)[458] provide that after a divorce or annulment, a beneficiary designation of a life insurance policy in favor of the former spouse of the insured is ineffective unless the divorce decree keeps the designation in effect or the insured redesignates the former spouse as beneficiary. These subsections presuppose that the divorce court awards the policy to the insured or leaves the ownership of the policy undivided. If the court awards the policy to the ex-spouse of the insured, a new designation is presumably unnecessary.[459] The legislature also provided correlative rules for insurance policies other than those insuring life.[460] The legislature also enacted a new section 3.633[461] to provide that a divorce or annulment similarly effects the benefi-

451. *See* McDonald v. McDonald, 632 S.W.2d 636, 638-39 (Tex. App.—Dallas 1982, writ ref'd n.r.e.); Beckham v. Beckham, 672 S.W.2d 41, 42 (Tex. App.—Houston [14th Dist.] 1984, no writ). In both of these instances, however, the insured died almost immediately after the divorce, and that fact may have influenced the courts' analysis.

452. *See* Lewis v. Lewis, 693 S.W.2d 672, 675 (Tex. App.—San Antonio 1985, no writ); Parker v. Parker, 683 S.W.2d 889, 890-91 (Tex. App.—Fort Worth 1985, writ ref'd).

453. 731 S.W.2d 103 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

454. *Id.* at 105.

455. 727 S.W.2d 303 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.).

456. *Id.* at 307.

457. TEX. PROB. CODE ANN. § 69 (Vernon 1980).

458. TEX. FAM. CODE ANN. § 3.632(a), (b) (Vernon Supp. 1988) (effective November 1, 1987).

459. Family Code § 3.632(b)(1) should be amended to cover this eventuality.

460. TEX. FAM. CODE ANN. § 3.632(d) (Vernon Supp. 1988).

461. *Id.* § 3.633. This section does not apply to benefits of the Texas public retirement system as provided in TEX. REV. CIV. STAT. ANN. tit. 110B, § 12.001 (Vernon Pam. 1988).

In Savings & Profit Sharing Fund v. Stubbs, 734 S.W.2d 76 (Tex. App.—Austin 1987, no

cial interests of a former spouse in retirement benefits and other financial plans of an employee.

Dearman v. Dutschmann[462] dealt with a different type of life insurance problem. In *Dearman* the divorce decree did not dispose of the community policy, and the insured husband changed the beneficiary from the ex-wife to his mother after the divorce. On appeal, because the policy became a tenancy in common between the former spouses by operation of law, the appellate court found error in the trial court's summary judgment for the named beneficiary and remanded the cause.[463] The terms of section 3.632, however, do not affect this sort of situation.

Many questions have arisen as to whether particular assets are divided effectively by decrees whose terms do not make specific disposition of those assets and whose general terms may or may not include them. If, for example, a decree does not mention retirement benefits specifically and the judgment contains no general residuary clause that might include such interests, the decree does not dispose of the retirement benefits. Although in *Brannon v. Randmaa*[464] the parties' property settlement agreement (incorporated in the decree) stated that they "divided their real and personal property," the agreement did not specifically deal with community retirement benefits, and the benefits therefore became a tenancy in common between the ex-spouses.[465] The decree in *Dearman v. Dutschmann*,[466] which merely disposed of "personal effects," was, by a similar analysis, ineffective to dispose of intangible contract rights.[467]

If a litigant alleges that a foreign court left community property undivided and does not prove the foreign law or submit pleadings sufficient to allow the Texas court to take judicial notice of the foreign law, the Texas court must presume that the applicable foreign law is the same as Texas law.[468] Hence, in such circumstances when a California court did not divide community pension benefits, a Texas court applied Texas law to determine whether the California judgment left the property undivided.[469] In this instance the decree had failed to mention military retirement benefits (neither accrued nor vested at divorce) specifically, although the parties' property settlement agreement incorporated in the decree stated that the parties "desire . . . to . . . settle between them all questions concerning their community and other property rights."[470] This intention did not suffice, however, to divide the

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writ), the dispute with respect to the proper beneficiary of an employee benefit plan centered on the entitlement of the trusts and the surviving widow to attorney's fees.

462. 739 S.W.2d 454 (Tex. App.—Corpus Christi 1987, writ denied).

463. *Id.* at 456.

464. 736 S.W.2d 175 (Tex. App.—Austin 1987, writ denied).

465. *Id.* at 176.

466. 739 S.W.2d 454 (Tex. App.—Corpus Christi 1987, no writ).

467. *Id.* at 455-56.

468. Ewing v. Ewing, 739 S.W.2d 470, 472 (Tex. App.—Corpus Christi 1987, writ denied).

469. *Id.* at 472-73. Under TEX. FAM. CODE ANN. § 3.91(b) (Vernon Supp. 1988) the court "shall apply" the foreign law "regarding undivided property."

470. *Dearman*, 739 S.W.2d at 471.

unmentioned retirement benefits.[471] The clause releasing each party from future claims of the other party was also ineffective for that purpose.[472] The provisions that divided community property in the possession of a spouse also could not transfer an intangible interest.[473] Finally, because the retirement benefits constituted a contingent interest in property *acquired* during marriage, the benefits were not covered by an after-acquired property clause by which such property belonged to the acquiring ex-spouse.[474]

In a 1982 divorce the wife in *Koepke v. Koepke*[475] sought a division of various types of community property and one-half of the husband's military retirement benefits. The court's judgment divided certain enumerated items but did not specifically include the retirement benefits. The decree closed with the words "[a]ll relief requested in this case and not expressly granted herein be and is hereby denied."[476] The Texas Supreme Court held that in using this language the trial court was merely following a precedential form to make the decree final and not interlocutory in effect;[477] hence, the decree did not dispose of the military retirement benefits that were subject to subsequent partition.[478]

One of the difficulties with the conclusion in *Busby* is that it has never really meshed with the various authorities that hold that a divorce court must divide all community property or else its decree is interlocutory, not final.[479] In order to reconcile these authorities with the *Busby* holding, one might say that division of all community property means that the court must divide all community property known to the court in order to assure finality of the judgment. This rule does not explain the result in *Koepke*, however. In *Koepke* the court knew of the retirement benefits, as the benefits were before the court for division.[480] Thus, in light of *Koepke*, a divorce decree is final if the court did not intentionally omit assets from the division.

An odd result of the rule in *Busby*[481] is that the undivided community property that becomes a tenancy in common is thereafter subject to equal partition, rather than the "just and right" division that would have occurred had the divorce court divided the property.[482] A legislative act in 1987[483] partially changed that result. That is, a court to which either ex-spouse may

471. *Id.* at 473.
472. *Id.*
473. *Id.*
474. *Id.* at 472-73.
475. 732 S.W.2d 299 (Tex. 1987).
476. *Id.* at 300.
477. *Id.*; *see* Northeast Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 897 (Tex. 1966).
478. 732 S.W.2d at 300. The Texas Supreme Court stated: "Omission of certain community property from a divorce decree does not affect its finality. If it did, we would have no need for the rule that community property which is not divided on divorce is held by the former spouses as tenants in common." *Id.* The logic of the court's point is not readily apparent.
479. For a discussion of these authorities, *see* McKnight, *supra* note 101, at 38; McKnight, *1984 Annual Survey*, *supra* note 60, at 162.
480. Koepke v. Koepke, 732 S.W.2d 299, 300 (Tex. 1987).
481. *See supra* notes 448-50 and accompanying text.
482. *See* TEX. FAM. CODE ANN. §§ 3.91-.92 (Vernon Supp. 1988).
483. *Id.* §§ 3.90-.93.

present the issue of dividing undivided former community property will use the "just and right" standard for its disposition.[484] The claimant for such a division must bring the suit within two years after discovering that the other ex-spouse has unequivocally repudiated the claimant's interest.[485] But if one of the parties to the divorce or annulment dies before any proceeding for division is brought or fails to bring suit within two years of the discovery of unequivocal repudiation, the parties would still hold the property as tenants in common.[486] Thus, part of the *Busby* rule still subsists.

To outside observers the greater oddity of the *Busby* rule may be that the divorce decree is not res judicata, leaving to each former spouse all property that he or she nominally holds or actually controls and that might have been put before the court for division. Three of the dissenting judges in *Busby* preferred this result.[487] The majority of the court presumably steered away from that conclusion because such a rule would have encouraged secreting of assets on divorce and would have overemphasized nominal title-holding, contrary to Texas usage.

Property Settlement Agreements. In the case of terms of agreed judgments or those of property settlement agreements incorporated in judicial decrees, the Supreme Court of Texas has employed the rules of contract law, rather than those of judgments in determining the meaning of ambiguous provisions.[488] The contract law rule is functionally preferable to the judgments rule because it admits evidence concerning the parties' intent and surrounding circumstances to ascertain the significance of ambiguous terms used.[489] Under the law of judgments, courts look only to the terms of the decree.[490] In practice, however, most appellate courts seldom rely on any source other than the terms of the decree.

In *Smith v. Smith*[491] the residuary clause of the spouses' settlement agreement provided that each spouse would retain the personal property in his or her possession. The majority of the court seemed to conclude that, as a matter of law, the reference to property in possession in such clauses means "physical control of property" and therefore does not include retirement benefits.[492] Justice Dunn, in dissent, attempted to approach the problem in

484. *Id.* §§ 3.91-.92.
485. *Id.* § 3.90(c).
486. *Id.*; *see supra* notes 448-50 and accompanying text.
487. Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970) (Walker, J., joined by Greenhill and McGee, JJ., dissenting).
488. McGoodwin v. McGoodwin, 671 S.W.2d 880 (Tex. 1984); *see* McKnight, *1986 Annual Survey*, *supra* note 101, at 28-29.
489. RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).
490. Austin v. Conaway, 283 S.W. 189, 192 (Tex. Civ. App.—Eastland 1926, no writ).
491. 733 S.W.2d 915 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
492. *Id.* at 916-17. In most of the Texas appellate cases on this point the courts have reached a similar conclusion. *See, e.g.*, Ewing v. Ewing, 739 S.W.2d 470, 473 (Tex. App.—Corpus Christi 1987, no writ); Dunn v. Dunn, 703 S.W.2d 317, 319 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); Yeo v. Yeo, 581 S.W.2d 734, 738 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); Dessommes v. Dessommes, 505 S.W.2d 673, 676 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). *But see* Carreon v. Morales, 698 S.W.2d 241, 244-45 (Tex. App.—El Paso 1985, no writ).

terms of contractual interpretation to reach a contrary result, but her efforts were hindered by having nothing more than the written terms of the agreement for guidance.[493] That one approach is any more contractually oriented than the other approach is difficult to see. The members of the court seemed to disagree merely on the construction of the language of the decree.

The difference between applying the rules for construing contracts and those for interpreting judgments is also not very apparent in another context. In *Fox v. Fox*[494] the dispute centered on whether the reference to Texaco stock in the nonconsensual decree referred only to the Texaco stock held in the name of the husband or whether it also included stock held in the husband's benefit-plan. The Beaumont court of appeals held that the decretal reference to "the Texaco stock," which divested the husband of "all right, title and interest in and to . . . the Texaco stock," disposed of all Texaco stock that the parties held in their own names or in trust.[495] Because the judgment was noncontractual, the court could not consider evidence of the parties' intent.[496] While this part of the decision is clear, just why a decretal reference to "the Texaco stock" must therefore include Texaco stock held in trust is hard to understand.

In conformity with the principles of contractual interpretation, property settlement agreements incorporated in divorce decrees are subject to reformation for mutual mistake.[497] An ex-spouse can also obtain reformation with respect to omitted property in order to conform an agreement to the parties' evidenced intentions.[498] But, as illustrated by *Templet v. Templet*,[499] if the ex-spouse seeks mere clarification rather than reformation, and the trial court's decree, albeit an agreed judgment, is silent with respect to disposition of particular property, the court cannot grant relief.[500] In *Templet* the spouses' agreed judgment did not dispose of the family home, but merely provided for occupancy. Hence, the property was undisposed and was not subject to an order for clarification.[501] If the ex-husband had sought reformation and had adduced evidence with respect to the parties' agreement or mutual intention, the court could have granted relief.[502]

Clarification. The interpretative process instituted by a motion to clarify a divorce decree requires that the court elucidate, but not change, the prior order. If in the course of clarifying the order the court makes an error of

493. *Smith*, 733 S.W.2d at 918-20 (Dunn, J., dissenting).
494. 720 S.W.2d 880 (Tex. App.—Beaumont 1986, no writ).
495. *Id.* at 882.
496. *Id.*
497. Allen v. Allen, 717 S.W.2d 311, 312 (Tex. 1986), *discussed in* McKnight, *1987 Annual Survey*, *supra* note 188, at 29-30; Markantonis v. Tripoli, 730 S.W.2d 91, 94 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).
498. Patrick v. Patrick, 728 S.W.2d 864, 865-66 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).
499. 728 S.W.2d 844 (Tex. App.—Beaumont 1987, no writ).
500. *Id.* at 847-48.
501. *Id.*
502. *Id.* at 848.

law, the clarification order cannot stand and must be set aside on appeal.[503] If a court cannot clarify the original order because of omissions, the rule of undivided property or res judicata applies, depending on the circumstances. In *Able v. Able*[504] the divorce court had specifically divided prepaid income taxes for the year of divorce. Further along in the decree, the court ordered that the husband pay "all other community liability of any nature not specifically ordered to be paid" by the wife.[505] The ex-wife sought a determination that the ex-husband pay all the taxes incurred during the marriage. The ex-husband asserted, in effect, that the specific order for division of prepaid taxes implied that the other more general provision of the decree was not meant to deal with tax liability. Thus, the ex-husband argued, the liability clause of the decree was not meant to cover liability for taxes. The court rejected this argument by saying that the division of assets did not preclude the trial court from ordering the discharge of liabilities.[506] While courts have often construed orders to pay "community debts" as not including the duty to discharge federal income tax liability,[507] the court in *Able* considered the liability clause in this instance sufficiently broad to encompass liability for federal taxes.[508]

In *Stanley v. Stanley*[509] the wife sought clarification of a divorce judgment awarding her one-half of "any damages recovered by [her husband] for loss of earning capacity during the marriage," for which his suit was pending when the divorce court entered the decree.[510] The ex-husband later settled his suit, and the ex-wife received payment from the *tortfeasors* for loss of consortium and one-half of the husband's lost earning capacity during marriage. The ex-wife contended that although she had received payment from the *tortfeasors*, she had not been paid by her *ex-husband* in accordance with the divorce decree. The trial court found that she had already recovered that to which she was entitled under the divorce decree, and the appellate court found no agreement between the parties or other facts in the record to disturb the lower court's determination.[511] In effect, receipt of payment from the tortfeasor amounted to payment by the ex-husband under the divorce decree.[512]

Enforcement. Under the 1983 provisions of the Family Code for enforce-

503. Head v. Head, 739 S.W.2d 635, 637 (Tex. App.—Beaumont 1987, no writ).
504. 725 S.W.2d 778 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).
505. *Id.* at 780.
506. *Id.* at 779.
507. *See* Moody v. Moody, 154 Tex. 114, 117-18, 274 S.W.2d 535, 536-37 (1955); Brooks v. Brooks, 515 S.W.2d 730, 733 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.); Gaulding v. Gaulding, 256 S.W.2d 684, 688 (Tex. Civ. App.—Dallas 1953, no writ).
508. *Able*, 725 S.W.2d at 780.
509. 725 S.W.2d 441 (Tex. App.—Beaumont 1987, no writ).
510. *Id.* at 442.
511. *Id.*
512. *Id.* at 442-43. The appellate court also noted that the ex-wife had unsuccessfully sought relief from a federal court. *Id.* at 443. Although the judgment of that court and its affirmation by the Fifth Circuit court were not free from ambiguity, the Texas appellate court held that the matter before it was res judicata. *Id.* at 443.

ment of divorce decrees,[513] enforcement suits are to be brought in the divorce court.[514] A party must bring a motion to enforce a division of tangible personal property within two years of the time that the decree is signed or becomes final after appeal.[515] The Waco court of appeals has held, however, that if the court, on its own motion, orders delivery of such personal property beyond the two-year time limitation, such an order is proper although an aggrieved party could not have invoked the court's power.[516]

In *Bowden v. Knowlton*[517] the ex-wife brought suit for money due under a divorce decree. The trial court had concluded that the two-year statute of limitation in Family Code section 3.70(c)[518] barred the suit.[519] In the divorce decree the court awarded the wife $10,000 in lieu of her interest in the family home and in the husband's retirement benefits, both of which the court awarded to the husband. The decree further provided that the amount was due within thirty-one days of "finality" of the judgment.[520] A year later the ex-husband paid the ex-wife $5,000, and the ex-spouses agreed in writing that he should pay her the remaining $5,000 when he sold the house. Hence, the ex-wife was still entitled to $5,000 under the divorce decree. Her objective was to reduce that claim to judgment. The part of the subsection dealing with enforcement of divisions of tangible personal property clearly did not apply, as the appellate court pointed out.[521] Whether section 3.70(c),[522] which provides a period of two years for filing a motion to enforce the division of future property not in existence at the time of the divorce decree, was meant to apply to these facts is unclear. The statute of limitation, however, clearly had not run. The appellate court further pointed out that the ex-wife was entitled to judgment under section 3.74(b),[523] though the trial court could consider the agreement to extend time for payment in fashioning the plaintiff's relief.[524] In remanding the case to the trial court, the appellate

513. TEX. FAM. CODE ANN. §§ 3.70-.77 (Vernon Supp. 1988).

514. *Id.* § 3.70. A suit filed before that statute became effective, however, could have been brought in another court. Blake v. Blake, 725 S.W.2d 797, 798 (Tex. App.—Houston [1st Dist.] 1987, no writ).

515. TEX. FAM. CODE ANN. § 3.70(c) (Vernon Supp. 1988). The property that is the object of the decree must have existed at the time of the divorce. *Id.* For a discussion of the length of time applicable for filing of claims arising before the effective date of the 1983 statute, see Gonzales v. Gonzales, 728 S.W.2d 446, 447-48 (Tex. App.—San Antonio 1987, no writ). By way of obiter dicta, the court in Bowden v. Knowlton, 734 S.W.2d 206 (Tex. App.—Houston [1st Dist.] 1987, no writ), discussed the application of this provision to a hypothetical division of tangible personal property in light of the peculiar terms of the decree in that case. *Id.* at 207-08.

516. Burton v. Burton, 734 S.W.2d 727, 729 (Tex. App.—Waco 1987, no writ). In this instance the ex-wife filed a motion for child support. The ex-husband responded with a motion for contempt for failure to deliver tangible personal property in existence at the time of divorce. This motion drew the court's attention to the ex-husband's grievance.

517. 734 S.W.2d 206 (Tex. App.—Houston [1st Dist.] 1987, no writ).

518. TEX. FAM. CODE ANN. § 3.70(c) (Vernon Supp. 1988).

519. *Bowden*, 734 S.W.2d at 207.

520. *Id.*

521. *Id.*

522. TEX. FAM. CODE ANN. § 3.70(c) (Vernon Supp. 1988).

523. *Id.* § 3.74(b). Section 3.74 does not mention a period of limitation.

524. *Bowden*, 734 S.W.2d at 208.

court went on to say that in aid of enforcement of the monetary award, the trial court might impose a lien on the home[525] under the rule in *McGoodwin v. McGoodwin*.[526]

Overruling the conclusion of the Austin court of appeals,[527] the Texas Supreme Court in *Stubbe v. Stubbe*[528] held that a party may enforce a past-due judgment against the United States in order to reach an ex-spouse's military retirement pay.[529] The recipient of contractual support may take advantage of the federal government's waiver of immunity to garnishment for alimony.[530]

In *Veterans Administration v. Kee*,[531] however, the Texas Supreme Court reiterated its holding in *Ex parte Johnson*[532] that federal military disability benefits are not subject to garnishment.[533] In this instance an ex-wife sought to enforce a foreign judgment for alimony and child support against Veterans Administration disability benefits, which the serviceman received as a consequence of waiving *all* of his military retirement benefits. Although the federal statute speaks in terms of the pensioner's waiving "a portion" of his military retirement benefits in order to receive disability benefits administered by the Veterans Administration,[534] the court treated his waiver of all of his retirement benefits as amounting to compliance with the statute.[535] This conclusion is consistent with the federal regulations.[536]

In *Lee v. State*[537] Texas brought a criminal proceeding for violation of a court order against an ex-husband who contravened the parties' agreement that the ex-husband would not to go within 200 yards of his ex-wife's residence.[538] The court's order evidently incorporated the agreement, but did not contain an order to the ex-husband in respect of the agreement. The appellate court held that without a court order that would support a con-

525. *Id.* at 208-09.
526. 671 S.W.2d 880, 882 (Tex. 1984).
527. Stubbe v. Stubbe, 710 S.W.2d 673, 678 (Tex. App.—Austin 1986) (per curiam); *see* McKnight, *supra* note 188, at 33 (criticizing *Stubbe* along the lines followed by the supreme court).
528. 733 S.W.2d 132 (Tex. 1987).
529. *Id.* at 133. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1988) enforces a past-due judgment that has arisen under a divorce decree, which incorporates a contractual alimony agreement.
530. *Stubbe*, 733 S.W.2d at 133; *see* 42 U.S.C. §§ 659, 663(c) (1983). The contractual support provision is binding under Texas law. *Stubbe*, 733 S.W.2d at 133.
531. 706 S.W.2d 101 (Tex. 1986).
532. 591 S.W.2d 453, 456 (Tex. 1979).
533. *Kee*, 706 S.W.2d at 103; *Johnson*, 591 S.W.2d at 456.
534. *See* 42 U.S.C. § 662(f)(2) (Supp. III 1985).
535. *Kee*, 706 S.W.2d at 102-03.
536. *Id.* at 103.
537. 742 S.W.2d 80 (Tex. App.—Austin 1987, no writ).
538. The prosecution was brought under TEX. PENAL CODE ANN. § 25.08 (Vernon Supp. 1987):

> (a) A person commits an offense if, in violation of an order issued under Section 3.581, Section 71.11, or Section 71.12, Family Code, he knowingly or intentionally:
>
> . . . .
>
> (3) goes to or near the residence . . . of a member of the family or household as specifically described in the protective order . . . .

tempt order, the ex-husband had not committed a criminal act within the penal statute.[539]

Effect of Bankruptcy. Prior to their divorce the husband and wife in *Roberts v. Poole*[540] entered into a property settlement agreement by which the husband agreed to make monthly payments to support his wife. Several years later, the ex-husband filed a voluntary petition in bankruptcy. The bankruptcy court admitted parol evidence to show that the support payments actually amounted to a division of the spouses' community estate. On appeal the district court followed *In re Benich*[541] in holding that the evidence was admissible to show the true nature of the debt.[542] Although provisions of the property settlement agreement unambiguously stated that the monthly payments were for support of the ex-wife, parol evidence showed that the provision was for division of property, and the debt was therefore dischargeable in bankruptcy.[543]

539. 742 S.W.2d at 82; *see Ex parte* Blanchard, 736 S.W.2d 642, 643 (Tex. 1987) (lack of notice of court order as grounds for granting writ of habeas corpus).

540. 80 Bankr. 81 (N.D. Tex. 1987).

541. 811 F.2d 943, 945 (5th Cir. 1987).

542. *Roberts*, 80 Bankr. at 86.

543. *Id.* For a thorough analysis of this subject, see Comment, *Bankruptcy Discharge of Texas Marital Property Awards under Section 523(a)(5) of the Bankruptcy Code: Rethinking* In re Nunnally, 41 Sw. L.J. 869, 878-84 (1987).