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## Family Law: Husband and Wife

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# FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight \*

## I. STATUS

**I**NFORMAL Marriage. Although the resolution of most disputes concerning the validity of an informal marriage occur in an inter vivos context, some of the more notable contests involving informal marriage<sup>1</sup> deal with its post mortem consequences. The situation in *Dukes v. Migura*<sup>2</sup> concerned an inter vivos assertion of informal marriage and the subsequent post mortem consequences. A woman alleging an informal marriage filed a suit for divorce and sought division of the alleged community estate. The man denied the existence of the union and thereupon entered into a ceremonial marriage with another woman. The husband died in an accident and the court joined his executor, but not his ceremonial wife, as a party in the pending suit with respect to the claim to property accumulated during the alleged informal marriage. Ultimately the parties entered into an agreed judgment in the pending suit acknowledging the validity of the informal marriage. The judgment resulted in a lien placed on realty devised to the ceremonial wife under the husband's will.<sup>3</sup> In a subsequent suit brought by the wife of the informal marriage to foreclose the lien, the Texas Supreme Court held that the agreed judgment was not void against the wife of the ceremonial marriage.<sup>4</sup> The argument that the wife of the ceremonial marriage was a putative wife failed to surface.<sup>5</sup> But even without the ceremonial wife's knowledge of the alleged informal marriage, one could further question whether the Texas putative-marriage doctrine would have produced favorable results. Texas law tends to adhere to the antecedent Hispanic doctrine<sup>6</sup> that a putative marriage contains only two significant incidents: treatment of property acquired during the relationship as community property

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1. See *Grigsby v. Rieb*, 105 Tex. 597, 153 S.W. 1124 (1913), in which the institution was authoritatively accepted in Texas.

2. 758 S.W.2d 831 (Tex. App.—Corpus Christi 1988, *rev'd per curiam*, 32 Tex. Sup. Ct. J. 410 (1989)).

3. 758 S.W.2d at 832.

4. 32 Tex. Sup. Ct. J. at 410-11.

5. *Davis v. Davis*, 521 S.W.2d 603, 606 (Tex. 1975). Had the ceremonial wife known of the dispute as to the husband's informal marriage, one would question her status as a putative wife.

6. See J. ESCRICHE, *DICCIONARIO RAZONADO DE LEGISLACION Y JURISPRUDENCIA* 1209 (2d ed. 1852).

and treatment of children conceived or born during the relationship as legitimate.<sup>7</sup>

In *Garduno v. Garduno*,<sup>8</sup> the court extensively explored the relationship between the informal and putative marriage doctrines. The man and woman began living together in 1980 and held themselves out as married until 1986 when the woman sued for divorce. When they began living together, the man represented himself as single though he was then married. A year later the woman learned of this fact, but the man assured her that he would get a divorce. In 1984 the man told the woman that he was divorced. This was untrue, but there was some evidence that the woman believed that the man was then divorced. The man was not actually divorced until 1985. Thus, a valid informal marriage could not have existed until the man was free to marry. The woman, however, could have been a putative wife at any time that there was an invalid informal marriage.<sup>9</sup> At the first of the relationship before the wife learned of the husband's existing marriage, there could have been an attempted informal marriage but for the fact that the couple did not agree to marry. Although the couple cohabited as husband and wife and held themselves out as married, an agreement to be married could not be inferred under section 1.91(b) of the Family Code<sup>10</sup> if direct evidence definitely shows that there was no such agreement.<sup>11</sup> In 1984, however, when the man told the woman that he was divorced, there was some evidence of a present agreement to marry. If she then believed in good faith that the divorce had occurred,<sup>12</sup> a putative marriage could have begun at that time. Because no claim was made to property acquired prior to the man's actual divorce, however, the possibility of a putative marriage during that period was irrelevant. The court's observation with respect to the character of property acquired during a putative marriage is also irrelevant as well as misleading. Although it is accurate to say that "property acquired during a putative marriage is not community property, but jointly owned separate property,"<sup>13</sup> such property is nonetheless treated as community property for purposes of division, just as separate marital acquisitions in noncommunity-property states are treated as community property for purposes of division under section 3.63(b) of the Family Code.<sup>14</sup> As to property acquired by the couple following the man's divorce from his first wife, however, the property

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7. *Davis*, 521 S.W.2d at 603. Cf. *Fort Worth & Rio Grande Ry. v. Robertson*, 103 Tex. 504, 131 S.W.2d 400 (1910) (putative spouse not treated as surviving spouse for purpose of qualifying as administratrix).

8. 760 S.W.2d 735 (Tex. App.—Corpus Christi 1988, no writ).

9. *Id.* at 738 (citing *Rey v. Rey*, 487 S.W.2d 245, 248 (Tex. Civ. App.—El Paso 1972, writ dismissed); *Whaley v. Peat*, 377 S.W.2d 855, 858 (Tex. Civ. App.—Houston [1st Dist.] 1964, writ refused n.r.e.)).

10. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1975).

11. 760 S.W.2d at 739 (citing *Rush v. Travelers Ins. Co.*, 347 S.W.2d 758, 760 (Tex. Civ. App.—Texarkana 1961, no writ); *Perales v. Flores*, 147 S.W.2d 974, 975-76 (Tex. Civ. App.—San Antonio 1941, writ refused)).

12. *Id.* at 740.

13. 760 S.W.2d at 739 (citing *Mathews v. Mathews*, 292 S.W.2d 662, 665 (Tex. Civ. App.—Galveston 1956, no writ)).

14. TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1989).

was community property because the existing attempted informal marriage became a valid marriage by virtue of section 2.22 of the Family Code.<sup>15</sup>

In *Grigsby v. Grigsby*<sup>16</sup> a majority of the court rejected the proposition that a woman's refusal of a man's request that they be married ceremonially constitutes disproof of an existing informal marriage.<sup>17</sup> Courts have previously rejected several variants of this argument<sup>18</sup> which is not borne out by common experience.<sup>19</sup> But even without a conclusive determination of the existence of informal marriage, a prima facie showing of an alleged informal marriage is sufficient to support temporary orders in a divorce proceeding.<sup>20</sup>

In a criminal case<sup>21</sup> the accused introduced evidence of an informal marriage between himself and a witness against him in order to exclude evidence offered by the prosecution.<sup>22</sup> The couple allegedly married informally while living in Oklahoma. Hence, as the court pointed out, the standards of Oklahoma law apply when determining the existence of the marriage.<sup>23</sup> Previously courts sometimes overlooked this point in making a proper choice of law to determine the validity of an informal marriage.<sup>24</sup>

*When Is a Divorce Granted?* Over the last decade some important disputes have turned on the point in time when a divorce is granted. If, for example, the judge indicates from the bench that a divorce is granted, but one of the parties dies a few days later, before a decree is entered, the other spouse may then assert dissolution of the marriage by death rather than divorce.<sup>25</sup> The spouse might then claim the succession rights that the death produced.<sup>26</sup>

Such disputes continue to arise. In *Smith v. Stansbury*<sup>27</sup> the couple en-

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

16. *Grigsby v. Grigsby*, 757 S.W.2d 163 (Tex. App.—San Antonio 1988, no writ).

17. *Id.*

18. See *Rodriguez v. Avalos*, 567 S.W.2d 85 (Tex. Civ. App.—El Paso 1978, no writ); *Warren v. Kyle*, 565 S.W.2d 313 (Tex. Civ. App.—Austin 1978, no writ). But a subsequent ceremonial marriage may tend to discredit the validity of a purported prior informal marriage to another person. *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 166 (Tex. 1981). See also *Roach v. Roach*, 672 S.W.2d 524 (Tex. App.—Amarillo 1984, no writ). But see *Rosetta v. Rosetta*, 525 S.W.2d 255 (Tex. Civ. App.—Tyler 1975, no writ), discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 70 (1976).

19. It is not at all uncommon that couples solemnize informal relationships or renew formal or informal vows from time to time.

20. *Ex parte Threet*, 160 Tex. 482, 485, 333 S.W.2d 361, 363-64 (1960); *Garduno v. Garduno*, 760 S.W.2d 735, 742 (Tex. App.—Corpus Christi 1988, no writ); *Ex parte Ortega*, 759 S.W.2d 191 (Tex. App.—Houston [14th Dist.] 1988, no writ).

21. *Richardson v. State*, 744 S.W.2d 65 (Tex. Crim. App. 1987).

22. TEX. R. CRIM. EVID. 504 (providing privilege between spouses for communications during marriage).

23. 744 S.W.2d at 73.

24. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 41 Sw. L.J. 1, 1-2 (1987) (discussing conflict of laws); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 106 (1977) (discussing *Durr v. Newman*, 537 S.W.2d 323 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.)).

25. See *Verret v. Verret*, 570 S.W.2d 138, 140 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Austin v. Austin*, 553 S.W.2d 9, 11 (Tex. Civ. App.—Eastland 1977, writ dismissed); *Dunn v. Dunn*, 439 S.W.2d 830, 834 (Tex. 1969).

26. See *supra* note 25.

27. 754 S.W.2d 509 (Tex. App.—Houston [14th Dist.] 1988, no writ).

tered into an agreed property settlement stipulating that each spouse receive all insurance policies in the name of that spouse. The judge approved the agreement, made it an order of the court, and granted the divorce. A time was set during the following week for the signing of the judgment. Four days later the ex-husband died, and a month later the court signed the decree. The ex-wife then sought a writ of mandamus from the court of appeals to order the trial judge to strike language from the decree divesting her of an interest in the life insurance policies on the husband's life in which she was named as beneficiary. The court concluded that the error failed to qualify as a "clerical" one that would lend itself to a nunc pro tunc correction.<sup>28</sup> The judgment of divorce pronounced from the bench was final.

The trial of the suit for divorce in *Milwee v. Milwee*<sup>29</sup> proceeded similarly. The couple announced agreement to a judgment, which was read into the record. The judge then stated, "I will grant the divorce and I will render judgment based on the agreements that I have read into the record." Before the court presented the decree, the wife indicated her intention to withdraw her consent to the agreement, as she can do at any time before judgment is rendered, under section 3.631 of the Family Code.<sup>30</sup> The trial court, however, ruled that it had already rendered the judgment for divorce and the appellate court agreed.<sup>31</sup>

Another line of authority deals with the situation when the trial court reserves judgment on a matter that cannot be severed or is left unresolved. The issues of divorce and property division are inseparable.<sup>32</sup> Hence, if one is granted, without the other, the judgment is not final as to either. In *Pruett v. Pruett*<sup>33</sup> the Tyler court of appeals extended this rule to a child support case, where the trial court had reserved the issue of fixing attorney's fees in resolving a child support dispute.

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28. *Id.* at 512. See also *Smith v. Jones*, 757 S.W.2d 436 (Tex. App.—Houston [14th Dist.] 1988, no writ) (affirming summary judgment in favor of executrix of ex-husband's estate in suit brought by ex-wife claiming life insurance proceeds). The court said its decision in the suit for mandamus left the unappealed divorce decree as entered. Since that decree divested the ex-wife of the insurance proceeds, summary judgment in her suit against the executrix was proper. *Id.* at 437-38.

29. 757 S.W.2d 429 (Tex. App.—Dallas 1988, no writ).

30. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1989). See *Seibert v. Seibert*, 759 S.W.2d 768 (Tex. App.—El Paso 1988, no writ). In *McCaskill v. McCaskill*, 761 S.W.2d 470, 473 (Tex. App.—Corpus Christi 1988, no writ), the alleged revocation of consent was not proved.

31. 757 S.W.2d at 431. See Prof. Sampson's comments on this and an unreported Houston case in STATE BAR OF TEXAS SECTION REPORT, FAMILY LAW 14-15 (Fall 1988).

32. See *In re Johnson*, 595 S.W.2d 900, 902 (Tex. Civ. App.—Amarillo 1980, writ dismissed); *Garrison v. Garrison*, 568 S.W.2d 709 (Tex. Civ. App.—Beaumont 1978, no writ); *Garrison v. Texas Commerce Bank*, 560 S.W.2d 451 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.); *Garrison v. Mead*, 553 S.W.2d 25 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). For a discussion of the *Garrison* cases, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 122-23 (1979); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 122-23 (1978). See also *Ex parte Scott*, 133 Tex. 1, 123 S.W.2d 306, 313 (1939).

33. 754 S.W.2d 802 (Tex. App.—Tyler 1988, no writ).

## II. CHARACTERIZATION OF MARITAL PROPERTY INTERESTS

*Survivorship to Community Property.* In *Allard v. Frech*<sup>34</sup> the Texas Supreme Court once again struck down a pre-1987 effort by spouses to create a right of survivorship in their community property by mere agreement. The couple attempted to convert community property into a joint tenancy, a species of separate property, without an express partition of it.<sup>35</sup> In spite of the statutory authorization of such a conversion,<sup>36</sup> the court said that "the language of [the statute] was not intended to abrogate" the constitutional requirement<sup>37</sup> of a partition.<sup>38</sup>

Although no appellate case has yet addressed the point, lawyers have raised the question of whether the 1987 constitutional amendment<sup>39</sup> allowing spouses to create a right of survivorship in their community property by a written agreement applies to such agreements entered into prior to the addition of the amendment to the Texas Constitution. In spite of the fact that the editors of the West Publishing Co. note that the section was "amended . . . Nov. 3, 1987",<sup>40</sup> the Texas Constitution provides that legislation shall provide for the mechanics of amendment,<sup>41</sup> and the Election Code provides that the election shall be canvassed within thirty days after the election.<sup>42</sup> Amendments favorably responded to by the people then become effective.<sup>43</sup> Hence the effective date of the amendment seems to be the day of the election canvass, in this case, December 1, 1987.<sup>44</sup> A recent Texas Supreme Court case and a Texas Attorney General's opinion indicate that the amendment does not affect transactions entered into prior to its adoption, unless the amendment was meant to have that effect.<sup>45</sup> In *Wesseley Energy Corp. v. Jennings*<sup>46</sup> the Texas Supreme Court stated that "[t]he law existing at the time a contract is made becomes a part of the contract and

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34. 754 S.W.2d 111 (Tex. 1988).

35. *Id.* at 115.

36. TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1989).

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

38. 754 S.W.2d at 115.

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

40. *Id.*

41. TEX. CONST. art. XVII, § 1 (1876, amended 1987).

42. TEX. ELEC. CODE § 67.012 (Vernon Supp. 1989). The code provides that the State Board of Canvassers whose membership includes the governor, the secretary of state, and a citizen whom the governor appoints canvasses the votes on "statewide measures." *Id.* § 67.010 (Vernon 1986). The board must canvass the election results not earlier than fifteen days nor later than thirty days following the election. *Id.* § 67.012 (Vernon Supp. 1989).

43. Op. Tex. Att'y Gen. Nos. 0-6821 (1945), 0-6278 (1944).

44. 12 Tex. Reg. 4611-12 (1987). A proclamation of Governor Clements, dated December 3, 1987, reveals that the Board of Canvassers canvassed the general election results on December 1, 1987. The canvass date, not the proclamation date, is the effective date of a constitutional amendment. Op. Tex. Att'y Gen. No. 0-6821 (1945).

45. *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624 (Tex. 1987) and Op. Tex. Att'y Gen. No. JM-991 (1988).

46. 736 S.W.2d 624 (Tex. 1987) (citing *Langever v. Miller*, 124 Tex. 80, 83, 76 S.W.2d 1025, 1026-27 (1934)). *Wessely* concerned the applicability of the old statute requiring the husband's joinder in his wife's conveyances. The court held that the statute would have governed the transaction but for its unconstitutionality on Equal-Protection grounds. 736 S.W.2d at 627-28.

governs the transaction."<sup>47</sup> The Attorney General reiterates this point in his opinion that an amendment does not affect a situation occurring prior to the amendment's addition to the Texas Constitution.<sup>48</sup>

*Marital Partition.* The same observations apply to the 1980 and 1987 amendments to the same constitutional article as they affect premarital agreements, premarital and marital partitions, and marital donations. In 1980 an amendment to the Texas Constitution allowed partitions and exchanges of after-acquired community earnings and income from a spouse's separate property, so that the character of the property acquired would constitute separate property rather than community property.<sup>49</sup> In 1981<sup>50</sup> and again in 1987,<sup>51</sup> the legislature enacted statutes implementing the constitutional provisions. Following the constitutional mandate<sup>52</sup> these statutes<sup>53</sup> specifically provided that a marital partition requires an agreement in writing.

The parties unsuccessfully asserted compliance with these provisions in *Collins v. Collins*.<sup>54</sup> Each spouse brought substantial separate property into the marriage, and during marriage, pursuant to a mutual understanding, each kept records characterizing the income from separate property as the separate property of the owner of the property producing the income. The parties reflected their characterization of the income in their joint federal income tax returns which they both signed. After the husband's death, the executor of the husband's estate asserted that these returns constituted written marital partitions. Because the returns did not contain words of promise or agreement, however, the court held that the recitations therein failed to meet the standards prescribed for a written partition.<sup>55</sup> Although the only statute mentioned by the court is section 5.54 of the Family Code, enacted in 1987, it appears that substantive provisions concerning content and form, in force at the time the alleged agreement was made, govern each transaction. Although the court fails to note the husband's date of death, it probably occurred before September 1, 1987 when the 1987 enactment became effective.<sup>56</sup> The most one can say regarding the effect of the income tax returns in *Collins* is that they constituted evidence of a written agreement between

47. 736 S.W.2d at 626.

48. Op. Tex. Att'y Gen. No. JM-991 (1988). The Texas Attorney General concluded that TEX. CONST. art. VIII § 1d(b) concerning the exemption from taxation of the homestead of a surviving spouse was inapplicable to spouses widowed prior to the 1987 amendment of the constitution.

49. TEX. CONST. art. XVI, § 15.

50. TEX. FAM. CODE ANN. §§ 5.41-5.46 (amended 1987). See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 36 Sw. L.J. 97, 102-104 (1982).

51. TEX. FAM. CODE ANN. §§ 5.41-5.56 (Vernon Supp. 1989). See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 42 Sw. L.J. 1, 16-17 (1988).

52. TEX. CONST. art. XVI, § 15.

53. 1981 Tex. Gen. Laws ch. 782, § 1, 2964, 2965 (TEX. FAM. CODE § 5.45); TEX. FAM. CODE ANN. § 5.54 (Vernon Supp. 1989).

54. 752 S.W.2d 636, 637 (Tex. App.—Fort Worth 1988, writ ref'd).

55. *Id.*

56. 1987 Tex. Gen. Laws ch. 678, §§ 2-3. It may be cogently argued, however, that merely *procedural* provisions of the later enacted statutes govern the conduct of subsequent

the spouses.<sup>57</sup> The tax returns fell short of constituting an overt partition in writing.<sup>58</sup>

In *Sadler v. Sadler*,<sup>59</sup> the effect of a 1982 written marital partition was in issue. Prior to their marriage, the husband possessed extensive separate property while the wife owned an insubstantial amount of property. The agreement, drafted by the husband's attorney, provided that income from separate property belongs to the owner of the property producing it. The agreement included a warning in capital letters that a party to the agreement might surrender claims to income from separate property. The husband's attorney testified that, when the parties met to execute the agreement, she spoke to the wife privately and urged her to retain a lawyer to advise her concerning the agreement or she should, at the very least, study the agreement carefully before executing it. The wife testified that no one privately warned her about giving up valuable rights and that she did not understand the terms of the agreement. The trial court refused to give the agreement effect and divided the property covered by the agreement. The Houston court of appeals reversed the trial court's decision concerning the agreement and remanded the case for division of community property derived from the husband's earnings which were not dealt with by the agreement.<sup>60</sup> The intermediate appellate court noted that the agreement was both brief and clear, its terms were unfair, and no duress accompanied its execution.<sup>61</sup> Further, provisions of the Family Code, in effect at the time of the execution of the agreement did not require that legal counsel advise a party to a partition: "[I]f an accused in a criminal proceeding may waive his constitutional rights to remain silent and to have counsel, we cannot see why a spouse may not likewise speak for herself without a lawyer . . . [T]he introduction of a fair agreement, fairly executed, creates a presumption of enforceability."<sup>62</sup> In commenting on the fairness of the agreement, the court noted that the agreement did not preclude the existence of some community estate.<sup>63</sup> The Texas Supreme Court, nevertheless, reversed on the ground that the lower appellate court had overlooked the fact that at the time of the trial and entry of judgement, the 1981 statute on burden of proof was still in effect, and hence, the proponent of the partition bore the burden of showing its validity.

*Rebutting the Community Presumption.* All property acquired by either

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litigation involving earlier partitions. Such procedural provisions include matters of evidence and burden of proof.

57. A memorandum in writing satisfies the requirements of TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1987) (statute of frauds).

58. 752 S.W.2d at 637.

59. 765 S.W.2d 806 (Tex. App.—Houston [14th Dist.] 1988, *rev'd per curiam*, 32 Tex. Sup. Ct. J. 391 (1989). Validity of the 1984 pre-marital partition discussed in *Dewey v. Dewey*, 745 S.W.2d 514, 517 (Tex. App.—Corpus Christi 1988, writ denied), was not disputed, however.

60. 765 S.W.2d at 806.

61. *Id.* at 808.

62. *Id.*

63. 32 Tex. Sup. Ct. J. at 391, (citing ch. 782, § 1, 1981 Tex. Gen. Laws 2964, 2965 (codified TEX. FAM. CODE ANN. § 5.45)).



spouse during marriage is presumed to be community property.<sup>64</sup> A spouse who asserts that particular property is her or her separate property carries the burden of proof in that regard.<sup>65</sup> Showing that the spouse acquired the property with separate assets or on the sole credit of the spouse's separate estate will suffice to discharge the burden of proof.<sup>66</sup> In *Glover v. Henry*,<sup>67</sup> the husband asserted that the real property he purchased in 1947 constituted his separate property. In making the purchase the buyer paid cash and gave the sellers, his mother and his brothers and sisters, a promissory note. The deed of conveyance to the husband "as his sole and separate property" further recited that the husband provided the requisite cash from his separate property. On payment of the note in 1957, the husband's mother gave him a release stating that all payments on the note came from his separate property. The appellate court stated that the deed recital, indicating that the property was conveyed to the husband as his separate property, and the recital in the release, stating that the note was paid with the husband's separate property, constituted "some evidence" to support the jury's finding that the seller agreed to look to the buyer's separate estate for payment.<sup>68</sup> After reviewing all the evidence, the court concluded that the seller indeed agreed to look solely to the buyer's separate estate for payment.<sup>69</sup> Though the court did not describe the nature of this evidence, the assertion that the recitals supplied some evidence of an agreement between the parties appears unconvincing. Standing alone, the recitals evidence, at most, the grantors', particularly the buyer's mother's, intention to treat the property as the buyer's separate property. Nevertheless, the court ultimately sustained the complaint of the proponents for the community presumption.<sup>70</sup> The court concluded that the trial court's instruction to the jury erroneously stated that an ancient document<sup>71</sup> constitutes *prima facie* evidence of the recitals it contains.<sup>72</sup> Because the court determined that the instruction was improper and unduly emphasized the importance of the recitals, it reversed and remanded the judgment of the trial court.<sup>73</sup>

An aspect of marital property law that appellate courts have, in the past, overlooked pertains to compensation for bodily injury paid over a period of time extending beyond the termination of a marriage. In *Hicks v. Hicks*<sup>74</sup>

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64. TEX. FAM. CODE ANN. § 5.02 (Vernon Supp. 1989).

65. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965). If that burden is discharged to the satisfaction of the trial court, the proponent of community character of the property must demonstrate the trial court's error. There was some dispute as to characterization of marital property in *Wahlenmaier v. Wahlenmaier*, 750 S.W.2d 837 (Tex. App.—El Paso 1988), writ denied *per curiam*, 762 S.W.2d 575 (Tex. 1988), but the facts given are insufficient to provide a basis for discussion.

66. *McKinley*, 496 S.W.2d at 783.

67. 749 S.W.2d 502 (Tex. App.—Eastland 1988, no writ).

68. *Id.* at 503-04.

69. *Id.*

70. *Id.* at 503.

71. An ancient document is defined as one in existence for over 20 years, coming from proper custody, and not suspicious in appearance. TEX. R. CIV. EVID. 901(b)(8).

72. 749 S.W.2d at 504.

73. *Id.* at 505.

74. 546 S.W.2d 71, 73-74 (Tex. Civ. App.—Dallas 1976, no writ).

the Dallas court of appeals concluded that worker's compensation benefits received after divorce constitute separate property, presupposing that all payments are for loss of current income.<sup>75</sup> In *Andrle v. Andrle*<sup>76</sup> the court considered a settlement for disabilities allegedly covered by an insurance policy. During marriage the husband had purchased a private policy of insurance against disability unrelated to his employment. The husband used community funds to pay the premiums. When the husband suffered a disability and the insurer refused payment, the husband filed suit on the contract. The parties reached a settlement whereby the insurance company agreed to compensate the husband with a lump-sum amount payable in monthly increments. When the couple subsequently divorced, the husband did not object to the court's treatment of payments received during marriage as community property but he did object to the court's division of post-divorce payments. In affirming the conclusion of the trial court, the Eastland court of appeals relied merely on the community character of the policy of insurance to sustain the trial court's division.<sup>77</sup> Because it was entered into during marriage, the contract and its fruits were indeed presumptively community property. The burden was thus placed on the husband-insured to show how much of the post-divorce payments arose for loss of post-divorce earning power. The husband evidently failed to discharge this burden. In an agreed lump-sum award, compensation for loss of past and future earning power is commingled, and it would therefore be very difficult for the claimant of separate property to show its precise amount. If both spouses had been joined in the litigation to claim the benefits of the insurance policy, and the character of the insurance proceeds was agreed between them and the insurance company, a judgment reflecting that agreement would bind all parties concerned.<sup>78</sup>

Perhaps the most difficult means of rebutting the community presumption, but the easiest process to describe, is tracing: identification of separate property commingled with community property.<sup>79</sup> The spouse who attempts to trace must do so with clear and convincing evidence.<sup>80</sup> Though tracing was attempted in *Martin v. Martin*,<sup>81</sup> the effort failed. Prior to marriage the husband owned two lots, one with a small building on it. During marriage the husband and wife erected a larger building on one of the lots and purchased a third lot. The couple subsequently sold all three lots with their improvements for \$700,000 (\$200,000 in cash and a note for \$500,000).

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75. This view of the nature of worker's compensation conforms to that of the leading national authority on the subject. 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 57.10 (1981). *But see* J. MCKNIGHT & W. REPPY, TEXAS MATRIMONIAL PROPERTY LAW 139 (1983).

76. 751 S.W.2d 955 (Tex. App.—Eastland 1988, writ denied).

77. *Id.* at 956.

78. Such a device for adjudication is suggested in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 71-72 (1974), and a similar contractual arrangement may be negotiated.

79. 759 S.W.2d 463, 466 (Tex. App.—Houston [1st Dist.] 1988, no writ).

80. TEX. FAM. CODE ANN. § 5.02 (Vernon Supp. 1989).

81. 759 S.W.2d at 464, 466-67.

The sales contract failed to allocate specific amounts to any of the lots and no records allocating the purchase price among the three lots existed. The couple used the cash and monthly payments on the note for living expenses and the payment of various obligations. Part of the note remained unpaid at the husband's death, and his estate claimed it as separate property. The only evidence offered on behalf of the claimant was the testimony of a real estate appraiser as to the approximate value of the two lots when the husband died. The appellate court affirmed the trial court's rejection of the claimant's proof as inadequate and unconvincing.<sup>82</sup>

*Retirement Benefits.* Retirement benefits are ordinarily compensation deferred until an employee retires. Thus, if one earns compensation during marriage, the benefits are community property.<sup>83</sup> Hence, if the non-employee spouse dies first, his or her share of the employee-spouses's retirement benefits are subject to the same rules of succession as other community property. In *Allard v. Frech*<sup>84</sup> the husband nevertheless argued that benefits arising under a retirement plan maintained in compliance with a federal statute belonged to the employee and not to the community estate. The conclusion does not necessarily follow from the reason given. The husband further asserted that the 1978 decision of the Texas Supreme Court in *Valdez v. Ramirez*<sup>85</sup> supports the federal preemption argument. Although in *Valdez* the court relied alternatively retired on a federal law under which the retirement benefits issue arose, neither the primary nor the alternative ground for the decision rested on a rejection of community property concepts.<sup>86</sup> The court there concluded that the employee's choice of retirement benefits under the employee's retirement plan constituted a proper exercise of community management powers under state law.<sup>87</sup> The court further held, in the alternative, that the federal statute conferred management powers that prevail over contrary state rules under the Supremacy Doctrine.<sup>88</sup> In *Allard* a majority of the Texas Supreme Court rejected the federal preemption arguments.<sup>89</sup>

*In re Joiner*<sup>90</sup> presented an intermediate appellate court with another sort of argument in favor of a separate interest in employee-benefits earned during marriage. The husband's employer's profit-sharing plan required five years of service before an employee became entitled to participate in the

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82. *Id.* at 467.

83. Although a husband's employer maintained a pension plan prior to his marriage, the benefits in the plan on the husband's behalf accrued during marriage and were therefore community property as deferred compensation. *Dewey v. Dewey*, 745 S.W.2d 514, 518-519 (Tex. App.—Corpus Christi 1988, writ denied).

84. 754 S.W.2d 111, 113-14 (Tex. 1988).

85. 574 S.W.2d 748 (Tex. 1978).

86. *Id.* at 751-53.

87. *Id.* at 750-51.

88. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 115 (1979).

89. 754 S.W.2d at 114. The majority of the court, nevertheless, interpreted the *Valdez* decision as resting "primarily" on the federal preemption argument. *Id.* The decision as reported, however, does not easily lend itself to that interpretation.

90. 755 S.W.2d 496 (Tex. App.—Amarillo 1988, no writ).

plan. The company employed the husband over six years before his marriage. The husband therefore argued that a court should consider his first five years of employment as part of his time within the plan. The court rejected this argument since the husband had not met the qualifications granting him an interest in the plan until after five years of employment.<sup>91</sup> Such a contention rests, in part, on the terms of the plan, and the court rejected this argument because the husband had not then met the standard to participate in the plan.<sup>92</sup> Because the husband acquired a vested separate interest in the plan after his sixth year and an eighty percent interest during the first four years of marriage, the appellate court concluded that all subsequent benefits were acquired by that ratio of separate to community property.<sup>93</sup> Unless the employer's contribution and those of the employee stopped at the end of the vesting period, however, this conclusion is erroneous. Such a vesting schedule does not characterize all benefits acquired thereafter.

Texas courts generally treat all federal benefits payable from the Veterans Administration as separate property and therefore do not subject them to division on divorce on the ground that those benefits are subject to federal law that does not allow division.<sup>94</sup> The United States Supreme Court recently agreed to hear an appeal from an unpublished California decision<sup>95</sup> holding that the Uniform Services Former Spouses Protection Act authorizes the division of such benefits.<sup>96</sup>

### *Interest in Business Entities*

In *Eikenhorst v. Eikenhorst*<sup>97</sup> the husband, a radiologist, formed two professional partnerships with another radiologist during his marriage. At divorce, commercial goodwill accounted for a \$150,000 increase in the partnership value. The husband did not offer evidence that this value resulted from the personal attributes of the husband or his partner. The appellate court, therefore, held that the goodwill constituted a community element in valuing the business entities, and consequently the trial court correctly refused to apply the rule in *Nail v. Nail*<sup>98</sup> to this situation.<sup>99</sup> But the appellate court's affirmation of the divorce court's partition of the tangible assets of the husband's solely owned corporate professional association,<sup>100</sup>

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91. *Id.* at 498.

92. *Id.*

93. *Id.*

94. See *Ex parte* Burson, 615 S.W.2d 192, 194-96 (Tex. 1981); *Ex parte* Johnson, 591 S.W.2d 453, 454 (Tex. 1979); *Ex parte* Pummill, 606 S.W.2d 707, 709 (Tex. Civ. App.—Fort Worth 1980, no writ).

95. Mansell v. Forbes, 108 S. Ct. 2868, 101 L. Ed. 2d 904 (1988) (noting probable jurisdiction).

96. 10 U.S.C. § 1408. See *Rose v. Rose*, 481 U.S. 619 (1987), discussed in Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 42 Sw. L.J. 55, 59-60 (1988).

97. 746 S.W.2d 883 (Tex. App.—Houston [1st Dist.] 1988, no writ).

98. *Id.* at 883 (citing 486 S.W.2d 761, 764 (Tex. 1973)), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 27 Sw. L.J. 27 (1973).

99. 746 S.W.2d at 888.

100. *Id.* at 887-89.

without any apparent suggestion of an later ego situation, seems clearly contrary to principle.<sup>101</sup> The husband did not offer evidence to show that the shares of the corporation formed during marriage were not community property, but the fact that the husband held all of the corporation's stock did not make assets of the corporation subject to division as community property.<sup>102</sup> Besides, the appellate court also divided the community interest in the shares of the professional association.<sup>103</sup>

The revelation of a community business interest often constitutes grounds for disqualification of a spouse to serve as an appointed officer of a public body or as a state-employee, because of conflict of interest concerns. Statutes generally define rules of state-employment whereas traditional general principles define rules for honorific appointees, such as members of governing boards of universities. The Texas Attorney General recently considered the situation of an officer of a state university who owned a .2 percent non-voting community stock interest in a corporation doing business with a university.<sup>104</sup> The officer's husband owned a more substantial separate property interest in the corporation and the husband was employed by the corporation and paid a salary constituting community income. Although the officer owned a very small stock interest, the attorney general concluded<sup>105</sup> that this direct financial interest and the indirect interest in the community earnings of the husband constituted a common law conflict of interest barring the state from doing business with the corporation while the officer served on the university's governing board.<sup>106</sup> The opinion distinguishing an earlier opinion<sup>107</sup> that expressed the view that a state officer's community interest in her husband's salary from a corporation doing business with the state entity of which she was an officer failed to constitute a conflict of interest under a *statute* defining a conflict of interest as "any substantial pecuniary interest in a facility".<sup>108</sup>

In another instance<sup>109</sup> the attorney general was asked to determine whether the husband of a bailbondsman could qualify to serve as a district attorney's criminal investigator. The inquiry stemmed from a perceived correlation between the number of arrests made and the consequent number of bailbonds that a surety writes. The attorney general concluded that although an investigator sometimes must decide whether probable cause exists in order to make an arrest without a warrant, such a decision did not involve his wife's business in which the officer had a substantial interest<sup>110</sup>

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101. *Id.*

102. *See* Brooks v. Brooks, 612 S.W.2d 233, 237 (Tex. App.—Waco 1981, no writ).

103. 746 S.W.2d at 887. The court first approved the award to the wife of the cash from the corporate bank account "for her community interest" and then went on to approve another award of \$150,000 for "the community's interest in the P.A. and partnership entities."

104. Op. Tex. Att'y Gen. No. JM-817 (1987).

105. *Id.* at 3878.

106. *Id.*

107. Op. Tex. Att'y Gen. No. JM-126 (1984).

108. *Id.* at 535 (discussing TEX. REV. CIV. STAT. ANN. art. 4418h, § 2.02 (Vernon Supp. 1989), expired Sept. 1, 1985 pursuant to ch. 735, § 2.114, 1977 Tex. Gen. Laws 1848).

109. Op. Tex. Att'y Gen. No. JM-776 (1987).

110. *Id.* at 3658.

within the conflict-of-interest statute.<sup>111</sup>

*Reimbursement.* The rules of reimbursement between marital estates come into play when a claimant on dissolution of marriage pleads and proves a contribution by one marital estate for the benefit of another marital estate.<sup>112</sup> The concept is a relatively simple one, but over the years courts have engrafted a number of refinements on the rule, complicating its application. Although the Spanish law, from which the Texas rule is derived, was only rarely used in an inter vivos marital dissolution context,<sup>113</sup> the application of the rule on the death of a spouse was commonly used in reckoning accounts between marital estates without recourse to factual equities.<sup>114</sup> Although the Texas Supreme Court initially applied the fundamental Spanish rule in cases of marital dissolution occasioned by death or divorce, adjudication of the issue occurred infrequently.<sup>115</sup>

Toward the end of the nineteenth century, concepts borrowed from the Anglo-American law of partition and betterments were engrafted onto the reimbursement doctrine,<sup>116</sup> and as the twentieth century progressed the concept began to be referred to as an *equitable* one,<sup>117</sup> which allowed for reducing the amount of recovery as the equities of circumstances suggested. During the 1950s and '60s trial courts tended to apply equity in a very general way without recourse to proof of precise facts. More recently, however, courts have required arithmetical calculation of amounts for reduction of claimed reimbursement. As parties have tended to assert reimbursement claims more frequently in divorce cases, courts of appeals have tended to embellish their decisions with a welter of nice, but often confused, distinctions. In *Penick v. Penick*<sup>118</sup> the Texas Supreme Court has undertaken to sweep away some of the insubstantial distinctions and thus clarify the application of the doctrine. *Penick* concerned significant payments of community property made in order to discharge pre-marital purchase-money liens against the husband's separate property. The husband, consequently, argued that courts should reduce the reimbursement of the community estate by the amount that the community estate benefited from federal income tax deductions attributable to depreciation of the husband's separate property. In ef-

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111. TEX. LOCAL GOV'T CODE § 171.003(a)(1) (Vernon 1988) and ch. 323, § 1, 1987 Tex. Gen. Laws.

112. A right of marital reimbursement does not arise after the termination of a marriage. Thus, for the sake of clarity, the term "reimbursement" should not be used in that context. See *Seaman v. Seaman*, 756 S.W.2d 56, 59 (Tex. App.—Texarkana 1888, no writ); *Tyler v. Tyler*, 742 S.W.2d 740 (Tex. App.—Houston [14th Dist.] 1987, no writ).

113. The principal Spanish authority on the matter is A. AYERVE DE AYORA, TRACTATUS DE PARTITIONIBUS BONORUM COMMUNIUM INTRA MANTIUM et UXORUM et FILIOS ac HEREDES EORUM (1586). See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, Sw. L.J. 99, 139 (1979).

114. See J. McKnight & W. Reppy, *supra* note 75 at 177.

115. *Furrh v. Winston*, 66 Tex. 525, 1 S.W. 527 (1886); *Rice v. Rice*, 21 Tex. 58, 66-67 (1858).

116. *Welder v. Lambert*, 91 Tex. 510, 44 S.W. 281 (1898); *Clift v. Clift*, 72 Tex. 144, 10 S.W. 338 (1888).

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

118. 32 Tex. Sup. Ct. J. 143 (Dec. 14, 1988).

fect, the husband asserted a counterclaim for reimbursement of his separate estate for benefits rendered to the community. Relying on decisions of other intermediate appellate courts, the Houston court of appeals concluded that the husband could not set off his claims against that of the community.<sup>119</sup> The court strongly relied on *Pruske v. Pruske*<sup>120</sup> in which the Austin court held that one should not set-off community revenues from particular separate property against claimed reimbursement for community benefits rendered to that property, because the community is absolutely entitled to those revenues.<sup>121</sup> The court's reasoning in *Pruske* is sound, but it has no application to a case of set-off of one reimbursement claim against another,<sup>122</sup> as called for by the facts before the court in *Penick*.

In concluding that courts should set-off rights of reimbursement against each other, the Texas Supreme Court pointed out that there is no substance in the asserted distinction between reimbursement for capital improvements of one marital estate at the expense of another and reimbursement of a monetary debt paid by one marital estate for the benefit of another.<sup>123</sup> Indeed, general rules for reimbursement should generally apply in all reimbursement situations. Regrettably, in *Anderson v. Gilliland*,<sup>124</sup> the Texas Supreme Court laid down a rule that is not applicable to all situations, including the situation discussed in *Penick*.<sup>125</sup> Contrary to a long line of cases which followed the established cost measure of reimbursement of Spanish law, the court in *Anderson* applied a measure of subsequent value of the marital estate benefited or depleted. One can easily apply such a test to improvements, but not to the discharge of a lien since it is inapplicable by its very terms, as the lower appellate court pointed out in *Penick*.<sup>126</sup> Although *Anderson* adopted the subsequent value measure of reimbursement, in the interest of fairness, the measure is essentially unfair to the owner of the benefited estate when the property appreciates in value and unfair to the supplier of benefits when the benefited property diminishes in value.<sup>127</sup> In the case of enhancement in value, this measure creates unfair results because it is likely to give the claimant for reimbursement a greater recovery than the spouse could, in all likelihood, have negotiated by contract.<sup>128</sup> In the case when the benefited property has lost value, the measure of reimbursement is unfair to the estate

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119. *Penick v. Penick*, 750 S.W.2d 247, 249-50 (Tex. App.—Houston [14th Dist.] 1988), *rev'd*, 32 Tex. Sup. Ct. J. 143 (Dec. 14, 1988).

120. 601 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1980, writ *dism'd*).

121. 750 S.W.2d at 249.

122. *See Beavers v. Beavers*, 675 S.W.2d 296, 298 (Tex. App.—Dallas 1984, no writ); *Schechter v. Schechter*, 579 S.W.2d 502, 505-06 (Tex. Civ. App.—Dallas 1978, no writ). For another mention of set-off of reimbursement claims, see *Rogers v. Rogers*, 754 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist.] 1988, no writ).

123. 32 Tex. Sup. Ct. J. at 145.

124. 684 S.W.2d 673, 675 (Tex. 1985).

125. 750 S.W.2d at 247.

126. *Id.* at 249. The same point is made in *Martin v. Martin*, 759 S.W.2d 463, 465 (Tex. App.—Houston [1st Dist.] 1988, no writ).

127. *Id.* at 247-49.

128. *See McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law*, 39 Sw. L.J. 1, 12 (1985).

rendering the benefit when it risked expenditure without consent. The so-called *enhancement* rule of *Anderson*, in reality, represents a *subsequent-value* test, as the Texas Supreme Court in *Anderson* clearly holds.<sup>129</sup> Although the right of reimbursement remains non-recoverable until a marriage terminates, the right actually arises upon receiving the benefit. One should, therefore, fix the amount of reimbursement when the benefit is received. Thus the value of the benefit, when rendered, not only represents the most appropriate but also the easiest measure to apply because one only needs to prove one value.<sup>130</sup> Whether to establish some sort of equitably adjustable rate of interest running from the time the right is fixed poses an age-old question. Further, whether the property benefited increases or decreases in value after receiving the benefit is not necessarily related the receipt of the benefit.

In *Penick* the Texas Supreme Court very much stressed the doing of equity.<sup>131</sup> No instance appears more out of harmony with the doing of equity than the conclusion that a spouse may not assert a right of reimbursement for the contribution of separate funds for family support. This result nevertheless resurfaced in *Oliver v. Oliver*.<sup>132</sup> The court's conclusion rests on the decision of the Texas Supreme Court in *Norris v. Vaughan*.<sup>133</sup> The court held that because of a spouse's duty to support his family and the availability of his separate property for providing his family with necessities, no right of reimbursement for separate expenditures for support exists upon dissolution of the marriage.<sup>134</sup> One might advance the same argument against reimbursement for the satisfaction of *any contractual obligation* that a spouse incurs. Therefore, due to the ill-conceived and unfair basis of the rule, logic mandates casting aside the rule as an aberration.

In *Dewey v. Dewey*<sup>135</sup> the misconception that the assets of a separately owned corporation are themselves separate property was the basis for the husband's reimbursement claim. Such assets represent neither separate nor community property; they belong to the corporation.<sup>136</sup> A professional corporation employed the husband who, in turn, owned all of the stock of the corporation as his separate property, and the corporation, as an independent entity, provided a pension plan for the husband's benefit. Hence when the corporation deposited its funds in the pension plan on behalf of the husband,

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129. 684 S.W.2d at 675. The Texas Supreme Court in *Anderson* made it very clear that, "a benefited estate is not required to pay more in reimbursement than the amount in which it was benefited by the other estate. Likewise, it is necessary to ascertain that the benefited estate pay no less than it has been benefited." *Id.*

130. Measuring the right of reimbursement by increase or decrease in value of the benefited property requires proof of two values: the value before the rendering of the benefit and that at some later time. In *Rogers v. Rogers*, 754 S.W.2d 236, 240 (Tex. App.—Houston [1st Dist.] 1988, no writ), the claimant failed in his asserted right of reimbursement, because he failed to establish the value of the property upon rendering the benefit and the later values.

131. 32 Tex. Sup. Ct. J. at 146.

132. 741 S.W.2d 225, 228 (Tex. App.—Fort Worth 1988, no writ).

133. 152 Tex. 491, 502-03, 260 S.W.2d 676, 683 (1953).

134. 741 S.W.2d at 228.

135. 745 S.W.2d 514 (Tex. App.—Corpus Christi 1988, writ denied).

136. *Id.* at 517-19.



no right of reimbursement arose in favor of the husband's separate property for a benefit conferred on the community. The shares of the corporation represent the husband's separate property, but one should not consider the assets of the corporation separate property since they belong to the corporation.<sup>137</sup>

### III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

*Jointly Managed Community Property.* *Williams v. Jennings*<sup>138</sup> involved a misunderstanding between grantors and grantees of real estate and an inept effort to rectify an error. A husband and wife, acting together, purchased a tract of real property in 1972. At the time of the conveyance, a misunderstanding arose as to the amount of the mineral interest the grantors owned. The grantors apparently thought they owned all the minerals. The grantors actually owned only half the minerals, and they conveyed that half to the grantees. The husband-grantee was, however, dissatisfied with the way the deed read. Without his wife's or the grantors' knowledge and without re-execution of the deed, he procured from the grantors' agent a revision of the language of one paragraph of the deed to grant all the minerals. Some time later, the grantors, believing they had retained a mineral interest, conveyed that interest to a third person. When the grantees of the first conveyance divorced, the husband conveyed his interest to his wife. When the ex-wife realized that the grantors' second conveyance of mineral interests conflicted with the grant which she held, she sued for and recovered damages for slander of title against the grantee of the second deed. On appeal, the defendant argued that the former husband's efforts to reform the deed affected the wife. On the basis of the trial record, the appellate court concluded that the property conveyed to the husband and wife constituted their jointly managed community property.<sup>139</sup> As such, even if the husband acting alone had received a reformation of the deed in valid form, under the circumstances it could not have constituted a reformed deed.<sup>140</sup>

On the death of one of the spouses, different rules of management prevail. In *Shiffers v. Estate of Ward*<sup>141</sup> when the husband died intestate in 1977, the husband and wife were in possession of jointly managed community realty subject to a purchase-money mortgage favoring the defendant. The following year the mortgage was foreclosed for alleged non-payment. Not until 1981, however, did the widow apply for letters of administration which were subsequently granted subject to her qualification by filing her bond and taking the oath. When she filed suit as administrator for wrongful foreclosure in 1982, within four years of accrual of the cause of action, the widow still failed to qualify in accordance with the order of the probate court. She did

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137. *Id.* at 519.

138. 755 S.W.2d 874 (Tex. App.—Houston [14th Dist.] 1988, no writ).

139. *Id.* at 881.

140. *Id.* The dissenting judge's contrary conclusion is based on pre-Family Code decisions that no longer carry any authority in this regard. *Id.* at 887-88 (Sears, J., dissenting). See *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200, 202 (Tex. 1974).

141. 762 S.W.2d 753 (Tex. App.—Fort Worth 1988, no writ).

not file her bond and oath until after the hearing in 1983. The defendant, however, did not object until 1984 to the widow's ability to sue in her representation capacity. In 1988 the court finally entered an award of damages in favor of the administratrix. If the statute of limitations point is put aside, the appellate court's handling of the issue of capacity still requires comment. On appeal, the defendant urged the widow's entitlement to only one-half the damages awarded because she sued in her representative capacity only and not in her individual capacity. The court held that because she could have qualified as a qualified community administrator under sections 161 and 162 of the Probate Code,<sup>142</sup> she could be regarded as having done so, and hence she was entitled to recover on behalf of the entire former community estate.<sup>143</sup> As a practical matter, the widow would have been even longer delayed in procuring a surety as a community administrator than an ordinary administratrix because of the large bond customarily required for a community administrators.<sup>144</sup>

There is an easier route toward sustaining the widow's management of the entire former community through her capacity as an ordinary administratrix, provided that her ultimate qualification can relate back to the date of tentative appointment, as the court suggests. The land had been acquired in the names of both spouses. Hence, according to controlling authority<sup>145</sup>, during marriage the land was subject to the joint management of both spouses. Section 177(b), of the Probate Code<sup>146</sup> deals with situations when a community administrator has not qualified. Although a more careful drafting of the first sentence of the subsection would include a reference to an administrator as well as an executor, the third sentence suggests that section 177(b) is meant to cover situations in which either an executor or an administrator is acting as a personal representative. The third sentence clearly refers to the power of a personal representative to control property subject to

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142. TEX. PROB. CODE ANN. §§ 161-162 (1980).

143. 762 S.W.2d at 757.

144. A large bond has been required to fit the breadth of the power of the community administrator as defined in *Brunson v. Yount-Lee Oil Co.*, 122 Tex. 237, 56 S.W.2d 1073 (1933). But the scope of the community administrator's power was somewhat reduced in 1955. See *Gray v. Gray*, 424 S.W.2d 309 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 24 Sw. L.J. 49, 56-57 (1970). See also *In re Jackson*, 613 S.W.2d 80 (Tex. Civ. App.—Amarillo), writ ref'd n.r.e. per curiam sub nom, *Harrison v. Parker*, 620 S.W.2d 102 (Tex. 1981), discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 36 Sw. L.J. 97, 114-15 (1982).

145. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Cooper v. Texas Gulf Industr., Inc.* 513 S.W.2d 200 (Tex. 1974). In *Shiffers*, 762 S.W.2d at 756, the court said that "since the record does not reflect the source of the funds of the community claim on the contract we must presume the funds to be joint management community property." *Id.* There is no such presumption.

146. TEX. PROB. CODE ANN. § 177(b) (1980):

When an executor of the estate of a deceased spouse has duly qualified, such executor is authorized to administer, not only the separate property of the deceased spouse, but also the community property which was by law under the management of the deceased spouse during the continuance of the marriage and all of the community property that was by law under the joint control of the spouses during the marriage.

the decedent's sole or joint management.<sup>147</sup> Hence, as ordinary administratrix, the widow, if property qualified, had control over the entire community interest in the property.

*Liability of a Spouse for an Obligation Incurred by the Other Spouse.* The enactment of the 1987 amendment to section 5.61 of the Family Code<sup>148</sup> should help to dispel much of the confusion concerning the non-liability of one spouse for an obligation the other spouse incurred during marriage when the spouse incurring liability was not acting as the agent of his or her spouse.<sup>149</sup> *Rush v. Montgomery Ward*<sup>150</sup> illustrates some of the confusion the amendment is meant to obviate. The husband and wife opened an account with a store. Upon divorce, the court ordered the wife to discharge the mutual debt. When she failed to do so, the store sued the ex-husband on a sworn account and recovered a judgment against him. The ex-husband appealed on the ground that the court ordered the ex-wife to pay the debt.<sup>151</sup> In affirming the judgement of the trial court, the appellate court pointed out that the debt was a community debt and the ex-husband was therefore liable for it.<sup>152</sup> Under the proper analysis, however, the court should find the ex-husband liable for the debt apart from all these arguments without any mention of the phrase *community debt*. The husband was personally liable in contract for the debt he had incurred.<sup>153</sup>

*Tyler v. Tyler*<sup>154</sup> illustrates the consequences of voluntary payment of a debt by a nonobligated ex-spouse. In *Tyler*, the ex-wife paid an unmatured note which her ex-husband had contracted during their marriage. Community stock of a divorced couple secured the debt. The divorce court provided that the ex-spouses would divide the stock equally upon payment of the note. The court further provided that after the dividends on the stock-collateral reduced the note, the ex-husband was solely liable to pay the remaining balance of the note. The ex-wife's objective in paying the note consisted of gaining control of half the shares of stock so that she might sell them. The court concluded that when only one spouse remains liable for an obligation, and following divorce the other ex-spouse pays the indebtedness without any agreement with the liable former spouse, the payor acts as a volunteer and cannot later recover from the benefited ex-spouse.<sup>155</sup> Having paid the note,

147. *Id.*:

The surviving spouse may by written instrument filed with the clerk waive any right to exercise power as community survivor, and in such event the executor or administrator of the deceased spouse shall be authorized to administer upon the entire community estate (emphasis added).

148. TEX. FAM. CODE ANN. § 5.61 (Vernon Supp. 1989).

149. When both spouses incur liability mutually, as apparently occurred in *Rogers v. Rogers*, 754 S.W.2d 236, 241-42 (Tex. App.—Houston [1st Dist.] 1988, no writ), this issue fails to arise.

150. 757 S.W.2d 521 (Tex. App.—Houston [14th Dist.] 1988, no writ).

151. *Id.* at 522.

152. *Id.* at 523.

153. *Id.*

154. *Tyler v. Tyler*, 742 S.W.2d 740 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

155. *Id.* at 742-43.

the ex-wife sued her ex-husband in the divorce court for her expenditure, and the court awarded judgment to her as an aid to the enforcement of the divorce decree. The appellate court reversed the court's award to the ex-wife.<sup>156</sup> Such a holding clearly exceeded the divorce court's power to enforce its decree.<sup>157</sup> The ex-wife had acted as a volunteer "with full knowledge of all the facts and without fraud, deception, duress or coercion."<sup>158</sup>

*Homestead: Designation and Extent.* In *In re Montgomery*<sup>159</sup> the court reiterated the proposition that "a person may not have more than one homestead."<sup>160</sup> Under the Bankruptcy Code<sup>161</sup> the debtor claimed his rural home of 1.7 acres as exempt property.<sup>162</sup> He also claimed as exempt three other unrelated, apparently rural, tracts located some distance from the debtor's home. The bankruptcy court denied the claimed exemptions beyond the home.<sup>163</sup> Similarly in *In re Brown*<sup>164</sup> the court held that exempt homestead property excluded rural farm land rented to tenants which was not used as a home.<sup>165</sup> Another tract, not owned by the debtor but farmed by the debtor for thirteen years until a year before bankruptcy, also failed to qualify as exempt homestead property. When the debtor filed the bankruptcy petition he neither owned nor used the property as a home, but rather the debtor inherited the land within six months of filing. Therefore the property became a part of the debtor's bankruptcy estate.<sup>166</sup> But when inherited, the debtor used the land for purposes other than the debtor's home. Though the court indicated that it would treat the property as exempt if the debtor used it as a home at the time of acquisition,<sup>167</sup> the debtor's evidence neither supported homestead use nor overt acts of preparing to make the land a homestead in the future.<sup>168</sup>

An urban homestead may embrace two kinds of homestead use within the one-acre limitation. The claimant may have a business homestead as well as a residence, but not more than one of each at the same time.<sup>169</sup> In *In re Moore*,<sup>170</sup> the homestead claimant sought to show that a business homestead had been established on particular realty prior to its actual occupancy as a

156. *Id.* at 743.

157. *Id.* The trial court had apparently relied on TEX. FAM. CODE ANN. §§ 3.70-3.71 (Vernon Supp. 1989).

158. 742 S.W.2d at 743.

159. 80 Bankr. 385 (Bankr. W.D. Tex. 1987).

160. *Id.* at 386.

161. 11 U.S.C. § 522(b)(2) (1979 & Supp. 1988).

162. 80 Bankr. at 386.

163. *Id.* at 393.

164. 78 Bankr. 486 (Bankr. N.D. Tex. 1987).

165. *Id.* at 487.

166. *Id.* at 487-88.

167. *Id.* (citing *In re Sivley*, 14 Bankr. 905, 910 (Bankr. E.D. Tenn. 1981)).

168. *Id.* at 487-88.

169. *Archibald v. Jacobs*, 69 Tex. 248, 6 S.W. 177 (1887) (residence and business homestead); *Aetna Insurance Co. v. Ford*, 417 S.W.2d 448 (Tex. Civ. App.—Eastland 1967), *aff'd*, 424 S.W.2d 612 (Tex. 1968) (business homestead). *See also Johnston v. Martin*, 81 Tex. 18, 16 S.W. 550 (1891) (a family, having established a homestead or a leasehold, could not establish another by intent).

170. 93 Bankr. 480 (Bankr. N.D. Tex. 1988).

business and even prior to its acquisition so that the pre-acquisition liens to which he had agreed would not attach to the property because they were not executed in the manner that valid liens on homestead property are created.<sup>171</sup> In all these respects the claimant was unsuccessful because he maintained another place of business and failed to consider the new property his business homestead until he moved into it to do business.<sup>172</sup> Implicitly the court's opinion recognizes that once the move has been made from an existing homestead to an intended homestead, the homestead character of the new place does not relate back to the time when the intent to move was formulated.

Achieving exempt status of land through present acts that show an intention of future homestead use is one of the most difficult homestead concepts to apply. In *Farrington v. First National Bank of Bellville*<sup>173</sup> the debtor owned two pieces of property. In 1980 she acquired a seventeen acre tract within the limits of an urban area but classified as rural property. After her divorce in 1982, when she acquired full title to the property, the debtor erected a metal storage building on the property and designated a home-site by placing rocks at the corners of the area. She spent about three weeks living there in her car and cooking on a campfire. In early 1983 the debtor bought a two-bedroom urban home in the same urban area, and she was living in that house when she executed a mortgage on the rural tract in September, 1984. In 1986 the bank foreclosed upon the mortgage. The mortgagee then sought a summary judgment that the rural tract was not the debtor's homestead at the time it granted the mortgage. As proof that the debtor had established a continuing homestead on the urban tract and had thus abandoned any claim established to the rural tract as a homestead, the mortgagee offered evidence of various outward signs of the debtor's occupancy of the urban home as her homestead, including the debtor's declaration of the urban lot as her homestead for ad valorem tax purposes in August, 1985. The debtor, in turn, submitted an affidavit stating that she had continuously intended to use and occupy the rural tract as her homestead. In reversing the trial court's summary judgment in favor of the mortgagee, a majority of the Houston court of appeals concluded that on the state of the evidence a fact question existed regarding the debtor's homestead at the time the bank granted the mortgage on the rural land.<sup>174</sup> The dissenting judge apparently concluded that living in the urban premises constituted an abandonment of any intention to establish a homestead on the rural land as a matter of law.<sup>175</sup> This point of view is akin to that which the Fifth Circuit Court of

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171. If the property were a business homestead, it would have been necessary for the husband and wife to execute all mechanic's lien contracts before work was commenced and for the wife to join in renewals of liens. These formalities had not been complied with. 93 Bankr. at 481-82, 484.

172. 93 Bankr. at 483.

173. 753 S.W.2d 248 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

174. *Id.* at 251.

175. *Id.* at 251-52 (Bass, J., dissenting).

Appeals expressed in *In re Clafin*.<sup>176</sup>

With the intention of defrauding his creditors, the debtor in *In re Moody*<sup>177</sup> executed a gratuitous transfer of homestead property to a corporation which the debtor solely owned. The Fifth Circuit court held that no real transfer occurred and hence the debtor did not lose the homestead exemption under section 522(b)(2) of the Bankruptcy Code.<sup>178</sup> The court also held that simulated fraudulent transfers of undivided interests in the homestead to third persons were void as a matter of law and the transferor therefore did not lose his homestead claim.<sup>179</sup> The effect of section 522(g), of the Bankruptcy Code<sup>180</sup> was not argued, however, and when read in conjunction with section 522(b)(2),<sup>181</sup> seems to support the opposite conclusion.<sup>182</sup>

In *In re Peters*<sup>183</sup> a Texas bankrupt debtor without a Texas homestead claimed a homestead in a foreign country as a Texas exemption under section 5.22(b) of the Bankruptcy Code.<sup>184</sup> The court held that the proper interpretation of the Bankruptcy Code requires that the homestead be located in the forum state.<sup>185</sup> The court cited its own prior decision in support of this conclusion.<sup>186</sup> This interpretation seems to rest on the logical premise that a debtor is adjudicated a bankrupt in the state of his domicile and hence his homestead, if he has one, must be in that state. It may be suggested, however, that if the domiciliary state allows an extra-territorial homestead and the law of the state where the land is located also allows a non-domiciliary to assert a homestead there, a bankruptcy court should honor such a claim. The meager Texas authority on the point<sup>187</sup> falls short of supporting such a claim however.

In several instances bankruptcy courts considered the proper application of the rule that a creditor must object to a homestead claim within thirty days after the debtor asserts his claim.<sup>188</sup> In filing his schedules, the debtor in *In re Cooke*<sup>189</sup> failed to claim particular property as exempt, but he announced his claim at the ensuing creditors' meeting, which the creditor at-

176. 761 F.2d 1088 (5th Cir. 1985), discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 40 Sw. L.J. 1, 18-20 (1986).

177. 862 F.2d 1194 (5th Cir. 1989), *aff'g*, 77 Bankr. 566 (S.D. Tex. 1987).

178. *Id.* at 1198-99 (citing 11 U.S.C. 522(b)(2) (1979)).

179. *Id.* at 1199-2000.

180. 11 U.S.C. § 548(a), (b) (1979).

181. 11 U.S.C. § 522(g) (1979).

182. See McKnight, *Prefiling Exemption Planning: A National Perspective* in 2 REPRESENTING DEBTORS IN BANKRUPTCY ¶ 3.03 at 3-12—3-13 (J. Norton, M. Rochelle & P. Franklin, eds.) (1988).

183. 91 Bankr. 401 (Bankr. W.D. Texas 1988).

184. 11 U.S.C. § 522(b)(2) (1979 & Supp. 1989).

185. 91 Bankr. at 403-04.

186. *Id.* at 404 (citing *In re Schmidt*, No. 1-86-01102 (Bankr. W.D. Tex.—Sept. 1, 1987) (not published)).

187. *William Cameron & Co., Inc. v. Abbott*, 258 S.W.562 (Tex. Civ. App.—Amarillo 1924, no writ). *Cf. Bell v. Indian Livestock Co.*, 11 S.W. 344 (Tex. 1889); *Strawn Mercantile Co. v. First Nat'l Bank of Strawn*, 279 S.W. 473, 474-75 (Tex. Civ. App.—Eastland 1925, no writ).

188. Bankruptcy Rule 3003(b), 11 U.S.C.A. 3003(b) (1984).

189. 84 Bankr. 67 (Bankr. N.D. Tex. 1988).

tended. More than thirty days after the creditors' meeting the debtor amended his schedules to claim the exemption but the debtor failed to serve the creditor with notice of those amendments. The creditor delayed more than thirty days after the filing of the amended schedule to object to the claimed exemption. The creditor argued that he made a timely objection because he failed to receive notice of the amended schedules. Formal notice of the amended schedules was irrelevant, however, because the creditor's thirty days in which to object ran from receipt of actual notice at the creditors' meeting.<sup>190</sup> On the other hand, when the issue is lien avoidance on exempt property rather than the underlying claim of an exemption, the creditor is not foreclosed from challenging the motion for lien avoidance though he has made no timely objection to the claimed exemption.<sup>191</sup>

*Liens on Homestead Property.* In *Hruska v. First State Bank of Deanville*<sup>192</sup> the Supreme Court of Texas made it clear that a lien on homestead property cannot be established by estoppel, though estoppel may prevent a homestead claimant from denying the validity of an existing lien in some circumstances. In this case the owners of the homestead promised to give a lien for improvements on their property but failed to do so. The owners never made any misrepresentations as to the validity of an existing lien. In order to fix a valid mechanic's and materialman's lien on homestead property for improvements, the lien contract must be executed in writing before furnishing materials and making improvements.<sup>193</sup> The homeowners represented to the lender that they would acquire a mechanic's and materialman's lien before commencement of the work. The lender agreed to finance the improvements, but the homeowners failed to execute a lien.<sup>194</sup> When the lenders made the loan for the improvements, the lender prepared a lien contract, backdated to a time prior to construction. The buyers executed this agreement. The lender later attempted to enforce the purported lien, and the trial court gave the lien effect on the ground that equity estopped the borrowers' denying the lien's validity.<sup>195</sup> In reversing the judgment, affirmed by the court of appeals, the Supreme Court of Texas reaffirmed the strict construction of the constitutional requirement that a valid improvement-lien on a homestead must be acquired prior to the beginning of construction.<sup>196</sup>

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190. *Id.* at 68.

191. *In re Boyd*, 93 Bankr. 538, 540 (Bankr. S.D. Tex. 1988); *In re Montgomery*, 80 Bankr. 385, 388, 393 (Bankr. N.D. Tex. 1987); *In re Mitchell*, 80 Bankr. 372, 374-89 (Bankr. W.D. Tex. 1987). In *Hardage v. Herring Nat'l Bank*, 837 F.2d 1319 (5th Cir. 1988), a debtor in bankruptcy amended his schedule of exempt property to include an agricultural leasehold on which there were unmaturing crops. Four days prior to the amendment, however, the trustee sold the unmaturing crops. The court concluded that whatever claim the debtor might assert to the crops as exempt was in the sales price rather than in the crops themselves. *Id.* at 1322-23.

192. 747 S.W.2d 783 (Tex. 1988).

193. TEX. CONST. art. XVI, § 50 (Vernon Supp. 1989). See TEX. PROP. CODE ANN. §§ 41.005, 53.059 (Vernon Supp. 1989); see also Bridwell, *Texas Property Code Amendments*, 52 TEX. B.J. 40 (1989).

194. 747 S.W.2d at 784.

195. *Id.* at 783-84.

196. *Hruska v. First State Bank of Deanville*, 727 S.W.2d 732 (Tex. App.—Houston [1st

In *Shearer v. Allied Live Oak Bank*,<sup>197</sup> however, estoppel was relied on to reject a homestead claim and thus to validate a lien put on the property. The central issue in this dispute was whether the property mortgaged had been abandoned as a homestead. At the time the lender granted the mortgage on the property, the borrower informed the lender that the property was neither his home nor his place of business.<sup>198</sup> At that time no one appeared to occupy the premises. Relying on the rule in *Alexander v. Wilson*,<sup>199</sup> the court concluded that the apparent non-use of the property coupled with the borrower's disclaimer of homestead estopped the borrower from denying the truth of his statement.<sup>200</sup>

In 1985 the legislature repealed Property Code section 41.005,<sup>201</sup> enacted as a non-substantive revision of article 3841<sup>202</sup> in 1983, since it was out of harmony with the revisions of chapter 41 of the Property Code. These provisions relate to creditors who seek to seize the property of debtor-claimants.<sup>203</sup> The draftsman of the 1985 act felt that declarations of homestead claims, meant for the assurance of prospective mortgagees of non-homestead property, are best handled by agreement. Lenders, however, achieved revision of some of these provisions in 1987. Article 41.005,<sup>204</sup> as amended, provided that a homestead claimant may voluntarily designate a part of an urban or rural tract larger than the area which one might claim as his homestead. The purpose of this designation is to assure a lender, who seeks to secure a loan to a claimant, that the portion of the tract not claimed as a homestead will secure the loan. The lender usually initiates such a designation and immediately afterwards the lender grants the secured loan. At some future time, however, the claimant may vary the homestead use of his tract or may change his homestead entirely. To provide for that eventuality, the legislature should amend the statute to provide guidance for creditors who seek to seize particular land of a debtor.

*Exempt Personalty.* Prior to the 1983 recodification of the exemption law in the new Property Code,<sup>205</sup> courts consistently construed the provision for exempt "wearing apparel" to include jewelry.<sup>206</sup> A non-substantive revision

Dist.] 1987), *rev'd*, 747 S.W.2d 783 (Tex. 1988), commented on in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 42 Sw. L.J. 1, 33-34 (1988).

197. 758 S.W.2d 940 (Tex. App.—Corpus Christi 1988, no writ).

198. *Id.* at 945.

199. 124 Tex. 392, 77 S.W.2d 873 (1935) (also an abandonment case) The court relied particularly on *Prince v. North State Bank of Amarillo*, 484 S.W.2d 405, 411 (Tex. Civ. App.—Amarillo 1972, writ *ref'd n.r.e.*).

200. 758 S.W.2d at 945-46. "[W]here the facts known to the mortgagee at the time, and those of which he is required to take notice, are consistent with the declared intention of the mortgagors, their declaration may estop them from asserting their homestead claim." 124 Tex. at 394, 77 S.W.2d at 874.

201. 1983 Tex. Gen. Laws ch. 576, § 6 at 3729.

202. TEX. REV. CIV. STAT. ANN. art. 3841 (Vernon 1966) (repealed 1984).

203. TEX. PROP. CODE ANN. § 41.005 (Vernon Supp. 1989).

204. *Id.*

205. TEX. PROP. CODE ANN. (Vernon 1984), enacted as 1983 Tex. Gen. Laws ch. 576.

206. See *In re Richards*, 64 F. Supp. 923, 927 (S.D. Tex. 1946); *Hickman v. Hickman*, 228 S.W.2d 565 (Tex. Civ. App.—Eastland 1950), *aff'd*, 149 Tex. 439, 444, 234 S.W.2d 410, 413-



of the statute replaced the word "clothing" for the phrase "wearing apparel." Overlooking the legislative history of the statute, the federal district judge in *In re Fernandez*<sup>207</sup> affirmed the holding of the bankruptcy court that jewelry could not be claimed as exempt property.<sup>208</sup> In reversing that conclusion the Fifth Circuit<sup>209</sup> not only relied on the legislative history<sup>210</sup> of the act as passed without substantive change<sup>211</sup> but also on "the Texas tradition of liberality toward the debtor in construing exemption statutes."<sup>212</sup> The court nonetheless emphasized two limitations on the breadth of the statutory language: (1) that the jewelry must be worn by the owner<sup>213</sup> and (2) that the jewelry is "reasonably necessary for the family or single adult."<sup>214</sup> The bankruptcy court relied on both of these limitations in *In re Reed*.<sup>215</sup> The debtor, in this case, claimed as exempt property four rings, two jeweled pins, and silver and gold coins. Though the debtor wore the rings daily and wore the pins regularly but not daily, the debtor placed all of these items in a safe deposit box to protect them from seizure by the debtor's estranged husband. In the course of subsequent state court litigation, counsel for the disputants agreed that all of this property should be kept in the safe deposit box in lieu of the registry of the court, and thus constructively *in custodia legis*. The court held that the rings and pins met the "necessary" standard in the sense that they were "usual and appropriate for the reasonable comfort and convenience of the debtor."<sup>216</sup> Further, because the state court effectively held the property in its custody, the court held that the property was secure from the writ of garnishment previously sought to reach it.<sup>217</sup>

Light cars or trucks not used for business purposes or two particular types of vehicles, regardless of purpose of use are defined as exempt within the value-limit for exempt personal property.<sup>218</sup> Whether further business vehicles may be claimed as tools of trade<sup>219</sup> was before a bankruptcy court in *In re Weiss*.<sup>220</sup> In concluding that this further exemption was not allowed, the

14 (1950); *First Nat'l Bank of Eagle Lake v. Robinson*, 124 S.W. 177, 179 (Tex. Civ. App.—San Antonio 1909, no writ).

207. 89 Bankr. 601, 603 (W.D. Tex. 1988), *rev'd*, 855 F.2d 218 (5th Cir. 1988).

208. 89 Bankr. at 603. A bankruptcy court in the same district reached a contrary conclusion by a somewhat different analysis in *In re Peters*, 91 Bankr. 401 (Bankr. W.D. Tex. 1988).

209. 855 F.2d 218, 222 (5th Cir. 1988) (*per curiam*).

210. *Id.* at 219-21.

211. *Id.* at 221 (citing TEX. PROP. CODE ANN. § 1.001(a) (Vernon 1984)).

212. 855 F.2d at 221. See Olds & Palmer, *Exempt Property* in CREDITORS' RIGHTS IN TEXAS 23, 45-59 (1st ed. 1963) (J. McKnight, ed.). The Family Law Section Council of the State Bar of Texas has suggested a general clarification of personal property exemption law in 1989; jewelry would be included in the list of exempt property and the "reasonably necessary" test would be discarded for determining exemptions.

213. 855 F.2d at 222 (citing *Hickman v. Hickman*, 149 Tex. 439, 444, 234 S.W.2d 410, 413-14 (1950)).

214. 855 F.2d at 222 (citing TEX. PROP. CODE ANN. § 42.002(3) (Vernon 1984)).

215. 89 Bankr. 603 (Bankr. N.D. Tex. 1988).

216. *Id.* at 607.

217. *Id.* at 607-608.

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

219. *Id.* § 42.002(3).

220. 92 Bankr. 677 (Bankr. N.D. Tex. 1988).

court relied on a case<sup>221</sup> decided before the value-limit on personal property exemptions existed and a bankruptcy case<sup>222</sup> relying on that earlier case. In commenting on the debtor's argument that the express reference to a boat as a tool of trade suggests the inclusion of motor vehicles, the court responded that the specific provisions enacted for motor vehicles precludes their inclusion as tools of trade.<sup>223</sup> As a matter of information the reference to a boat was meant to replace the specific statute dealing with ferry boats.<sup>224</sup> The draftsmen of the 1973 statute, of which the 1983 statute is a recodification, did not mean to exclude claims of additional vehicles as tools of trade as indicated by the draftsman's commentary.<sup>225</sup>

Without reference to the provisions of the Property Code,<sup>226</sup> exempting the cash surrender value of certain life insurance policies from seizure, the Insurance Code<sup>227</sup> was amended in 1987 to exempt lump-sum proceeds of life insurance. In *In re Brothers*<sup>228</sup> the court rejected the argument that the Insurance Code amendment meant to include the cash surrender value of all life insurance policies.

The Texas Constitution exempts wages of an employee in the hands of the employer,<sup>229</sup> and is reflected in the personal property exemption statute.<sup>230</sup> Once the employee receives his wages, however, the exemption no longer applies.<sup>231</sup> The fact that an agency of the federal government pays the wages does not preclude a creditor's seizure unless the federal law so provides.<sup>232</sup> Although the Texas Constitution precludes an employee's creditors from garnishing wages in the hands of the employer,<sup>233</sup> and writs of execution and attachment in Texas do not constitute a continuing levy to affect a wage-earner's subsequently acquired property, interpretations of the provisions of the 1979 turnover statute<sup>234</sup> have allowed a court to require a wage-earner to pay wages to a creditor as the wages are received in the future.<sup>235</sup> In *Davis v.*

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221. *McMillan v. Dean*, 174 S.W.2d 737 (Tex. Civ. App.—Austin 1943, writ ref'd w.o.m.).

222. *In re Trainer*, 56 Bankr. 21 (Bankr. S.D. Tex. 1985).

223. 92 Bankr. at 687.

224. See McKnight, *Modernization of Texas Debtor-Exemption Statutes Short of Constitutional Reform*, 35 TEX. BAR J. 1137 (1972).

225. *Id.* at 1138.

226. TEX. PROP. CODE ANN. § 42.002(7) (Vernon 1984).

227. TEX. INS. CODE ANN. art. 21.22(1) (Vernon Supp. 1989).

228. 94 Bankr. 82 (N.D. Tex. 1988).

229. TEX. CONST. art. XVI, § 28 (Vernon 1989).

230. TEX. PROP. CODE ANN. § 42.002(8) (Vernon 1984). Neither the constitutional nor the statutory provision exempts commissions of an independent contractor, however. This point is illustrated by *In re Perciavalle*, 92 Bankr. 688 (W.D. Tex. 1988), dealing with the nonexempt status of an insurance agent's renewal commissions. See also TEX. CIV. PRAC. & REM. CODE ANN. § 63.004 (Vernon 1986).

231. *Barlow v. Lane*, 745 S.W.2d 451, 453 (Tex. App.—Waco 1988, writ denied).

232. *Cain v. Cain*, 746 S.W.2d 861, 863 (Tex. App.—El Paso 1988, writ denied).

233. TEX. CONST. art. XIV, § 28 (Vernon Supp. 1989).

234. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon 1987).

235. *Cain*, 746 S.W.2d at 862-63; *Barlow*, 745 S.W.2d 451 (Tex. App.—Waco 1988, writ denied); *Salem v. American Bank of Commerce*, 717 S.W.2d 948 (Tex. App.—El Paso 1986, no writ).

*Rabon*<sup>236</sup> the Houston court of appeals termed this interpretation unconstitutional, and the Supreme Court of Texas must resolve the impasse. In *Barlow v. Lane*,<sup>237</sup> however, the Waco court of appeals termed a court's power to make a turnover order discretionary.<sup>238</sup> The trial judge in his sound discretion may fashion an order to fit the particular case, taking into consideration, for example, the debtor's necessitous circumstances. The court may also refuse to grant the order.<sup>239</sup>

In the course of its opinion in *In re Fernandez*,<sup>240</sup> the Fifth Circuit mentioned the Texas exemption of "athletic and sporting equipment"<sup>241</sup> as an instance of Texas's liberality toward debtors. Without adverting to analogous state law, the bankruptcy court in *In re Courtney*<sup>242</sup> construed the "household goods" provision in the federal bankruptcy statute pertaining to avoidance of non-purchase money liens on exempt property.<sup>243</sup> The court held that household goods include such items as guns, bow and arrows, cameras, a bicycle and a set of golf clubs.<sup>244</sup>

In 1983 the Fifth Circuit held in *In re Goff*<sup>245</sup> that the anti-alienation provisions contained in the federal Employee Retirement Income Security Act (ERISA)<sup>246</sup> did not exempt the corpus of a Texas spendthrift trust, set up by a bankrupt debtor for himself, from the debtor's creditors. In *In re Brooks*<sup>247</sup> the Fifth Circuit held that creditors can no more seize a beneficiary's share of a trust set up by an association of which the beneficiary is a member, just as if he was the sole settlor.<sup>248</sup>

In *Mackey v. Lanier Collection Agency*<sup>249</sup> the United States Supreme Court considered a Georgia garnishment statute providing that funds or benefits of a pension, retirement, or employee benefit plan or program subject to the Federal Employee Retirement Income Security Act of 1974 (ERISA) are not subject to garnishment.<sup>250</sup> A creditor sought to reach vacation and holiday funds (welfare funds), of a beneficiary of a plan subject to the act. The entire court concluded that the congressional act preempted the field relating to the subject matter of the act. Because the federal act failed to make such welfare benefit funds exempt, however, a majority of the court held the Georgia garnishment writ could reach them.<sup>251</sup> A minority of the

236. *Davis v. Rabon*, 754 S.W.2d 481, 483 (Tex. App.—Houston [1st Dist.] 1988, writ granted).

237. 745 S.W.2d 451 (Tex. App.—Waco 1988, writ denied).

238. *Id.* at 453-54.

239. *Id.* at 454 (turnover order limited to wages in excess of living expenses).

240. 855 F.2d 218, 221 (5th Cir. 1988).

241. TEX. PROP. CODE ANN. § 42.002(1), (3)(E) (Vernon 1984).

242. 89 Bankr. 15 (Bankr. W.D. Tex. 1988).

243. 11 U.S.C. § 522(f) (1979).

244. 89 Bankr. at 16.

245. 706 F.2d 574, 582 (5th Cir. 1983).

246. 26 U.S.C. § 401(a)(13) (1988); 29 U.S.C. § 1056(d)(1) (Supp. 1988).

247. 844 F.2d 258, 263-64 (5th Cir. 1989).

248. *Id.*

249. 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988).

250. GA. CODE ANN. § 18-4-22.1 (1982).

251. 108 S. Ct. at 2186; 100 L. Ed. 2d at 836.

court would have precluded garnishment of the funds on the basis of congressional preemption of the entire subject matter.<sup>252</sup> The effect of the 1987 amendment to the Texas personal property exemption statute is, therefore, left in considerable doubt.<sup>253</sup> The amendment exempts all benefits qualifying under the provisions of the 1986 Internal Revenue Code, and benefits under government and church plans as defined, and therefore excluded from coverage, by ERISA. In the light of the decision of the United States Supreme Court, the Texas statute may be beyond repair with respect to ERISA benefits until the Congress acts to determine whether such benefits are exempt. If the Congress allows the states to legislate the exemption of ERISA benefits, the Texas Legislature can then clarify the language of the statute to make it clear whether benefits of a single plan or any plan are exempt.<sup>254</sup> Without adverting to *Mackey*, the Fifth Circuit held in *In re Brooks*<sup>255</sup> that the Texas statute does not purport to affect claims and interests already fixed before the statute's effective date.<sup>256</sup>

The problems raised by *Mackey* provide an opportunity for rethinking the present Texas personal property exemption scheme. Prior to 1973 there was no monetary limit aggregate-value on the defined list of personal property exemptions. The legislature adopted the view in 1987 that certain retirement benefits that may greatly exceed that value are also exempt. A reevaluation of general exemption policy is necessary in order to achieve a balance between the rights of creditors and those of debtors. Modest amounts of property are excluded from exemption by the definitions of the Property Code subject to a maximum exempt amount. Some thought should be given to the comparative values of these exemptions.

#### IV. DIVISION ON DIVORCE

*Jurisdiction.* In *Wahlenmaier v. Wahlenmaier*<sup>257</sup> the issue was the court's power to enter a decree of divorce on behalf of a petitioning wife who became mentally incompetent prior to the trial. Although a court had not adjudicated the wife incompetent,<sup>258</sup> she was unable to attend the trial or to testify. The court appointed an attorney ad litem to protect the wife's interest, and the court entered a decree in favor of the wife.<sup>259</sup> The respondent-

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252. 108 S. Ct. at 2191; 100 L. Ed. 2d at 836.

253. TEX. PROP. CODE ANN. § 42.0021 (Vernon Supp. 1988), commented on in Hall, *Retirement Benefits: Texas Property Code Amendment*, 50 TEX. BAR J. 993 (1987). See also Suhre, *Clarification of Retirement Benefits as Exempt Property*, 52 TEX. BAR J. 38 (1989).

254. This issue was raised in *In re Komet*, 94 Bankr. 82 (Bankr. W.D. Tex. 1988). Putting aside the construction of the act on that issue, the court concluded *sua sponte* that the Texas act ran afoul of the preemption doctrine as defined in *Mackey*. That decision has, however, been withdrawn for further argument.

255. 844 F.2d at 261. See also *Steves & Sons, Inc. v. House of Doors, Inc.*, 749 S.W.2d 172 (Tex. App.—San Antonio 1988, writ denied).

256. 844 F.2d at 261. Sept. 1, 1987. See 1987 Tex. Gen. Laws ch. 376, § 2 and § 3.

257. 750 S.W.2d 837 (Tex. App.—El Paso 1988), writ denied *per curiam*, 762 S.W.2d 575 (Tex. 1988).

258. *Id.* at 838.

259. *Id.* at 839. But see *Garcia v. Daggett*, 742 S.W.2d 808 (Tex. App.—Houston [1st Dist.] 1987, no writ). Supervening death of a party to a divorce, as opposed to intervening

husband appealed relying on *Hart v. Hart*<sup>260</sup> and *Dillion v. Dillion*.<sup>261</sup> In each case the court refused to entertain a suit for divorce brought on behalf of an incompetent, though only in the former case had a court adjudicated the petitioner incompetent. The reason given in both cases was the same: the decision to sue for divorce is so personal that a guardian or next friend on behalf of the incompetent cannot exercise it.<sup>262</sup> In reaching the conclusion that a next friend might pursue the incompetent wife's petition to judgment,<sup>263</sup> the El Paso court of appeals relied on a 1983 enactment of the Texas Mental Health Code protecting the constitutional rights of mentally ill persons.<sup>264</sup> On writ of error, the Texas Supreme Court in *Wahlenmaier v. Wahlenmaier* specifically disapproved the authority of both *Hart* and *Dillion*.<sup>265</sup> In the absence of contrary legislation, this conclusion and the statute on which it is based lift the subject into the realm of due process.<sup>266</sup> Thus rights that one may exercise on behalf of incompetent persons are greatly enhanced. Although *Wahlenmaier* focused on allowing a next friend to take a divorce to judgment on behalf of a petitioner who had subsequently become incompetent, the tone of Texas Supreme Court suggests that a next friend for an incompetent may petition for divorce on behalf of an incompetent. If this reading of the opinion is correct, a guardian or next friend may not only sue for divorce on behalf of an incompetent, but an agent serving under non-terminable powers of attorney<sup>267</sup> may presumably make a will for an incompetent or change a will executed while the testator was competent.

In 1978 the Texas Supreme Court held that a party not participating in a trial may successfully proceed by writ of error for a new trial if the prior proceeding which the complaining party did not attend contains no record.<sup>268</sup> The El Paso court of appeals in *McLamore v. McLamore* discussed waiver of this right to a record.<sup>269</sup> The court held that one may waive the right to a record in advance of the hearing provided the court consents to the waiver and the fact that the court enters judgment may imply consent.<sup>270</sup>

In another case<sup>271</sup> an appellate court considered the point when a court

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incompetence, has the effect of abating the suit. *Id.* at 809 (citing *Whaley v. Brown*, 649 S.W.2d 297, 299 (Tex. 1983); *Garrison v. Texas Commerce Bank*, 560 S.W.2d 451 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.)).

260. 705 S.W.2d 332 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

261. 274 S.W. 217 (Tex. Civ. App.—Amarillo 1925, no writ).

262. 705 S.W.2d at 333, 274 S.W. at 218-19.

263. 750 S.W.2d at 839.

264. TEX. REV. CIV. STAT. ANN. art. 5547-80(a) (Vernon Supp. 1989) (Texas Mental Health Code). The statute provides that "[e]very mentally ill person in this state shall have the rights, benefits, responsibilities, and privileges guaranteed by the constitution and laws of the United States and the constitution and laws of the State of Texas." *Id.*

265. 762 S.W.2d 575 (Tex. 1988).

266. *Id.*

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

268. *Rogers v. Rogers*, 561 S.W.2d 172 (Tex. 1978).

269. 750 S.W.2d 805 (Tex. App.—El Paso 1988, no writ).

270. *Id.* at 807. For a somewhat related case see *Barnett v. Barnett*, 750 S.W.2d 881 (Tex. App.—Dallas 1988, no writ).

271. *Mortgage Funding Corp. v. Schuble*, 737 S.W.2d 339 (Tex. App.—Houston [14th Dist.] 1987, no writ).

loses its power to control a case. Once the divorce court enters its judgment and thirty days have passed after the perfection of an appeal, the statutory grant of power to make further orders ends.<sup>272</sup> Thus, a court may properly issue a writ of prohibition to prevent the trial court from restraining foreclosure of a mortgage against a party to the proceeding.<sup>273</sup> Similarly, once thirty days expire after the entering of an order severing the trial of third-party claims from the suit for divorce, the divorce court can no longer allow intervention of third parties.<sup>274</sup>

*Receivership.* Section 3.58(h)(3) of the Family Code<sup>275</sup> authorizes the appointment of a receiver for the protection of the parties' property *pendente lite*. The Dallas Court of Appeals construed the reference to parties in this context as referring only to the husband and wife and not to an intervening creditor.<sup>276</sup> Hence, if a court appoints a receiver of property at the insistence of an intervenor, on joint motion of the husband and wife the court should terminate the appointment.<sup>277</sup> Any subsequent judicial order approving acts of the receiver, such as sale of the property, is void.<sup>278</sup> The power to appoint a receiver is an extraordinary one, and courts strictly construe the statute authorizing such an appointment.<sup>279</sup>

In *Young v. Young*<sup>280</sup> a settlement agreement left a large quantity of household furnishings undivided and further provided that a court should appoint a receiver if the parties could not agree on division. The divorce decree incorporated the agreement. After two years, the ex-husband moved for the enforcement of the decree and appointment of a receiver. The court appointed a receiver and the ex-wife appealed. The appellate court concluded that it possessed the power to appoint a receiver in order to facilitate division of the property.<sup>281</sup> The court also determined that it has the discretion to dispense with the requirement for a bond for the receiver.<sup>282</sup> Further, such a receiver might receive compensation on a monthly basis rather than in a lump sum.<sup>283</sup> Although the appointment of the receiver was prompted by the agreement, because the agreement was silent as to the bond and payment to the receiver, it may be inferred that the parties left those matters to the discretion of the court.<sup>284</sup>

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272. TEX. FAM. CODE ANN. § 3.58(h) (Vernon Supp. 1989).

273. 737 S.W.2d at 340.

274. *Mallou v. Payne & Vendig*, 750 S.W.2d 251, 257 (Tex. App.—Dallas 1988, writ denied).

275. TEX. FAM. CODE ANN. § 3.58(h)(3) (Vernon Supp. 1989).

276. *Mallou v. Payne & Vendig*, 750 S.W.2d 251 (Tex. App.—Dallas 1988, writ denied).

277. *Id.* at 255.

278. *Id.* at 255-257, 258.

279. *Id.* at 254-55.

280. 765 S.W.2d 440 (Tex. App.—Dallas 1988, no writ).

281. *Id.* at 444.

282. *Id.*

283. *Id.*

284. TEX. FAM. CODE ANN. §§ 3.90-3.93 (Vernon Supp. 1989).

*Property Settlement Agreements.* In *Allen v. Allen*<sup>285</sup> an ex-wife sued to enforce the terms of a divorce-property-settlement-agreement providing that each spouse continues to own one-half of all their mineral interests. When the couple entered into the agreement, they owned a mineral interest which the husband had increased pursuant to an agreement with a third person prior to the divorce. Hence, the property-settlement-agreement and the award in the divorce decree gave the wife a one-half interest in the entire mineral interest. The appellate court, therefore, denied the ex-wife a constructive trust on that interest as superfluous and inappropriate.<sup>286</sup> The ex-wife held a property interest in the minerals under the decree of the divorce court. The appellate court distinguished cases<sup>287</sup> in which a court imposed a constructive trust on personal property that a third person held as a result of a spouse's gratuitous transfer of community property in fraud of the other spouse's rights.<sup>288</sup>

A somewhat similar case<sup>289</sup> involved a divorce-property-settlement-agreement in which the husband agreed to give his wife title to a term life-insurance policy that his employer provided as part of his compensation. The ex-husband's employer "owned" the policy when the parties entered into the settlement agreement and at the date of the ex-husband's death. The appellate court, nevertheless, affirmed the award of all of the proceeds to the ex-wife under the agreement in spite of the fact that the ex-husband had purported to change the beneficiary to his subsequent wife, and after the divorce the benefits provided by the policy had increased due to the employee's continuing service to his employer.<sup>290</sup> The court carefully distinguished<sup>291</sup> this case, in which the parties to the settlement-agreement vested all rights in an existing asset in one of them, from other cases in which a divorce court<sup>292</sup> or the parties<sup>293</sup> merely purported to divide property interests as they existed at the date of divorce. In this case, *Seaman v. Seaman*,<sup>294</sup> the second community claimed against the estate of the deceased husband on account of any benefit the second community may have conferred on the husband in the discharge of his obligation to his ex-wife under the property-settlement-agreement. Under the circumstances one would find it difficult to value such a benefit.

When the spouses in *MacMillan v. MacMillan*<sup>295</sup> divorced in 1983, the husband participated in a military retirement plan, under which he elected to provide a monthly income of \$300 to his widow at the cost of \$8 a month.

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285. 751 S.W.2d 567 (Tex. App.—Houston [14th Dist.] 1988, no writ).

286. *Id.* at 578.

287. *Spruill v. Spruill*, 624 S.W.2d 694 (Tex. App.—El Paso 1981, writ dism'd); *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

288. 751 S.W.2d at 578.

289. *Seaman v. Seaman*, 756 S.W.2d 56 (Tex. App.—Texarkana 1988, no writ).

290. *Id.* at 58-59.

291. *Id.* at 59.

292. *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983); *Crumley v. Crumley*, 753 S.W.2d 417, 418 (Tex. App.—Texarkana 1988, writ denied).

293. *Hudspeth v. Stoker*, 644 S.W.2d 92, 93 (Tex. App.—San Antonio 1982, writ ref'd).

294. 756 S.W.2d at 56.

295. 751 S.W.2d 302 (Tex. App.—San Antonio 1988, no writ).

The agreed divorce decree required the ex-husband to maintain this benefit but the ex-wife soon learned that federal law prohibited such benefits for an ex-spouse. The opinion fails to indicate, however, whether there was a mutual mistake between the parties with respect to existing federal law. Although the federal law at the time allowed a voluntary form of insurance for an ex-spouse at a cost of \$360 a month with a resulting benefit to the ex-spouse of \$1,800 a month, the ex-husband refused to accede to his ex-wife's request that he procure these benefits for her. After the amendment of the federal law in 1984 to allow a former spouse to apply directly for such insurance, the ex-wife applied to the U.S. Army for the benefit. In due time the U.S. Army approved the application and deducted the cost from the ex-husband's retirement pay on a retroactive basis to the date of divorce. Several months later, in 1985, the federal law once again changed providing that an ex-spouse could qualify for the same benefits, at the same cost, as a current spouse. After the ex-husband refused to apply for this less costly insurance coverage, the ex-wife filed a motion for clarification of the decree. The court held that the ex-husband should provide the benefits immediately prior to divorce but nothing more.<sup>296</sup> When the ex-wife appealed, the appellate court held that one should construe the couple's agreed judgment as a contract.<sup>297</sup> The ex-wife, therefore, became entitled to the benefits of the plan referred to in the agreed judgment, specifically, those benefits in effect at the time of the decree. The court found it irrelevant that the federal military authorities had otherwise interpreted the ex-wife's rights.<sup>298</sup> The court failed to discuss the possible impact of the changed federal law, but the ex-wife was apparently entitled to coverage under the 1985 act most nearly equivalent to the benefits that the parties agreed to in 1983.<sup>299</sup> The benefits agreed to in 1983 were, of course, non-existent. The apparent mutual mistake of the parties coupled with the later change in federal law in 1985 made it possible for a court to give the agreement effect.<sup>300</sup>

*Roberts v. Poole*<sup>301</sup> dealt with the impact of the husband's bankruptcy on the terms of a property-settlement-agreement incorporated in a divorce decree. The agreement provided for the ex-wife's support at the rate of \$3,000 a month for ten years and not as a part of a property division. Hence, the ex-wife asserted that the support payments constituted alimony within section 523(a)(5) of the Bankruptcy Code<sup>302</sup> and were therefore not subject to discharge. But the bankruptcy court found that the support payments actu-

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296. *Id.* at 304.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* In *Harris v. Harris*, 765 S.W.2d 798 (Tex. App.—San Antonio 1988, no writ), the ex-wife alleged that a property settlement had been agreed to whereby she was entitled to the proceeds of sale of certain real property. Although no agreement was proved, the ex-wife could not have prevailed against a creditor holding a valid lien on the land, even if the property settlement agreement had been valid. *De Mello v. NBC Bank—Perrin Beitel*, 762 S.W.2d 379 (Tex. App.—San Antonio 1988, no writ).

301. 80 Bankr. 81 (Bankr. N.D. Tex. 1987).

302. 11 U.S.C. § 523(a)(5) (1982).



ally constituted part of the property division, did not constitute alimony, and were therefore dischargeable under section 523(a)(5)(B).<sup>303</sup> The ex-wife relied principally on the parol evidence rule to exclude evidence which contradicted the clear terms of the agreement. The Fifth Circuit in *In re Benich*<sup>304</sup> already rejected that argument.

The Texas Supreme Court has resolved the dispute in *Herbert v. Herbert*,<sup>305</sup> which the intermediate appellate court had analyzed as turning on the terms of a property-settlement-agreement.<sup>306</sup> The supreme court classified the dispute as an evidentiary matter for the jury to decide as the finder of fact.<sup>307</sup> The ex-wife sued her former husband for one-half of his military retirement benefits to which she alleged entitlement under a property-settlement-agreement. The ex-husband contested the ex-wife's right on the ground that she had materially breached the agreement when she refused to deliver certain property to him in accordance with the terms of the agreement. After the parties tried this case to a jury, the trial judge rendered judgment in favor of the ex-husband on the basis of the jury verdict that the plaintiff-ex-wife failed to show her compliance with the terms of the agreement. The Fort Worth court of appeals found the jury's answer inconsistent with the great weight and preponderance of the evidence.<sup>308</sup> Three justices of the Texas Supreme Court held that it should reverse and remand the intermediate appellate court's judgment because the court of appeals had applied an incorrect test in reviewing the finding of the jury.<sup>309</sup> Three justices concurred in the reversal but thought that the court should affirm the judgment of the trial court.<sup>310</sup> One justice favored reversal and remand to the trial court for a new trial,<sup>311</sup> and one other justice merely dissented and apparently would have affirmed the holding of the court of appeals.<sup>312</sup> The other two justices did not participate in the decision of the case.

When a spouse alleges that a property-settlement-agreement or an agreed judgment was actuated by fraud or misrepresentation, the burden falls upon the other spouse to show a lack of fault or negligence on his or her part.<sup>313</sup> The ex-spouse seeking to set aside a judgment based on such an agreement must also show that the other party's fraud was extrinsic, that is, of a nature denying an opportunity to litigate all rights or defenses the party was entitled to assert.<sup>314</sup> In *Kennell v. Kennell*<sup>315</sup> the ex-wife complained of extrin-

303. *Id.* § 523(a)(5)(B) (1982).

304. 811 F.2d 943, 945 (5th Cir. 1987).

305. 754 S.W.2d 141 (Tex. 1988).

306. 699 S.W.2d 717 (Tex. App.—Fort Worth 1985), *rev'd*, 754 S.W.2d 141 (Tex. 1988), discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 40 Sw. L.J. 1, 30-31 (1987) (discussion concerns an opinion later withdrawn and replaced).

307. 754 S.W.2d at 144.

308. 699 S.W.2d at 724.

309. 754 S.W.2d at 142 (opinion by Kilgarlin, J.); *Id.* at 145 (Phillips, C. J., concurring joined by Gonzalez, J., concurring in the result).

310. *Id.* at 146-48 (Mauzy, J. joined by Ray, J.).

311. *Id.* at 145-46 (Culver, J.).

312. *Id.* at 148 (Robertson, J.).

313. *Alexander v. Hagedorn*, 148 Tex. 565, 568, 226 S.W.2d 996, 1001 (1950).

314. *Id.*

sic fraud in an agreed judgment entered into as a result of her ex-husband's misrepresentation of the value of community assets. In affirming the trial court's rejection of her bill of review, the Houston court of appeals pointed out that misrepresentation of value of a community asset falls short of constituting extrinsic fraud.<sup>316</sup> "Divorce litigants commonly assert differing valuations and differing versions of the facts."<sup>317</sup> The critical issue for the court to determine is whether, by coercive or non-coercive action, the other spouse precluded the complainant from determining the actual value of the property. When the petitioner has all ordinary means of discovery available or to establish values for herself, no grounds exist for her complaint.<sup>318</sup>

*Making the Division.* The division of property on divorce is the function of the trial court. The appellate court participates in the process in only rare instances. As a preliminary step toward division of the community, the owners must identify their separate estates. In 1987 the legislature provided that courts should use the clear and convincing standard of proof in order to demonstrate that property is separate.<sup>319</sup> In *Bogart v. Somer*,<sup>320</sup> the Texas Supreme Court approved this standard for an heir's rebuttal of donative intent as the basis for a spousal transfer.<sup>321</sup> A couple bought realty and put title in the name of their son-in-law without receiving value from him. The court held that the son-in-law therefore presumptively received the property as a gift rather than on a constructive trust for the purchasers, and clear and convincing evidence is required to rebut such a presumption of gift.<sup>322</sup> In this instance a strong presumption of gift exists and to demand a strict standard of evidence for rebuttal is not unreasonable.<sup>323</sup> But in the instance of a presumed gift between spouses,<sup>324</sup> when the presumption is weak,<sup>325</sup> a mere preponderance of the evidence seems sufficient for rebuttal.

Once separate property is identified and put aside, the entire community

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315. 743 S.W.2d 299 (Tex. App.—Houston [14th Dist.] 1988, no writ).

316. *Id.* at 301 (citing Rathmell v. Morrison, 732 S.W.2d 6, 13 (Tex. App.—Houston [14th Dist.] 1987, no writ)).

317. *Id.*

318. *Id.* at 301-302.

319. TEX. FAM. CODE ANN. § 5.02 (Vernon Supp. 1989).

320. 32 Tex. Sup. Ct. J. 51 (Tex. 1988), *aff'g per curiam* 749 S.W.2d 202 (Tex. App.—Dallas 1988).

321. *Id.*

322. *Id.*

323. *Id.*

324. *See, Dewey v. Dewey*, 745 S.W.2d 514, 518 (Tex. App.—Corpus Christi 1988, writ denied) (evidence held sufficient to rebut gift but presumption of gift and standard of evidence to rebut it not discussed). *See also Garduno v. Garduno*, 760 S.W.2d 735, 738, 741 (Tex. App.—Corpus Christi 1988, no writ). Because the parties had not entered into a formal, informal, nor putative marriage at the time of the conveyance of the husband's separate half-interest in realty (the condominium) to himself and his alleged informal wife. The alleged wife's interest is her separate property acquired by gift. The man's donative intent was not contested; however, the court could not presume a spousal gift since no marriage existed at the time of the conveyance.

325. *See Cockerham v. Cockerham*, 527 S.W.2d 162, 174-175 (Tex. 1975) (Reavley, J. dissenting).

estate must be found<sup>326</sup> and valued.<sup>327</sup> When a community right of reimbursement is found the process is not over. As pointed out in *Penick v. Penick*,<sup>328</sup> the determination of such a community right is just the first step; like other community property, the trial court may divide the community right of reimbursement as it deems just and right.<sup>329</sup>

Homestead property requires particular care. If the homestead is the separate property of one of the spouses, the court may grant occupancy to the other spouse during conservatorship of their children, but no longer.<sup>330</sup> Although the court may order sale of a community homestead not capable of partition between the spouses for the purpose of making a division of the community estate,<sup>331</sup> the Dallas court of appeals found the sale of a homestead inappropriate for the purpose of satisfying the claims of an unsecured intervening creditor<sup>332</sup> even if the homestead property is part of a larger tract of non-exempt property.<sup>333</sup>

An award of attorney's fees is an incident in the general division of the community estate.<sup>334</sup> Thus, a claim for attorney's fees should not be severed from the process of property-division.<sup>335</sup> In *Eikenhorst v. Eikenhorst* the court added that a claimant of an attorney's fee should show that the fee is necessary and reasonable.<sup>336</sup>

The question sometimes arises whether a divorce court possesses the inherent power to grant a money judgment in favor of one spouse against the other in order to divide the property justly when no liquid assets are available for division. In other contexts of partition courts have the analogous power of granting and securing owelty,<sup>337</sup> and the use of this device by di-

326. The court denied discovery of the active files of a lawyer-husband for the purpose of calculating the value of his interest in his firm's practice in *Enos v. Baker*, 751 S.W.2d 946 (Tex. App.—Houston [14th Dist.] 1988, no writ).

327. See Snyder, *Why Not Do It Yourself? (Value the Pension in a Divorce Case)*, 9 FAIR-SHARE 22 (No. 1 Jan. 1989) (raises many questions about the process of valuing a pension interest but provides few answers). In *Shafer v. Bedard*, 761 S.W.2d 126 (Tex. App.—Dallas 1988, no writ), a judicial admission barred discovery of financial records. In *Euston v. Euston*, 759 S.W.2d 788, 790 (Tex. App.—El Paso 1988, no writ), which concerned the valuation of a community partnership interest, the opinion is not clear on the evidentiary point.

328. 750 S.W.2d 247, 250 (Tex. App.—Houston [14th Dist.]), *rev'd*, 32 Tex. Sup. Ct. J. 143, 146 (Dec. 14, 1988).

329. *Id.*

330. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 141-42 (Tex. 1977); *LeBlanc v. LeBlanc*, 761 S.W.2d 450, 452-53 (Tex. App.—Corpus Christi 1988, no writ).

331. *Mallou v. Payne & Vendig*, 750 S.W.2d 251, 257 (Tex. App.—Dallas 1988, writ denied).

332. *Id.*

333. *Id.* at 255-257.

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

335. 750 S.W.2d at 257 (claim for attorney's fees by intervening creditor).

336. 746 S.W.2d 882, 890 (Tex. App.—Houston [1st Dist.] 1988, no writ).

337. *Sayers v. Pyland*, 139 Tex. 57, 62, 161 S.W.2d 769, 772 (1942); *Bouquet v. Belk*, 404 S.W.2d 862 (Tex. Civ. App.—Corpus Christi 1966, writ *ref'd n.r.e.*). *Cf. Smith v. Smith*, 715 S.W.2d 154 (Tex. App.—Texarkana 1986, no writ) (lien for money judgment may be put on property receiving a reimbursable benefit). In *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981), and *Reaney v. Reaney*, 5405 S.W.2d 338 (Tex. Civ. App.—Dallas 1974, no writ), the money judgment awarded was in the nature of damages (or reimbursement) for secreted or squandered funds.

voiced courts in lieu of selling the property and dividing the proceeds has sometimes received appellate approval.<sup>338</sup> In the vast majority of cases, appellate courts uphold a trial court's exercise of discretion in the division of community property.<sup>339</sup> *Morris v. Morris*<sup>340</sup> is one of the rare instances in which an appellate court found an abuse of discretion. The husband carried on a very successful medical practice. The wife possessed few work-skills and no other source of income. The trial court awarded the husband all of the community's most valuable asset (an interest in a medical professional association) as well as a medical partnership interest and a fully-furnished home.<sup>341</sup> The court awarded the wife with a furnished home, sixty percent of the profit sharing plan of the professional association, some rural land, and \$5,000 in cash, after the payment of her debts.<sup>342</sup> The court left the wife with no income to maintain her home or to care for her child. Considering the educational and experience benefits that had accrued to the husband during the marriage and the marked disparity in earning power between the spouses,<sup>343</sup> the court held that the property division was not "just and right" under section 3.63 of the Family Code.<sup>344</sup>

Within thirty days of rendition of the judgment, the Family Code<sup>345</sup> authorizes the trial court to order temporary spousal support pending an appeal and reasonable attorney's fees to pursue an appeal.<sup>346</sup> The award of costs on appeal falls within the province of the appellate court.<sup>347</sup> Because the trial court and not the appellate court is responsible for the division of property, if an error in division is committed, the appellate court must remand the case to the trial court for redivision.<sup>348</sup> If the appellate court determines, on appeal, that the trial court mischaracterized assets of any significance, the court must remand for a new division.<sup>349</sup> The trial court's improper application of the rules of reimbursement has the same effect.<sup>350</sup> Remand for redivision also seems appropriate when a mutual mistake of the parties or a misapprehension by the trial judge causes a division of property not actually owned by the community estate but by a third person. These

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338. *Dewey v. Dewey*, 745 S.W.2d 514, 519 (Tex. App.—Corpus Christi 1988, writ denied); *Weeks v. Weeks*, 471 S.W.2d 454, 455 (Tex. Civ. App.—Beaumont 1971, writ dismissed).

339. See *Eikenhorst v. Eikenhorst*, 746 S.W.2d 882, 890 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Dewey*, 745 S.W.2d at 520.

340. 757 S.W.2d 466 (Tex. App.—Houston [14th Dist.] 1988, no writ).

341. *Id.* at 468.

342. *Id.*

343. *Id.*

344. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1988).

345. *Id.* § 3.58(h)(1),(2).

346. For applications of these provisions see *In re Joiner*, 755 S.W.2d 496, 499 (Tex. App.—Amarillo 1988, no writ) (support); *Eikenhorst v. Eikenhorst*, 746 S.W.2d 882, 891 (Tex. App.—Houston [1st Dist.] 1988, no writ) (attorney's fees); *Ex parte Oliver*, 736 S.W.2d 277, 279 (Tex. App.—Fort Worth 1988, no writ) (support).

347. See *In re Joiner*, 755 S.W.2d at 500.

348. *McKnight v. McKnight*, 543 S.W.2d 863 (Tex. 1976); *LeBlanc v. LeBlanc*, 761 S.W.2d 450, 453 (Tex. App.—Corpus Christi 1988, no writ); *Rogers v. Rogers*, 754 S.W.2d 236, 242 (Tex. App.—Houston [1st Dist.] 1988, no writ).

349. *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985); *In re Joiner*, 755 S.W.2d at 498.

350. *Rogers v. Rogers*, 754 S.W.2d 236, 241 (Tex. App. Houston [1st Dist.] 1988, no writ).

situations arose in two recent cases. In *Seibert v. Seibert*<sup>351</sup> the divorce-court purported to divide property belonging to third persons, a fact known to one of the parties and their mutual attorney but not to the judge. On appeal, the appellate court, therefore, found error in the division and remanded the case for a new division.<sup>352</sup> The situation in *Crumley v. Crumley*<sup>353</sup> was somewhat different. Both spouses believed that certain real property was unencumbered and worth \$45,000 whereas the property was actually encumbered by a coal lease granted by a predecessor in title and was worth \$25,000. The court awarded the property to the wife on the basis of the mistaken valuation<sup>354</sup> and she later sued her ex-husband for damages suffered when she subsequently sold the land. The ex-husband under the same misapprehension as to the value of the land, discharged all of his obligations under the divorce decree. Moreover, the ex-wife did not seek to set aside the decree, and a court would not have done. Furthermore, the ex-wife could not rectify the situation under provisions of the Family Code providing for a clarification of the decree<sup>355</sup> or a division of undivided property.<sup>356</sup> But if the spouses had entered into a property-settlement-agreement or had entered an agreed judgment based on a similar mutual mistake, the court could reform the decree.<sup>357</sup>

*Effect of Bankruptcy.* Although the terms of a property division provided in a settlement agreement are subject to discharge in bankruptcy,<sup>358</sup> a judgment for necessities supplied to a child survive discharge. In *In re Boyd*<sup>359</sup> the former husband recovered a judgment against his former wife for necessities he supplied to their child. In her subsequent bankruptcy, he argued that the Bankruptcy Code<sup>360</sup> protects his claim from discharge and the court sustained his position.<sup>361</sup> The same result should be reached with respect to a debt for necessities supplied to a spouse.

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351. 759 S.W.2d 768 (Tex. App.—El Paso 1988, no writ).

352. *Id.* at 770.

353. 753 S.W.2d 417 (Tex. App.—Texarkana 1988, writ denied).

354. *Id.* at 418.

355. TEX. FAM. CODE ANN. § 3.72 (Vernon Supp. 1989).

356. *Id.*

357. See *Allen v. Allen*, 717 S.W.2d 311 (Tex. 1986), discussed in McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 41 Sw. L.J. 1, 29-30 (1987).

358. See *Roberts v. Poole*, 80 Bankr. 81 (N.D. Tex. 1987); see also *supra* note 301 and accompanying text.

359. 93 Bankr. 538 (S.D. Tex. 1988).

360. 11 U.S.C. s 523(a)(5) (Supp. II 1984).

361. 93 Bankr. at 539.