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FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight*

I. STATUS

INFORMAL marriage. From time to time a lawyer-legislator who loses a case will feel so strongly about the rightness of his client's cause that he will introduce a measure to change the offending law. Thus, counsel for the unsuccessful party felt that the conclusion reached by the Texas Supreme Court in *Estate of Claveria v. Claveria*¹ was so outrageous that the doctrine of informal marriage should be abolished. Many have criticized the application of the law in *Claveria*,² but most consider the abolition of the principle of informal marriage too extreme a reaction. At the last regular session of the legislature the losing counsel in *Claveria* proposed a bill to abolish the doctrine. The House of Representatives voted 72 to 62 in favor of the bill, but sensing that outright abolition would be unacceptable to the Senate, the sponsor of the House bill appended a less extreme proposal to the omnibus bill of Family Code amendments. Both houses of the legislature then acceded to that significant tightening of the law of informal marriage by repealing that part of section 1.91 allowing a trial court to infer the agreement to marry if the other two elements of an informal marriage are proved.

An informal marriage is usually asserted by a surviving party of a relationship who seeks the benefits of marriage or by a party to an existing relationship who seeks the division of the profits of marriage on divorce. In *Claveria* the doctrine was asserted defensively. The heirs of a deceased wife of a ceremonial marriage asserted that their mother's marriage was invalid because her surviving husband married the decedent while married informally to someone else. Counsel supported the assertion that the survivor was married informally at the time of his ceremonial marriage to the decedent by showing his cohabitation with another woman and two instances of the man's holding her out as his wife: once in a deposition given during the period of cohabitation and later in an instrument executed by both cohabitants as husband and wife. At the *Claveria* trial, however, both the survivor and his alleged informal wife testified that they had not been married. Apparently neither side of the dispute chose to make a full inquiry into all the

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1. 615 S.W.2d 164 (Tex. 1981).

2. See, e.g., McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 40 Sw. L.J. 1-2 (1986); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 34 Sw. L.J. 115 (1980).

facts of the alleged informal marriage. The trial court found that a valid informal marriage existed and was admittedly undissolved; hence the subsequent ceremonial marriage was invalid. The intermediate appellate court concluded, however, that the informal marriage had not been adequately proved. On writ of error to the Supreme Court of Texas, the court reinstated the trial court's inference of an agreement to be married in spite of the direct testimony of the participants that they had never married. Under the circumstances the trier of fact might have rejected the cohabitants' self-serving testimony as untruthful, but to hold that an inference of agreement could be arrived at without such an explanation made the Supreme Court's opinion hard to accept. The court's handling of the evidence suggested to some that a trial court might infer an informal marriage on the basis of cohabitation and holding out even when both parties deny the existence of an agreement.

Rather than abolishing the doctrine of informal marriage as had been proposed on numerous occasions in the past, the legislature tightened the rules for reliance on the doctrine by repealing the provision that allowed a court to infer an agreement to be married from proof of cohabitation and holding-out. This amendment, therefore, raises the question of how the elements of agreement may hereafter be proved.

In the future one of two basic fact patterns will develop depending on whether both parties are living. If both parties to the alleged informal marriage are alive, one of them will commonly deny the agreement. When the other party to the alleged informal union offers direct evidence of an express agreement to be presently married, the trier of fact will be required to weigh the testimony in the context of other evidence of the relationship. If one of the parties is dead, the survivor will be required to meet the limitation imposed by Evidence Rule 601(b)³ by providing corroboration of an alleged transaction with the decedent. Under most circumstances the proponent of the marriage will have an easier case in the latter instance unless there is convincing evidence that the decedent denied the existence of the agreement.⁴ If evidence of an express agreement to marry is not offered, the fact finder will have to treat the facts of cohabitation and holding-out as circumstantial evidence of the agreement in order to find a tacit agreement to be married. This process is, however, virtually identical to the prior process of inference. But by repealing the provision authorizing the fact-finder to infer an agreement from proof of two elements of an informal marriage, the legislature has not excluded a finding of a tacit agreement to be married. In making such a finding, however, it seems that the evidence of holding-out must be more convincing than before the 1989 amendment.

In a society in which non-marital cohabitation for extended periods of time is far more common than it once was, the fact-finder will have to weigh

3. TEX. R. CIV. EVID. 601(b).

4. Evidence that the decedent had said that he was not married and filed a separate income tax return was not sufficient to deter the statutory inference in *In re Estate of Giessell*, 734 S.W.2d 27 (Tex. App.—Houston [1st Dist.] 1988, writ ref'd n.r.e.).

the evidence of a tacit agreement more carefully than in the past. As the statute now stands, an occasional uncontradicted reference to a cohabitant as "my wife" or "my husband" or "mine" will not prove a tacit agreement to be married without corroboration. Such a reference by the contestant of the union will, of course, be stronger evidence of an agreement than such a statement by the proponent. The non-social context of the contestant's reference to the proponent as his "wife" or her "husband" will also receive closer scrutiny. If the statement is made in a self-serving context,⁵ the fact-finder may be expected to disbelieve the truth of the statement. A forthright assertion of marriage with the consequence of liability (as when an alleged spouse seeks admission of the other to a hospital)⁶ may, on the other hand be far more probative of a tacit agreement to be married.

Under section 1.91 as it now stands, the fact-finder will also tend to give greater weight to testimony indicating the state of mind of either party that a marriage did not exist during the period of cohabitation. Hence, if either cohabitant stated that the couple planned to get married at a future time the non-existence of a subsisting marriage is suggested. But such a conclusion does not necessarily follow. The speaker's reference may be to a subsequent ceremonial marriage for the benefit of family members, although the couple already consider themselves married.⁷ During the 1960s and 1970s, but perhaps less commonly today, some couples rejected the notion of ceremonial marriage and knowingly asserted an informal marriage. If such a relationship is shown, it seems unlikely that the fact-finder would reject such evidence of an informal marriage.

In amending section 1.91 the legislature added a new subsection providing that "[a] proceeding in which a marriage is to be proved under this section, must be commenced not later than one year after the date on which the relationship ended or not later than one year after September 1, 1989."⁸ The word "relationship" in this context must mean *cohabital relationship* rather than marital relationship. If the couple had previously recorded their infor-

5. A deponent's reference to his marital situation in order to show his stable family relationship and thus to bolster his veracity is another example. Lenders are frequently more willing to make a loan to a couple than to a single person. Thus asserting a marriage in such an instance may be regarded as essentially self-serving.

6. But the proponent's listing of her divorced husband as her spouse in an application for admission to a hospital would not have much, if any, probative force in proving an informal marriage. See *Warren v. Secretary of Health and Human Services*, 868 F.2d 1444, 1446 (5th Cir. 1989). Other evidence offered by the proponent in that case is not specified.

7. See *Tompkins v. State*, 774 S.W.2d 195, 209 (Tex. Crim. App. 1987, en banc). The precise evidence of agreement in this case is not specified. The most unusual aspect of the case is that the court treated cohabitation as husband and wife and an agreement to be presently married as proved. Holding-out, however, was not proved. *Id.* At the time of the trial TEX. CRIM. PROP. CODE ANN. art. 38.11 (Vernon 1979) generally allowed the prisoner to assert a privilege against spousal testimony contrary to his position, hence the concern for proving an informal marriage. Under TEX. R. CRIM. EVID. 504(2)(a), which replaced art. 38.11 on September 1, 1986, a spouse can be compelled to testify in crimes against members of either spouse's household except when the crime is committed against the spouse. See *Fuentes v. State*, 775 S.W.2d 64, 65-67 (Tex. App.—Houston [1st Dist.] 1989, no writ).

8. TEX. FAM. CODE ANN. § 1.91(b) (Vernon Supp. 1990). The comma between the words "section" and "must" is a typographical error in the enactment.

mal marriage under sections 1.92, 1.93 and 1.94,⁹ however, the marriage would not be provable *merely* "under this section" but under sections 1.92 through 1.94, compliance with which renders the sworn assertions prima facie evidence of the marriage.¹⁰

If a party alleges an informal marriage in a petition for divorce, an award of temporary alimony may be granted in the discretion of the trial judge pending a determination of the validity of the marriage, although the validity of the union is questioned.¹¹ If validity is set for determination and that issue alone is affirmatively resolved, such a conclusion is interlocutory and not then subject to appeal.¹²

Annulment. At its 1989 regular session the legislature also added a new subsection to section 2.48¹³ enacted in 1978 to complement the provision of section 1.82(c),¹⁴ which provides that a ceremonial marriage may not be conducted within seventy-two hours of the issuance of the marriage license. As provided in 1989, a suit to avoid a marriage entered into in violation of section 2.48(a) must be brought not more than thirty days after the ceremony. If the parties chose to enter into an informal marriage within seventy-two hours of receiving a license to be married ceremonially, they are free to do so. Such a marriage is clearly not subject to the strictures of either section 1.82 or 2.48.

Ground for Divorce. Once an informal marriage is established it has all the effects of a ceremonial marriage. Texas law also does not distinguish between a civil and religious ceremonial marriage. Although various arguments have been unsuccessfully advanced to defeat the applicability of the insupportability ground¹⁵ for divorce, no inroad has been made in favor of establishing that one type of marriage is more indissoluble than another. It has been frivolously asserted, for example, that a Christian marriage solemnized by a religious ceremony is immune from attack except on Biblical grounds.¹⁶ In *Zetune v. Jajif-Zetune*,¹⁷ Mexican nationals had been civilly married in Mexico and subsequently entered into a Jewish religious ceremony. In her petition for divorce the wife merely alleged the date of the Jewish marriage, and the divorce was granted. The husband attacked the

9. TEX. FAM. CODE ANN. §§ 1.92-1.94 (Vernon 1975).

10. See McKnight, TEXAS FAMILY CODE SYMPOSIUM, 13 TEX. TECH L. REV. 651 (1982).

11. See *Garduno v. Garduno*, 760 S.W.2d 735, 742 (Tex. App.—Corpus Christi 1988, no writ).

12. *Winfield v. Daggett*, 775 S.W.2d 431, 433 (Tex. App.—Houston [1st Dist.] 1989, no writ). For an instance in which the divorce-petitioner asserted an informal marriage but later moved for a nonsuit after the respondent asserted claims for affirmative relief including sanctions for frivolous pleadings, see *Page v. Page*, 780 S.W.2d 1, 2-3 (Tex. App.—Fort Worth 1989, no writ).

13. TEX. FAM. CODE ANN. § 2.48(b) (Vernon Supp. 1990).

14. *Id.* § 1.82(c).

15. *Id.* § 3.01.

16. *Trickey v. Trickey*, 642 S.W.2d 47, 50 (Tex. App.—Fort Worth 1982, no writ). See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 SW. L.J. 131, 135-36 (1984).

17. 774 S.W.2d 387 (Tex. App.—Dallas 1989, no writ).

decree on the ground that it purported to dissolve only the religious marriage and failed to address the prior and effective civil marriage.¹⁸ The appellate court brushed this argument aside with the comment that the trial court dissolved the *marital relationship*, not a particular ceremony.¹⁹

Although it is somewhat unusual for a spouse to rely on a fault ground for divorce, such reliance still occurs and must be supported by pleading of the ground.²⁰ Hence, if the fault ground is not plead but the issue is raised by the evidence, the pleadings require a trial amendment.²¹ A trial by consent will not be implied by failure to object to the testimony if an objection to submission of the issue fails because of lack of support in the pleadings.²²

Emotional Distress. In *Chiles v. Chiles*²³ the intermediate appellate court held that Texas law does not recognize a cause of action for emotional distress coupled with a suit for divorce. The court justified its refusal to allow such a recovery by noting that permitting an award of damages for such a cause "would result in evils similar to those avoided by the legislature's abrogation of fault as a ground of divorce."²⁴ While the court did not identify those evils and did not seem to be aware that the legislature had not abrogated fault as a ground for divorce in Texas, the lack of a cause of action for infliction of purely emotional distress between spouses is certainly consistent with the legislative abrogation of recovery by one spouse for alienation of affection by a third party²⁵ because the free will of the other spouse is generally deemed a fundamental element in the process of alienation.

Intercepted Evidence. In finding reversible error for the use of wiretapped evidence, the Dallas court of appeals declined²⁶ to follow *Simpson v. Simpson*,²⁷ where the federal court found an exception to the federal anti-wiretap statute²⁸ in the case of an interspousal wiretap on a residential telephone. In refusing to grant a writ of error the Texas Supreme Court made it plain that it left open the question of admissibility of intercepted evidence in such situations.

18. In Mexico a civil marriage is required. A subsequent religious marriage may be entered into but is superfluous for civil purposes. A religious marriage standing alone is ineffective for civil purposes.

19. *Zetune*, 774 S.W.2d at 389.

20. *Hirsch v. Hirsch*, 770 S.W.2d 924, 926 (Tex. App.—El Paso 1989, no writ).

21. TEX. R. CIV. P. 66-67.

22. *Hirsch*, 770 S.W.2d at 926.

23. 779 S.W.2d 127, 131 (Tex. App.—Houston [14th Dist.] 1989, writ granted).

24. *Id.* at 131.

25. Although the legislature abolished a cause of action for alienation of affection as of September 1, 1987, TEX. FAM. CODE ANN. § 4.05 (Vernon Supp. 1990), the court held in *Turner v. PV Internat'l Corp.*, 765 S.W.2d 455, 467-68 (Tex. App.—Dallas 1989, no writ), that the statute of limitation for recovery of damages for an already vested cause of action for alienation of affection runs for two years from the discovery of the cause of action. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986).

26. *Turner v. PV Int'l Corp.*, 765 S.W.2d 455, 470 (Tex. App.—Dallas 1989, writ ref'd n.r.e., sub nom. *PV Int'l Corp. v. Turner*, 700 S.W.2d 21, 24 (Tex. 1989)).

27. 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974), commented on in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 107 (1977).

28. 18 U.S.C. § 2515 (1988).

In *Fabian v. Fabian*²⁹ in an effort to avoid the barrier of *Simpson* in the appeal of a divorce case, the wife objected to evidence derived from intercepted messages on a residential telephone, stating that the planting of a wiretap is criminal under Texas law.³⁰ The trial court, however, refused to admit evidence that the husband had obtained solely on the basis of the wiretap. On the state of the record before it, the appellate court found no evidence that the trial court admitted that caused the rendition of an improper judgment.

II. CHARACTERIZATION

Premarital and Marital Partitions. After the amendment of article XVI, section 15 of the Texas Constitution³¹ in 1980 to allow premarital and marital partitions of future acquisitions of community property, the legislature provided statutory implementation of the amendment to take effect on September 1, 1981. Section 5.45³² required the proponent of a partition to demonstrate its validity "by clear and convincing evidence that the other party against whom enforcement of the agreement is sought gave informed consent [to the transaction] and that the agreement was not procured by fraud, duress, or overreaching."³³ This burden of proof proved to be unduly arduous for proponents of partitions. To dispose of this rule, the Uniform Premarital Agreement Act was enacted in 1987 along with additional provisions to cover marital partitions.

Under the new provisions for enforcement of premarital and marital partitions,³⁴ the burden of proof of invalidity is put upon the *contestant*, who may rely on either of two grounds in proving the invalidity of the partition. First, he or she may demonstrate mere lack of volition in making the partition. If it is conceded that the partition was entered into voluntarily, the contestant may attack the partition on a second ground which has two elements: (1) that the complainant lacked adequate knowledge of the other party's financial situation and did not waive receipt of that information in writing and (2) that the partition was unconscionable when executed. The disclosure element is a matter of fact. The element of unconscionability is a matter of law but is not defined. The 1987 act³⁵ provides that its terms become effective on September 1, 1987 but does not specify whether it is to apply to contests concerning partitions entered into prior to that date. The Texas Supreme Court defined general policy with regard to this sort of problem in

29. 765 S.W.2d 516 (Tex. App.—Austin 1989, no writ).

30. TEX. PENAL CODE ANN. § 16.02 (Vernon Supp. 1990). Cf. *Kotrla v. Kotrla*, 718 S.W.2d 853, 855 (Tex. App.—Corpus Christi 1986 (writ ref'd n.r.e.) (husband's tape-recorded conversation with wife not admissible under the Texas interception statute); TEX. CIV. PRAC. & REM. CODE ANN. § 123.002 (Vernon 1986).

31. TEX. CONST. art. XVI, § 15.

32. 1981 TEX. GEN. LAWS 2964, 2964-65, ch. 782, § 2.

33. *Id.*

34. TEX. FAM. CODE ANN. §§ 5.46 (premarital partitions), 5.55 (marital partitions) (Vernon Supp. 1990).

35. 1987 TEX. GEN. LAWS 2530, 2533 ch. 678, § 3.

*Wesseley Energy Corp. v. Jennings*³⁶ in saying that "[t]he law existing at the time a contract is made becomes a part of the contract and governs the transaction."³⁷ The court also stated in a per curiam opinion in *Sadler v. Sadler*³⁸ that it was inappropriate to apply the 1987 act to a marital partition in that case because *at the time of trial and entry of judgment* the 1981 statute was still in effect.³⁹ In two subsequent cases—one dealing with a marital partition⁴⁰ and the other dealing with a premarital partition⁴¹—courts of appeal followed the literal language of *Sadler* and applied the statute in effect at the date of the trial. Although the burden of proof provisions of sections 5.46 and 5.55 may be described as procedural rules that ordinarily apply to the conduct of suits brought after the enactment of procedural reforms,⁴² their effect is decidedly substantive. As such, under the rule of the *Wesseley* case the law in force when the transaction occurred would seem properly applicable. This point is accentuated by the fact that a partition may be more likened to a conveyance than to a mere contract. What was said in *Sadler*, somewhat offhandedly, may have merely meant that the law in effect at the trial should have been applied in that case, because it was the law in effect when the marital partition was executed.

With one judge dissenting, the court in *Daniel v. Daniel*⁴³ adopted the argument that there are other general defenses to the fundamental validity of marital partitions besides those specifically enumerated in the statute. If such defenses exist, they are equally applicable to premarital partitions. On its face, however, the defenses provided in the statute seem to be exclusive.

A Louisiana bankruptcy court produced a useful precedent in relation to the argument that a marital partition made when a spouse is in financial difficulty may be a fraudulent transfer. The court held that such a transaction is, not necessarily per se fraudulent.⁴⁴ This decision complements the earlier Florida federal court's conclusion that a conveyance pursuant to a premarital agreement does not necessarily constitute a fraudulent transfer.⁴⁵

The federal Tax Court has provided a peculiarly mistaken gloss of the

36. 736 S.W.2d 624, 626 (Tex. 1987). This case dealt with the validity of a contract and conveyance made by the wife alone at a time when the statute required her husband's joinder in such a transaction. The court held that the statute would have controlled the matter before it but for the unconstitutionality of the statute. The point is reiterated in the context of a constitutional amendment's not affecting a situation occurring prior to the adoption of the amendment in Op. Tex. Att'y Gen. No. JM-991 (1988).

37. 736 S.W.2d at 626.

38. 769 S.W.2d 886 (Tex. 1989).

39. *Id.*

40. *Daniel v. Daniel*, 779 S.W.2d 110, 114 (Tex. App.—Houston [1st Dist.] 1989, no writ).

41. *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ granted).

42. *Daniel v. Daniel*, 779 S.W.2d 110, 114 (Tex. App.—Houston [1st Dist.] 1989, no writ).

43. *Id.* at 114.

44. *In re Pietri*, 14 C.B.C. 2d Ser. 651, 655 (Bankr. Ct., M.D. La. 1986).

45. *Miele v. United States*, 637 F. Supp. 998, 1000 (S.D. Fla. 1986).

property settlement⁴⁶ and marital partition⁴⁷ statutes. In *Abram v. Commissioner of Internal Revenue*,⁴⁸ the court held that a spousal agreement to separate constitutes an agreement to partition community property. Such a conclusion is wholly unwarranted.

Inception of Title Rule. The Texas Constitution⁴⁹ makes it clear that property acquired by a spouse prior to marriage is that spouse's separate property. Although property on hand "on dissolution of marriage is presumed to be community property,"⁵⁰ the presumption is rebutted by a showing that particular property was a premarital acquisition. In *Dawson v. Dawson*,⁵¹ both spouses testified that certain property had been purchased by the husband under a contract for deed prior to marriage. The seller conveyed the property to both spouses during marriage after substantial payments were made with community property. Once the husband proved that he entered the contract of purchase prior to marriage, the court held that the property was the husband's separate property.⁵² Because the property was the husband's separate estate, a further burden, overlooked by the court, fell upon the husband to account for the title in the names of both spouses. This burden arose because there is a presumption of gift of one-half of the property when separate property is conveyed to both spouses.⁵³

The continuing personal service contract, sometimes extending over a period prior to marriage, during marriage and following dissolution of marriage by divorce or death of the other spouse, presents some difficult questions in relation to the inception of title rule. It is fundamental to this analysis that the subject matter is a personal contract by which an individual agrees to render services over a period of time in return for compensation. The chose in action created by the contract is personal to the contractor and personally enforceable. Liability for breach is also personal, although recovery may be had from either separate or community assets. Compensation for services received by the contractor is separate property if the services are rendered when the contractor is single; compensation is community property if the services are performed during marriage.⁵⁴ If the compensation agreed to while the contractor is single is to be paid by a conveyance of particular property, that property is characterized as separate property,⁵⁵ even though the services are yet to be performed and the transfer of title may not occur

46. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1990).

47. *Id.* § 5.55.

48. USTC ¶ 1989-462, 15 F.L.R. 1529 (1989).

49. TEX. CONST. art. XVI, § 15.

50. TEX. FAM. CODE ANN. § 5.02 (Vernon Supp. 1990). The spouse asserting a separate property interest has the burden of overcoming the community presumption. See *Hudson v. Hudson*, 763 S.W.2d 603, 605-06 (Tex. App.—Fort Worth 1989, no writ).

51. 767 S.W.2d 949 (Tex. App.—Beaumont 1989, no writ).

52. *Id.* at 951.

53. *Cockerham v. Cockerham*, 527 S.W.2d 162, 167-68 (Tex. 1975); *Smith v. Strahan*, 16 Tex. 314, 320-21 (1856).

54. *In re Joiner*, 766 S.W.2d 263, 264 (Tex. App.—Amarillo 1988, no writ).

55. *Welder v. Lambert*, 91 Tex. 510, 520, 526, 44 S.W. 281, 284 (1898); *Evans v. Ingram*, 288 S.W. 494, 495 (Tex. Civ. App.—Waco 1926, no writ); *Bishop v. Williams*, 223 S.W. 512, 515 (Tex. Civ. App.—Austin 1920, writ ref'd).

until a later time, perhaps while the contractor is married.⁵⁶ Similarly, if a particular property is contracted for during marriage but is to be paid for by the performance of services, the property accedes to the contract when the contract is made and is community property even though the services rendered may be performed after the marriage has been dissolved.⁵⁷

Funds in an employee's pension or retirement trust may be accumulated over a number of years. These funds may be attributable to compensation earned while the employee was both married and single. When ultimately received, the pension is treated as deferred compensation and is prorated between the separate and community estates on a proportional basis depending on the length of time the employee earned the funds when married or single.⁵⁸

In the case of a recovery for personal injury that is compensation for loss of earnings, the recovery is characterized as separate or community depending on whether the employee was single or married when the loss occurred. Earnings lost while single are separate property, and those lost while married are community property.⁵⁹ Recovery for pain and suffering is, on the other hand, separate property regardless of the marital status of the recipient.⁶⁰ When a spouse suffers personal injury during marriage and recovery is not achieved until after the marriage is dissolved, there is a question with respect to which former spouse has the burden of demonstrating these diverse property interests. The situation is analogous to that of undivided pension trust benefits enhanced after divorce. In a carefully reasoned decision,⁶¹ Chief Justice Guittard of the Dallas court concluded that the employee-former spouse should bear the burden of distinguishing between the separate and community elements of the recovery because he was the cotenant in charge of the asset and thus had access to the facts necessary to demonstrate the separate part of the property claimed as his own. In *Berry v. Berry*⁶² the Texas Supreme Court seemed to confirm this burden of proof. Most recently, in *Moreno v. Alejanero*,⁶³ a personal injury award left undivided on divorce was at issue. The court put the burden of demonstrating the com-

56. *Id.* See also *Carter v. Carter*, 736 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1987, no writ) (character of title as separate or community depends upon date of inception of title); *Roach v. Roach*, 672 S.W.2d 524, 531 (Tex. App.—Amarillo 1984, no writ) (origin or inception of title occurs when party has right or claim to property by which title is finally vested); *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 731a (Tex. Civ. App.—Houston [1st Dist.] 1981 no writ) (the character of property as separate or community is determined at time of inception of title).

57. *Gulf Oil Corp. v. Shell Oil Co.*, 410 S.W.2d 260, 263 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.).

58. *Berry v. Berry*, 647 S.W.2d 945, 948 (Tex. 1983); *Taggart v. Taggart*, 552 S.W.2d 422, 424 (Tex. 1977); *Busby v. Busby*, 457 S.W.2d 551, 552, 554 (Tex. 1970).

59. TEX. FAM. CODE ANN. § 5.01(c) (Vernon 1975); *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972); *Hicks v. Hicks*, 546 S.W.2d 71, 73-74 (Tex. Civ. App.—Dallas 1977, no writ) (worker's compensation benefits).

60. *Graham v. Franco*, 488 S.W.2d 390, 393 (Tex. 1972).

61. *Dessommes v. Dessommes*, 505 S.W.2d 673, 679 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

62. 647 S.W.2d 945 (Tex. 1983).

63. 775 S.W.2d 735 (Tex. App.—San Antonio 1989, writ denied).

munity element on the injured spouse who received the recovery. Although the community presumption is inapplicable because the marriage had long since terminated and community property, as such, no longer existed, the ex-spouse who had control of the common fund should bear the burden of showing which part of it was his own.

Interest in Business Entities. In *Harris v. Harris*⁶⁴ the attorney-husband owned a separate interest in a professional partnership prior to marriage. The partnership owned a contingent-fee interest in the outcome of a client's litigation. The fee-contract was, therefore, partnership property and not marital property.⁶⁵ During the marriage, by agreement of the partners, the partnership clarified the shares of the partners in the contingent-fee interest. The court concluded that the husband's share in the contingent fee, so defined, related back to the acquisition of the contingent fee.⁶⁶ Thus, when the contingent-fee proceeds were divided among the partners, the husband took his share as separate property.⁶⁷ The court therefore treated the distribution of partnership funds as a partial liquidation of the partnership.⁶⁸ If uncompensated time had been spent on the contingent matter, the community might have claimed reimbursement for that time.⁶⁹ But because the partner-husband's share in the proceeds of the partnership was not affected by his time spent on the contingent matter, the community had no entitlement to reimbursement.⁷⁰

Tracing. In *Martin v. Martin*⁷¹ the husband owned two lots as his separate property and acquired a third lot during marriage as community property. All three lots were sold in 1983 for \$100,000. The husband died in 1985. No evidence suggested how much of the purchase price the buyer allocated to each lot. A real estate appraiser testified that the lots together were worth \$395,000 and that the community lot was worth \$350,000 in 1987 but that the value of the lots had not changed appreciably since the sale in 1983. The court concluded⁷² that the evidence failed to show clearly and convincingly the sales price of the separate lots, and hence the community presumption prevailed with respect to the proceeds of sale on hand at the husband's death.

Reimbursement. In *Martin v. Martin*⁷³ the court also considered a claim for reimbursement on the part of the community for discharging a separate

64. 765 S.W.2d 798 (Tex. App.—Houston [14th Dist.] 1989, no writ).

65. *Id.* at 802.

66. *Id.* at 803-04.

67. *Id.* at 804.

68. See Akers, *Community and Separate Property Characterization of Closely Held Corporate Stocks in Texas*, 14 COMM. PROP. J. 9, 39 (1987).

69. See Jensen v. Jensen, 665 S.W.2d 107, 110 (Tex. 1984).

70. 765 S.W.2d at 805-06. "While several documents relevant to the payment and distribution of the fee suggest to us a correlation between the time expended on the case and allocation of profit, no evidence that [the husband's] interest was tied to his performance on the case was introduced." *Id.* at 806.

71. 759 S.W.2d 463 (Tex. App.—Houston [1st Dist.] 1988, no writ).

72. *Id.* at 466-67.

73. 759 S.W.2d 463 (Tex. App.—Houston [1st Dist.] 1988, no writ).

debt on the wife's separate property.⁷⁴ The court concluded that the realization of such a claim did not depend on showing enhancement in the value of the separate property.⁷⁵ The court also alluded to the dubious "net-operations" approach by which a successful claim for interest, taxes, and insurance can not be asserted unless it is shown that expenditures by the community are greater than benefits received.⁷⁶ Because the community estate has an absolute right to the produce of separate property, it is difficult to understand why a netting-out approach is made with respect to profits in one instance but not the other. The court, however, remanded the claim for further findings of fact because the testimony addressed was insufficient to sustain the claim.

Retirement Benefits. On two occasions the Supreme Court of Texas has considered the extent of a community interest of a non-pensioner spouse in retirement benefits of the pensioner spouse when the non-pensioner dies first. In *Allard v. Frech*⁷⁷ the court held that when no provision is made concerning the right of the non-pensioner in a private retirement plan, the non-pensioner's community interest in the plan subsists after the non-pensioner's death. In *Valdez v. Ramirez*⁷⁸ the court held that for a federal Civil Service retirement plan, if the pensioner-spouse discharges her powers of sole management of the community interest in the plan by making a choice of survivorship benefits in the interest of the non-pensioner, but the non-pensioner died first, the non-pensioner's benefits in the plan terminated. In *Hoppe v. Godeke*⁷⁹ the Austin Court of Appeals dealt with a case of federal Civil Service retirement plan that had been the subject of a property settlement agreement on divorce. The agreement provided that the pensioner-husband retained all interest in his retirement benefits except a portion of the annuity payments and a former-spouse's survival annuity. The court therefore construed the agreement as meaning that the interests retained by the non-pensioner did not include her share of the benefits of her ex-husband in the event she should predecease him.⁸⁰

Agreement for Survivorship to Community Property. At the 1989 regular legislative session, the legislature enacted statutes⁸¹ to regulate and clarify the process of making and enforcing written agreements between spouses regarding the right of survivorship to community property pursuant to the constitutional amendment of 1987.⁸² Although some interpretative commentary on the constitutional provision and these statutes has begun to ap-

74. For comments on a similar situation dealing with community payment of an indebtedness on the husband's separate property, see *Dawson v. Dawson*, 767 S.W.2d 949, 951-52 (Tex. App.—Beaumont 1989, no writ) (Brookshire, J, concurring).

75. 759 S.W.2d at 465.

76. *Id.*

77. 754 S.W.2d 111 (Tex. 1989), *cert. denied*, 109 S. Ct. 788, 102 L. Ed. 2d 779 (1989).

78. 574 S.W.2d 748 (Tex. 1978).

79. 774 S.W.2d 368 (Tex. App.—Austin 1989, no writ).

80. *Id.* at 371.

81. TEX. PROB. CODE ANN. §§ 451-462 (Vernon Supp. 1990).

82. TEX. CONST. art. XVI, § 15.

pear,⁸³ no appellate decision has yet dealt with the subject.

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

Solely and Jointly Managed Community Property. In a criminal case⁸⁴ the prisoner-husband moved to suppress certain evidence acquired by the prosecution as a result of a warrantless search of the community home to which the police were given access by the prisoner's estranged wife. Relying on section 5.22(c),⁸⁵ the court argued that the community premises were subject to joint management of the spouses and hence that one spouse acting alone might give consent to search the home.⁸⁶ In accepting the first element of that argument, the court failed to appreciate the significance of the exception embodied in the statute:

Except as provided in subsection (a), the community property is subject to the joint management . . . of the husband and wife, unless the spouses provide otherwise by . . . agreement.⁸⁷

Hence, without a showing that subsection (a) does not apply, subsection (c) is not operative. But even if the premises had been subject to joint management, joint management means *acting in concert*, not singly. Although the wife's possession of a key to the house suggested an agreement of sole access on her part, the fact that the wife had removed all of her possessions from the house further suggested a subsequent tacit understanding that she had relinquished sole access to her husband. In spite of this initial misapplication of community property doctrine to a non-marital property dispute, however, in suppressing the evidence the court looked to the prisoner's individual right of privacy rather than prosecution arguments based on property rights.⁸⁸

Community Survivor. Prior to the appointment of an administrator of a deceased wife's estate, her surviving husband collected unpaid wages due his wife by her employer. After the administrator was appointed, he brought suit against the employer for the amount already paid. The court held⁸⁹ that payment to the surviving spouse prior to appointment of the personal representative was proper under section 160 of the Probate Code.⁹⁰ The employer therefore had no liability to the administrator.

Doctrine of Equitable Election. The doctrine of equitable election arises as

83. See Henkel, *Community Property with Right of Survivorship*, 28 STATE BAR OF TEXAS REAL ESTATE, PROBATE AND TRUST BAR NEWSLETTER 24 (no. 2, Jan. 1990); Schlueter, *Community Property Survivorship Agreements under Texas Law: A Modern Cure with Potentially Dangerous Side Effects* 1 COMMUNITY PROPERTY ALERT 1 (No. 6, Sept. 1989).

84. *May v. State*, 780 S.W.2d 866 (Tex. App.—Dallas 1989, no writ).

85. TEX. FAM. CODE ANN. § 5.22(c) (Vernon 1975). See also *Caulley v. Caulley*, 777 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1989, no writ) (In the absence of evidence that community property is subject to the wife's sole management, property is deemed to be jointly managed.).

86. *May*, 780 S.W.2d at 869.

87. TEX. FAM. CODE ANN. § 5.22(c) (Vernon 1975).

88. *May*, 780 S.W.2d at 870.

89. *Nelson v. Dallas Independent School District*, 774 S.W.2d 380, 382-83 (Tex. App.—Dallas 1989, no writ).

90. TEX. PROB. CODE ANN. § 160 (Vernon 1980).

a consequence of an implied conditional testamentary devise or bequest. When a testator disposes of certain property to a beneficiary and also disposes of property owned by that beneficiary in favor of another person, the beneficiary must choose between the benefit provided by the testator and his own property which the testator purported to dispose of as his own. The benefit provided by the testator to the legatee is therefore conditioned on relinquishment of the legatee's right to the other property by allowing it to pass as directed by the testator.⁹¹ Thus, the Texas Supreme Court held in 1951⁹² that when the husband-testator provided that his interest in the community homestead should pass to his wife and daughter "share and share alike," his widow received a benefit but at the same time was deprived of *sole* occupancy to which she was entitled as a surviving spouse. The widow was therefore put to an election between those rights. Similarly, in *Churchill v. Churchill*⁹³ the Fort Worth Court of Appeals held that a widow might be put to an election between benefits provided in her husband's will and a clearly expressed intention that she be deprived of her statutory right to a widow's allowance.⁹⁴ In this instance, however, the court found that the testator's intention to deprive his widow of an allowance was not clearly shown.⁹⁵ With one judge dissenting, the court also held that by promptly giving away her separate property, which would have been considered in her claim of an allowance, the widow did not forfeit her right to the allowance, because the property disposed of would not have been sufficient to provide for her maintenance.⁹⁶ But the fact that a party's separate property is insufficient for her maintenance does not excuse a court's consideration of its value in fixing the allowance.

Spousal Agency. Spousal agency and related topics of spousal liability and wives' contractual capacity have long plagued Texas law. With the recognition of full contractual capacity of married women in 1963⁹⁷ and the redefinition of community property liability in 1967,⁹⁸ many hoped that the confusion of the law would be dispelled, but, it only seems to have been abated. Misapprehension of the rules of management and liability of community property became so widespread⁹⁹ that it was necessary to enact sec-

91. *Wright v. Wright*, 154 Tex. 138, 147, 274 S.W.2d 670, 676-77 (1955).

92. *Miller v. Miller*, 149 Tex. 543, 546-50, 235 S.W.2d 624, 626-628 (1951). See *Akers, Community and Separate Property Characterization of Closely Held Corporate Stocks in Texas*, 14 COMM. PROP. J. 9, 28-29 (1987).

93. 780 S.W.2d 913, 915 (Tex. App.—Fort Worth 1989, no writ).

94. See *Lindsley v. Lindsley*, 139 Tex. 512, 519-22, 163 S.W.2d 633, 637 (1942).

95. Cf. *Trousdale v. Trousdale*, 35 Tex. 746 (1872).

96. *Churchill*, 780 S.W.2d at 916.

97. 1963 TEX. GEN. LAWS 1188, ch. 472, § 6.

98. 1967 TEX. GEN. LAWS 739, ch. 309, § 1.

99. *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Wileman v. Wade*, 665 S.W.2d 519, 520 (Tex. App.—Dallas 1983, no writ); *Anderson v. Royce*, 624 S.W.2d 621, 623 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Brazosport Bank v. Robertson*, 616 S.W.2d 363, 366-67 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Inwood Nat'l Bank v. Hoppe*, 596 S.W.2d 183, 185 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

tion 4.031¹⁰⁰ in 1987, and the legislature clarified that section in 1989.¹⁰¹ Although isolated comments suggest that some misunderstanding of spousal liability still subsists,¹⁰² judicial understanding of these matters has improved. As an example of this improved perception of the rules of spousal agency the court in *Marynick v. Bockelmann*¹⁰³ reiterated "the long-standing rule that 'the marital relationship does not in itself make one spouse the agent of the other.'"¹⁰⁴ In a situation in which a wife's liability to provide necessaries for her husband was not proved, the court found that the husband's contract with his landlord for a loan in the form of temporary abatement of rent did not impose any liability on his wife.¹⁰⁵

In *Caulley v. Caulley*,¹⁰⁶ however, the Houston Fourteenth District Court of Appeals seriously erred by applying the liability provisions of the Family Code.¹⁰⁷ The court failed to perceive the difference between rules of management and rules concerning liability of community property. Although the court correctly stated that a judgment against a husband to which his wife was not a party does not affect the property rights of the wife arising from her *management* powers,¹⁰⁸ that conclusion cannot be extended to a liability context because section 5.61(c)¹⁰⁹ specifically provides that all community property subject to a spouse's sole management is subject to his or her liabilities. Thus, the wife's share of the community property encumbered by the debt as well as his own share is liable in that circumstance.

In *Medaris v. United States*¹¹⁰ the Fifth Circuit Court of Appeals applied the liability rules in a federal tax dispute. The analysis is complicated by intrusion of the federal Supremacy Doctrine, but the analysis is nonetheless easier than the court made it. The court's opinion does not explain how the husband's tax liability arose, but the Internal Revenue Service sought to reach all of the husband's income and half of that of his wife to satisfy the husband's sole tax liability. Relying principally on the management provisions of the Family Code¹¹¹ and some older federal authorities,¹¹² the appellate court concluded that the Service may reach all of the husband's earnings and his half of his wife's earnings to satisfy the husband's liability.¹¹³ A

100. 1987 2d Spec. Sess. Tex. Gen. Laws 159, ch. 50, § 4 at 161.

101. TEX. FAM. CODE ANN. § 4.031 (Vernon Supp. 1990).

102. It is true, of course, that "debts contracted during marriage are presumed to be on the credit of the community," as stated in *Sunbelt Service Corp. v. Vandenburg*, 774 S.W.2d 815, 817 (Tex. App.—El Paso 1989, no writ), but the relevance of the statement in its context is not clear.

103. 773 S.W.2d 665, 670-71 (Tex. App.—Dallas 1989, writ granted on other grounds).

104. *Wilkinson v. Stevison*, 514 S.W.2d 895, 898 (Tex. 1974).

105. *Marynick*, 773 S.W.2d at 670-71.

106. 777 S.W.2d 147, 150-51 (Tex. App.—Houston [14th Dist.] 1989, no writ).

107. TEX. FAM. CODE ANN. § 5.61 (Vernon Supp. 1990).

108. *See Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974); *see also Dulak v. Dulak*, 513 S.W.2d 205, 207 (Tex. 1974) (judgment against husband does not affect management rights of wife).

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

110. 884 F.2d 832 (5th Cir. 1989).

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

112. *United States v. Mitchell*, 403 U.S. 190 (1971).

113. 884 F.2d at 834.

more direct analysis in terms of liability follows these propositions. First, all the husband's income, as his solely managed community property, is subject to his liability under section 5.61(b).¹¹⁴ Second, if there is no jointly managed community,¹¹⁵ no further community property would be subject to seizure for an ordinary debt. But because a debt is owed to the federal government, the Supremacy Doctrine allows Congress to make the husband's half of the wife's solely managed community property liable for claims of the United States.¹¹⁶ Contrary to the court's intimation,¹¹⁷ however, the concept of spousal *debt-exemption* no longer exists under Texas law in this context. Each spouse's liability is independent of that of the other spouse.

In another context related to federal tax liability, the Texarkana court of appeals dealt with some difficult problems of an alleged implied agency of tax-professionals hired by the husband in a situation having severe repercussions on the rights of his wife.¹¹⁸ The spouses initially filed joint federal income tax returns. Although the wife thought that her husband had filed returns regularly thereafter, no returns were filed for a period of six years. The federal government indicted the husband for failure to file these returns. He consulted an attorney who referred him to an accountant to prepare the unfiled returns. The attorney explained the husband's predicament to the wife and told her that the returns needed to be filed, but he failed to advise her as to her tax liability. Under the circumstances, if the wife had filed separate returns, she would have been liable for taxes owed on one-half of the community income, but for no more. Having filed a joint tax return the wife was jointly and severally liable for the taxes owed for the entire community income, as well as for penalties and interest. The couple were later divorced, and the husband became a bankrupt. The Internal Revenue Service thereafter seized the ex-wife's separate home and sold it and she was liable thereafter for a substantial deficiency. The ex-wife sued the lawyer and the accountant on the ground that she was the client of each of them, and each had failed to represent her properly. The court held that the filing of the tax returns was "a matter incidental to the representation" of the husband in a criminal prosecution.¹¹⁹ The court further held that no attorney-client relationship between the lawyer and the wife existed, although an issue of fact remained as to whether the attorney had been negligent in failing to advise the wife that he did not represent her.¹²⁰ The court also reiterated the well-established proposition that neither spouse acts for the other as

114. TEX. FAM. CODE ANN. § 5.61(b) (Vernon 1975).

115. All jointly managed community property is liable for either spouse's debts. *Id.* § 5.61(c).

116. 26 U.S.C. § 6321 (1988).

117. *Medaris*, 884 F.2d at 836.

118. *Parker v. Carnahan*, 772 S.W.2d 151 (Tex. App.—Texarkana 1989, no writ).

119. *Id.* at 156.

120. *Id.* at 157. Texas Code of Professional Responsibility DR7-104 (A) (2), in effect at the time, did not deal with a lawyer's duty in dealing with unrepresented persons. Rule 4.3 (effective Jan. 1, 1990) now addresses that point specifically.

a matter of law¹²¹ and held that the wife had not authorized her husband to act for her¹²² in hiring an attorney or an accountant. The court went on to state that the attorney did not control the accountant's work in this instance, and that the wife had no direct dealings with the accountant. Whether the accountant negligently failed to advise the wife concerning the consequences of the joint income tax return remained a question of fact.

Turnover Orders. Amid a flurry of conflicting opinions from courts of appeal,¹²³ the Texas Supreme Court reversed¹²⁴ the conclusion of a Houston appeals court that ordering a debtor to turnover¹²⁵ his wages when received is invalid because it thwarts the purpose of the constitutional prohibition against garnishment of wages.¹²⁶ Although the supreme court unanimously held that the order was constitutional because it did not affect wages in the hands of the employer, the court did not agree as to whether a court could enforce its order by citation for civil contempt.¹²⁷ One judge favored such enforcement while four others opposed it and the other four left the point open for further decision.¹²⁸ In another case¹²⁹ an order directing the executrix of the estate of a deceased judgment-debtor to turn over assets for execution was reformed to require the creditor to make a factual showing that the party from whom property was sought actually held such property. Such a showing is closely associated with enforcement by civil contempt.¹³⁰

Homestead Designation and Extent. Once a homestead is established on property, protection of the homestead exemption is not lost by one spouse if the other spouse abandons the property. After a judgment was rendered against him, the husband in *Taylor v. Mosty Brothers Nursery, Inc.*¹³¹ conveyed his interest in the community homestead to his wife and left the state. Thus, the wife became the owner as well as the occupier of the whole property. The conveyance, however, in no way affected the exempt character of

121. *Wilkinson v. Stevison*, 514 S.W.2d 895 (Tex. 1974); TEX. FAM. CODE ANN. § 4.031(c) (Vernon Supp. 1990).

122. *Parker*, 772 S.W.2d at 157.

123. In *Maumus v. Lyons*, 771 S.W.2d 191 (Tex. App.—Fort Worth 1989, no writ), the court viewed the turnover statute as unconstitutional. In four earlier instances appellate courts had held the statute constitutional. *Cain v. Cain*, 746 S.W.2d 861 (Tex. App.—El Paso 1988, writ denied); *Barlow v. Love*, 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); *Sloan v. Douglass*, 713 S.W.2d 436 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.). In two recent cases, the courts held the statute constitutional. *Caulley v. Caulley*, 777 S.W.2d 147, 151 (Tex. App.—Houston [14th Dist.] 1989, no writ); *Buttles v. Navarro*, 766 S.W.2d 893, 894-95 (Tex. App.—San Antonio 1989, no writ).

124. *Raborn v. Davis*, 33 Tex. Sup. Ct. J. 249 (Feb. 21, 1990), reversing *Davis v. Raborn*, 754 S.W.2d 481 (Tex. App.—Houston [1st Dist.] 1988).

125. The order was made pursuant to TEX. CIV. PRAC. & REM. CODE § 31.002 (Vernon 1986).

126. TEX. CONST. art. XVI, § 28.

127. 33 Tex. Sup. Ct. J. at 249-50.

128. *Id.*

129. *Buller v. Beaumont Bank*, 777 S.W.2d 763, 765 (Tex. App.—Beaumont 1989, no writ) (Brookshire, J., dissenting at 772).

130. See *Maggio v. Zeitz*, 333 U.S. 56 (1948); *Ex parte Gonzales*, 414 S.W.2d 656 (Tex. 1967).

131. 777 S.W.2d 568 (Tex. App.—San Antonio 1989, no writ).

the property even though the husband's creditor had abstracted the judgment. In this instance, the wife later sold the premises and brought suit against the creditor for a declaratory judgment that the entire proceeds were exempt from execution for six months.¹³² The appellate court reversed the trial court's conclusion that as much of the proceeds as represented the husband's share was subject to the creditor's judgment. The wife had had a homestead interest in the entire property prior to her husband's abandonment of it.¹³³ Further support for the court's conclusion may be found in the fact that the holder of exempt property may transfer it to a third person free of any judgment lien that would have attached to the property if it had not been exempt; a creditor cannot object to a debtor's disposition of something the creditor cannot reach¹³⁴ unless the creditor resorts to putting the debtor in bankruptcy.¹³⁵ Thus, once the property has passed to someone else, it is no longer the debtor's property.

A close case for analysis is that of a childless couple on a rural homestead. A rural family homestead may consist of up to two hundred acres while a homestead for a single person may only cover one hundred acres. If the husband conveys his share of a community tract of over one hundred acres to his wife and abandons her and the homestead with the intention of bringing suit for divorce, the extent of the wife's claim is brought into sharp focus. If the divorce occurs, the size of the exemption will contract by virtue of the fact that both former spouses become single. But as long as a family exists, the family homestead continues.¹³⁶ Since the amendment of the Texas Constitution in 1973 requiring both spouses to abandon a homestead for its character to be lost,¹³⁷ abandonment by only one spouse does not affect the family homestead rights of the other.

As part of the urban residential homestead of one acre, a debtor can claim urban business premises.¹³⁸ In *In re Krug*¹³⁹ the bankruptcy court reiterated the proposition laid down by the Texas Supreme Court in *Ford v. Aetna Insurance Co.*¹⁴⁰ that all parts of business premises classified as exempt must be "necessary to the business" and not merely used "in aid of" or "in con-

132. TEX. PROP. CODE ANN. § 41.001(c) (Vernon Supp. 1990).

133. *Taylor*, 777 S.W.2d at 570.

134. *Sorenson v. City Nat'l Bank*, 121 Tex. 478, 485, 49 S.W.2d 718, 721 (1932); *Du Perier v. Du Perier*, 126 S.W. 10 (Tex. Civ. App.—Galveston 1910, writ ref'd).

135. See Bankruptcy Code, 11 U.S.C. § 522(g) (1982). See also McKnight, *Prefiling Exemption Planning: A National Perspective* in 2 J. NORTON, M. ROCHELLE, & P. FRANKLIN, REPRESENTING DEBTORS IN BANKRUPTCY 3-1, ¶ 3.03 at 3-10 to 3-13 (1988).

136. A family homestead does not terminate as a result of dispersal of all but one member of the family unit. *Wood v. Alvarado State Bank*, 118 Tex. 588, 19 S.W.2d 35 (1929).

[T]he homestead is an estate created not only for the protection of the family as a whole, but for the units of the family, including those who survive, and embracing the head of the family at the time of dissolution, whether the dissolution has been brought about by death or dispersal, as distinguished from a mere privilege accorded the head of the family for the benefit of the family as a whole.

11 Tex. at 590, 19 S.W.2d at 36.

137. TEX. CONST. art. XVI, § 50.

138. *Id.* art. XVI, § 51; TEX. PROP. CODE ANN. § 41.002(a) (Vernon Supp. 1990).

139. 102 Bankr. 98 (Bankr. W.D. Tex. 1989).

140. 424 S.W.2d 612, 616 (Tex. 1968).

nection with" it.¹⁴¹ Thus, if the test of *Ford* cannot be met, those parts of the premises not required for business operations are not entitled to the homestead exemption.

Liens on Homesteads. A question of designation of rural land as a homestead arose in *Lane v. Small Business Administration*.¹⁴² The issue turned on the effect of a disclaimer of homestead in the course of mortgaging the property for a business loan. In 1968 the debtor-couple leased a 200 acre farm where they made their home. In 1975 the couple bought a 158 acre farm a few miles away. This farm was the only fee interest in realty held by them, and they farmed it continuously thereafter. The couple gave a mortgage on their 158 acres in 1977 and stated that the 200 acre farm was their homestead and the 158 acre tract was not their homestead. In 1984 the husband put a trailer house on the 158 acres and occupied it occasionally while farming the land. The family moved briefly into town in 1985 and in the following year took up residence on the 158 acres. In their subsequent bankruptcy the couple asserted that the 158 acres was their rural homestead and that the lien on the property was therefore void. The bankruptcy court held that they were estopped by their 1977 denial of homestead when the loan was made, and that this denial was consistent with the physical facts.¹⁴³ Some authority suggests that a leasehold may be asserted as a homestead,¹⁴⁴ although a tenant's reason for making such an assertion may be of very dubious wisdom. In 1977 the couple might have chosen either the leasehold property or the fee interest, or parts of each, as their homestead.¹⁴⁵ They chose the former. Because their assertion was consistent with the facts of use of the land, their representation bound them.¹⁴⁶

Once property is designated as a homestead, it is no longer available to be given as security for a loan except for the three purposes specified in the Texas Constitution.¹⁴⁷ The Internal Revenue Code,¹⁴⁸ nevertheless, allows tax deductions for the payment of interest on any loan on the family home. It has, therefore, been proposed at the last two regular sessions of the Texas Legislature that a statute should be enacted allowing non-enforceable liens on homestead property so that lenders would feel more comfortable in making such loans and so that the interest on the loans could be deducted for federal income tax purposes. The legislature resisted the opportunity to pass the bill on both occasions. Apart from the impropriety of enacting clearly unconstitutional legislation, the legislature declined to act because such a law would encourage putting invalid liens on property. Such purported liens

141. *Krug*, 102 Bankr. at 99-101.

142. 103 Bankr. 816 (Bankr. N.D. Tex. 1987).

143. *Id.* at 818.

144. *Johnson v. Martin*, 81 Tex. 18, 21 (1891); *Sterling Nat'l Bank v. Ellis*, 75 S.W.2d 716, 720 (Tex. Civ. App.—Amarillo 1934, writ dismissed).

145. *Lane*, 103 Bankr. at 818.

146. *Hughes v. Wruble*, 131 Tex. 444, 448, 116 S.W. 2d 368, 370 (1938).

147. TEX. CONST. art. XVI, § 50; TEX. PROP. CODE ANN. § 41.001(b) (Vernon Supp. 1990). The three excepted instances are liens for purchase money, improvement, and taxes on the property.

148. Internal Revenue Code, 28 U.S.C. § 163.

appear to have prima facie validity once the property ceases to have homestead character. Thus, a later owner of the property would be forced to clear the cloud from the title, which should not have been burdened with a sham lien from the outset. Such an apparent lien also greatly reduces the value of the property because the anticipated expense of removing the cloud on the title is a deterrent to buyers. More significantly, however, such a statute would encourage the imposition of sham liens that would become enforceable by a bona fide purchaser of the security interest.¹⁴⁹

The documents generating the dispute in *In re Shults*¹⁵⁰ also attempted to fix an impermissible lien on homestead property. The lender prepared the documents reciting that the loan effected a partition between cotenants. The transaction, however, actually consisted of nothing more than a purchase by the owner of a one-third undivided interest in the realty of the other undivided two-thirds, and the loan was made for that purpose. Because the transaction was described as a partition, the lender asserted an owelty lien against the entire property rather than merely against the undivided two-thirds which was purchased. Owelty arises only in connection with a partition, however. It is an amount paid by one cotenant to another for the purpose of equalizing shares in a partition. Thus, if cotenants partition property in unequal shares, an owelty lien can be placed on the greater share in favor of the taker of the lesser share in order to satisfy the difference.

The buyer in *Shults* had established a homestead on the property by consent of his cotenants prior to the purchase. If the coparceners had sought to partition the property, an owelty lien could have been put on either share. An owelty lien can be fixed upon a homestead in such an instance.¹⁵¹ But in this case one cotenant chose to buy the shares of the others and procured a loan to achieve the purchase.¹⁵² The lender presumably included the recital as to partition with owelty in the loan documents in order to broaden its lien. Because there was neither a partition nor a fixing of owelty in this transaction, the lender's effort failed. The homestead claimant in *Shults* made an equally untenable argument that he was entitled to claim a homestead in a specific part of the land as though a partition had occurred. No partition had occurred, however, and the claimant simply owned a one-third undivided interest in the land not subject to the lender's lien. On foreclosure and sale of the lender's interest, the claimant would still have a one-third undivided interest subject to a partition at the instance of either cotenant.

In order to use homestead property as security for a business loan, the owner typically avoids the rules against mortgaging by conveying the homestead property to a corporation so that the corporation may mortgage the

149. See *Davis v. Hawn Lumber Co.*, 193 S.W.2d 263, 265 (Tex. Civ. App.—Dallas 1946, no writ); *Uptmor v. Janes*, 210 S.W.2d 235, 238 (Tex. Civ. App.—Waco 1948, no writ).

150. 97 Bankr. 874 (Bankr. N.D. Tex. 1989).

151. *Sayers v. Pyland*, 139 Tex. 57, 161 S.W.2d 769 (1942); *Travelers Ins. Co. v. Nauert*, 200 S.W.2d 661 (Tex. Civ. App.—El Paso 1941, no writ).

152. An owelty lien is in the nature of a purchase money lien, *Shults*, 97 Bankr. at 878. A purchase money lien can be properly fixed on homestead property. TEX. CONST. art. XVI, § 50; *In re Miller*, 58 Bankr. 192, 197-99 (Bankr. S.D. Tex. 1985).

property. Once title to the land has passed to the corporation, the property loses its exempt status because a corporation cannot assert a homestead exemption.¹⁵³ The dispute in *In Re Girard*¹⁵⁴ arose from such a transaction. Having been advised by a lender that it would not lend money on the security of their homestead, the spouses incorporated their business and conveyed the homestead property to the corporation. The corporation then borrowed money from the lender, using the residential property as security. Another lender lent money to the corporation two years later for the purpose of improving the property and repaying the initial loan. The subsequent lender, therefore, succeeded by assignment to the position of the prior lender with the same property held as security. In their later personal bankruptcy, the spouses claimed the property as their homestead and sought to invalidate the lien against it as based on a "pretended sale" which is condemned by the Texas Constitution¹⁵⁵ as a means of circumventing the constitutional rule that a lien on a homestead is *void* unless given for purchase money, improvement, or payment of taxes on the property.¹⁵⁶ Relying on *Moore v. Chamberlain*,¹⁵⁷ which turned on the proposition that a grantee of a mortgage who takes with notice of a flaw in the transaction cannot be a bona fide purchaser, the homestead claimants attempted to impugn the second lender's standing to assume the prior lien by showing that the second lender had notice that the claimants maintained their home on the premises when the first lien was assigned. But, because the initial conveyance of the property to the corporation was valid and the security for the first lien was valid, the spouses' continued open use of their property as their residence was irrelevant.¹⁵⁸

Exempt Personalty. Since the personal property exemption statute was revised in 1973, Texas has offered a catalogue of items that a debtor may claim as exempt within value limitations: \$30,000 for a family and \$15,000 for a single adult.¹⁵⁹ For the purpose of establishing a claim for exemptions a family has been construed to mean a support relationship that does not

153. The homestead may be claimed only on behalf of a family or a single adult. TEX. CONST. art. XVI, § 50; TEX. PROP. CODE ANN. § 41.002 (Vernon 1990). Neither a corporation nor a partnership may claim a homestead exemption.

154. 104 Bankr. 817 (Bankr. W.D. Tex. 1989). *In re Loter*, 2 Tex. Bankr. Ct. Rptr. 362 (Bankr. N.D. Tex. 1988), was a case of similar facts, and it was similarly resolved. *In re Brooks*, 103 Bankr. 123, 125-26 (Bankr. S.D. Tex. 1988), a bankrupt partner was unsuccessful in claiming a homestead in partnership property.

155. "All pretended sales of the homestead involving any condition of defeasance shall be void." Tex. Const. art. XVI, § 50. Although counsel often argue in much broader terms, the language of § 50 does not condemn all sales that are artificially contrived to avoid the strictures of the homestead law. The kind of transaction that the language of § 50 was meant to preclude was the mortgage in the form of a sale but understood by the parties to be a mortgage.

156. *Id.*

157. 109 Tex. 64, 195 S.W. 1135 (1917). See *Girard*, 104 Bankr. at 819, n.4.

158. *Girard*, 104 Bankr. at 821-22.

159. TEX. PROP. CODE ANN. § 42.001 (Vernon 1986). In bankruptcy, a claimant of exempt personalty, as well as exempt realty, must assert his claims with sufficient specificity so that his creditors can appreciate what property is claimed. *In re Wright*, 99 Bankr. 339, 341-42 (Bankr. N.D. Tex. 1989).

necessarily involve a married couple or a parent-child relationship.¹⁶⁰ The body of law construing the family is not vast, but it is nonetheless notable and fundamentally consistent. The most recent case is *In re Leva*,¹⁶¹ where the court recognized a family consisting of an unmarried, but engaged, man and woman who had lived together for nearly five years, the woman's teenage son by a prior marriage, and the man's mother. The man was thereby allowed to claim up to \$30,000 worth of exempt personalty in bankruptcy.

In *Leva* the court also made some observations with respect to personal property that meets the definitions laid down in Property Code section 42.002.¹⁶² The debtor claimed that the proceeds of an insurance policy, paid for theft of a portable telephone and a hand-held recorder were exempt as representing¹⁶³ the stolen items, which qualified either as "tools of trade"¹⁶⁴ or "home furnishings."¹⁶⁵ Although the court did not specifically indicate the debtor's trade, it is apparent that he was engaged in selling goods or services. The court rejected his claim in both categories. The court observed that, though the articles might be useful or convenient, they were not actual tools of his trade in a strict sense.¹⁶⁶ Nor in this court's view could they qualify as household furnishings, as they were not "the sorts of items one might furnish one's house with."¹⁶⁷

The principal thrust of the long opinion in *Leva* is, however, to develop tests for determining when jewelry may be properly classified as "reasonably necessary . . . clothing" within Property Code section 42.002(3)(C).¹⁶⁸ Before the "reasonably necessary" standard was added to the personal property exemption statute in 1973, courts were very lenient in treating jewelry as within the "wearing apparel" exemption.¹⁶⁹ The Fifth Circuit Court of Appeals discussed the applicability of the wearing apparel exemption to jewelry in *In re Fernandez*.¹⁷⁰ The court noted that the substitution of "clothing" for "wearing apparel" in the non-substantive revision of the statute in 1983 did not affect the meaning of the statute but went on to point out that not all jewelry qualifies as exempt.¹⁷¹ To qualify, the jewelry must be worn

160. See *Central Life Assurance Soc'y v. Gray*, 32 S.W.2d 259 (Tex. Civ. App.—Waco 1930, writ ref'd); see also *Hutchenrider v. Smith*, 242 S.W. 204 (Tex. Comm. App. 1922, recommendation accepted) (three daughters who cared for aged father in their home); *Henry S. Miller Co. v. Shoaf*, 434 S.W.2d 243 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (divorce and her dependent mother).

161. 96 Bankr. 723, 736-38 (Bankr. W.D. Tex. 1989).

162. TEX. PROP. CODE ANN. § 42.002 (Vernon 1986).

163. *Willis v. Schoelman*, 206 S.W.2d 283, 284 (Tex. Civ. App.—Galveston 1947, no writ); *Mosely v. Stratton*, 203 S.W. 397, 398 (Tex. Civ. App.—Austin 1918, no writ). In *Sorenson v. City National Bank*, 121 Tex. 478, 485, 49 S.W.2d 718, 721 (1932), the court observed that by analogy to the statute making the proceeds of sale of exempt realty exempt for six months, fire insurance proceeds for the loss of household furnishings are exempt "for a reasonable time."

164. TEX. PROP. CODE ANN. § 42.002(3)(B) (Vernon 1984).

165. *Id.* § 42.002(1).

166. *Leva*, 96 Bankr. at 738-39.

167. *Id.* at 738.

168. TEX. PROP. CODE ANN. § 42.002(3)(C) (Vernon 1986).

169. See *Olds & Palmer, Exempt Property* in *CREDITOR'S RIGHTS IN TEXAS* 23, 45-49 (1st ed. 1963, J. McKnight, ed.).

170. 855 F.2d 218, 221 (5th Cir. 1988).

171. *Id.* at 221.

by the owner.¹⁷² The court added that jewelry purchased with concern for investment or resale tends to detract from its being regarded as "reasonably necessary" to the debtor.¹⁷³ Although some purchasers of jewels are unquestionably victims of retailers' advertisements concerning "investments" in jewelry, instances when a purchase of jewelry can be objectively accepted as an investment must be comparatively rare.¹⁷⁴ The amount paid for the jewelry must surely be a significant fact in making this determination.

In *Leva* the court put significant emphasis on the frequency of use of particular jewelry claimed as exempt, as well as its sentimental value to the debtor and the loss of personal dignity its deprivation would entail. The court also commented that a claim of a large number of jewels as exempt makes it less likely that all pieces are reasonably necessary. In this case, the court concluded that the debtor's Rolex watch should be set aside as exempt wearing apparel, whereas a diamond ring and a gold bracelet were not exempt because the latter two objects were mainly meant to impress others, and the debtor's being deprived of them would not destroy his dignity. Despite the court's thoughtful and witty discourse on the abstract aspects of the personal property exemption law, it is hard to know precisely how the court reached its decision in this case. Apart from the utilitarian quality of the watch,¹⁷⁵ unspecified subjective elements also appear to have contributed to the conclusion.

The length of the discussion that stems from the "reasonably necessary" test suggests that the recommended repeal of that standard would be salutary. The principal objection to the "reasonably necessary" test in practice is that it requires a judicial determination in almost all instances. Although the Property Code's definition of exempt property is also employed by bankruptcy courts,¹⁷⁶ where a judicial determination of the exemption claim is made as a matter of course, the principal purpose of the state law is to define property not subject to seizure for creditor's claims by the processes of execution or attachment. Because a "reasonably necessary" test requires recourse to judicial interpretation with respect to a resisted seizure under both writs, the test is unnecessarily burdensome. Without the "reasonably necessary" standard, some jewelry might still be treated as exempt and some not, and "the relationship of the debtor to the jewelry",¹⁷⁷ both as to frequency

172. *Id.*

173. *Id.* at 222. Luxury household furnishings acquired for speculation or investment purposes have also been declared as not exempt, although household furnishings are not subject to the "reasonably necessary" test. *In re Rowe*, No. 284-20097, slip op. at 19-20 (Bankr. N.D. Tex. March 14, 1985), noted in McKnight, *Family Law, Husband and Wife, Annual Survey of Texas Law*, 40 Sw. L.J. 1, 25 (1986). *Rowe* is not, therefore, a very convincing authority.

174. See Epstein, *Have You Ever Tried to Sell a Diamond?*, 249 THE ATLANTIC 23 (1982).

175. In a later case, *In re Mitchell*, 103 Bankr. 819, 820 (Bankr. W.D. Tex. 1989), the same court compared other jewelry with "such comparatively utilitarian items as watches and earrings." The utility of watches is understood; that of earrings is not explained. One may imagine that they may anchor ears which are apt to blow in the wind, but whether the application of weights is useful to hearing is unknown.

176. Bankruptcy Code, 11 U.S.C. § 522 (1988).

177. *Leva*, 96 Bankr. at 725.

of use and personal attachment, would still be relevant. But the courts' task in applying the law evenly and objectively would be greatly eased.

The tone of the court's discussion in *Leva* indicates that the court subscribes to the principle of mutually exclusive categories of exemptions catalogued in the statute.¹⁷⁸ Other courts¹⁷⁹ have also followed this line of reasoning, but it is clearly contrary to the intent of the legislative draftsmen, as determined from the statute's legislative history.¹⁸⁰ The fact that a particular item of personalty may be exempt under one subsection of the statute does not mean that similar personalty is not equally exempt under another section or subsection of the statute. Thus, if only two vehicles are exempt as means of transportation, a third vehicle may also be exempt as a tool of trade.¹⁸¹

The same court that decided *Leva* again considered the valuation of items of jewelry within the \$30,000 limit allowed to a family as exempt personalty in *In re Mitchell*.¹⁸² The value of a 6.18-karat diamond was in question. The creditor offered evidence of an appraiser that the "estate value"¹⁸³ of the stone was just over \$42,000, but its fair market value was only \$36,000. The debtors purchased the ring in 1978 for over \$36,000. The original seller testified that he would buy it for \$7,800. The court accepted \$36,000 as the fair market value—the standard accepted by both federal and Texas authorities in such instances.¹⁸⁴ In the course of its discussion the court analyzed the function of the Texas exemption law and its value-limitation. At its 1989 regular session the legislature discussed a proposal that the value-limits should be raised by a hundred percent or more to reflect inflation that had occurred since the amount was set in 1973. Those opposed to the increase pointed out that, but for a recent spate of affluent bankrupts, the ordinary bankrupt debtor of the past and present usually exhausts most of his merchantable exempt personalty before reaching the bankruptcy court. The legislature did not reach agreement on proposals for this and other proposed reforms of the personal property exemption law before the legislative session ended, although each house of the legislature passed a different form of the bill.¹⁸⁵

178. TEX. PROP. CODE ANN. § 42.002 (Vernon 1986).

179. See, *In re Weiss*, 92 Bankr. 677, 678 (Bankr. N.D. Tex. 1988).

180. See McKnight, *Modernization of Texas Debtor-Exemption Statutes Short of Constitutional Reform*, 35 Tex. Bar J. 1137, 1138 (1972).

181. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 Sw. L.J. 1, 25 (1989); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 34 Sw. L.J. 115, 137 n.193 (1980).

182. 103 Bankr. 819 (Bankr. W.D. Tex. 1989). Market value is alluded to in *Leva* in the context of its relation to whether an item of jewelry is held as wearing apparel or as an investment. See 96 Bankr. at 727, 731-32, 735.

183. "The estate value is what a jewelry company would have to pay on the diamond market to acquire the stone, as opposed to the retail market, which is what one would ask the customer to pay for the item." *Mitchell*, 103 Bankr. at 820 n.4.

184. *Mitchell*, 103 Bankr. at 820-21.

185. In the version of the bill passed by the House of Representatives the exemption value-limitations of the present law were doubled, but in the Senate version those limits were left unchanged.

It has been suggested that some sort of practical test should be used to determine the market value of exempt personalty. Under the old definition of urban homestead in terms of value of unimproved land, if spouses owned a homestead exceeding the maximum value at the time of designation, the surviving spouse was entitled to have a sale of the property to ascertain the present value, and if the land brought less than the value-limit, the sale would be cancelled and the property would be set aside to the debtor as exempt.¹⁸⁶ But just how such a sale might be conducted to ensure fairness to the debtor and to the bidder is a puzzle. Under present urban conditions it seems unlikely that such a procedure is viable in the context of personal property exemptions.

In *In re Anthony*¹⁸⁷ another bankruptcy court commented on the continuing dispute concerning the proper construction of section 42.001(a) of the Property Code:

. . . personal property that is owned by a family and that has an aggregate fair market value of not more than \$30,000.00 is exempt from attachment, execution, and seizure for the satisfaction of debts, except for encumbrances properly fixed on the property.¹⁸⁸

As the court in *Anthony* read the section, the question is whether "the last phrase: 'except for encumbrances properly fixed on the property' can be meant to modify the word 'debts' and the only thing meant by the phrase is that such encumbrances shall be enforceable"¹⁸⁹ or that the phrase is meant to modify the phrase "not more than \$30,000.00" with the consequence that the fair market value of encumbrances is excluded "from the \$30,000.00 exemption figure"¹⁹⁰ for the purpose of applying section 522(f) of the Bankruptcy Code.¹⁹¹ Had the court not been restrained by the Fifth Circuit Court's reading of the statute in *In re Allen*,¹⁹² the court would have chosen the former interpretation in determining the amount of property claimable within the value-limitation. There is a third interpretation, however, and it is the one intended by the draftsmen of the 1973 act: the dollar value of property claimable as exempt refers to the value of the debtor's equity ownership, but the debtor's ownership in the entire item is nonetheless exempt from seizure.¹⁹³ An amendment to make the draftsmen's original meaning clear was included in the proposed reform of the personal property exemp-

186. *Whiteman v. Burkey*, 115 Tex. 400, 401, 282 S.W. 788, 789 (1926).

187. 102 Bankr. 600 (Bankr. S.D. Tex. 1988).

188. TEX. PROP. CODE ANN. § 42.001 (Vernon 1986).

189. *Anthony*, 102 Bankr. at 602 (emphasis in original).

190. *Id.*

191. Bankruptcy Code, 11 U.S.C. § 522(f) (1988).

192. 725 F.2d 290 (5th Cir. 1984). See also *In re Evans*, 25 Bankr. 105 (Bankr. N.D. Tex. 1982) (personal property exempt from seizure except to satisfy encumbrances properly fixed thereon). This question is also alluded to in *Mitchell*, 103 Bankr. at 824-25 n.13.

193. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas law*, 37 Sw. L.J. 65, 88-89 (1983); see also *In re Thompson*, 59 Bankr. 690 (Bankr. W.D. Tex. 1986) (Declining to follow *In re Allen* and holding that encumbered personal property may be exempt), commented on in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 41 Sw. L.J. 1, 27 (1987).

tion law introduced in 1987¹⁹⁴ and again in 1989, but on both occasions time constraints of the legislative process disappointed these efforts for reform.

On September 1, 1987, Texas categories of exempt personalty were enlarged to include certain types of retirement interests not subject to the monetary limits set in 1973. The El Paso court of appeals has concluded,¹⁹⁵ however, that such exemptions may not be asserted against a writ of garnishment issued for recovery of a judgment rendered prior to the effective date of the statute creating the new exemptions.¹⁹⁶ The court presumably based its conclusion on the premise that changing the rules of enforcement of contractual obligation is contrary to the provisions of the Texas Constitution.¹⁹⁷

Because some, but not all, of the retirement benefits made exempt by the 1987 act¹⁹⁸ are interests defined as exempt by the federal Employee Retirement Income Security Act of 1974 (ERISA),¹⁹⁹ questions have been raised with respect to the effectiveness of the Texas statute in the light of the doctrine of federal preemption. Resolution of these questions turns on the interpretation of the United States Supreme Court's decision in *Mackey v. Lanier Collections Agency & Service, Inc.*²⁰⁰ In that case the Court held that ERISA preempted the field relating to types of property made exempt by the act.²⁰¹ Texas bankruptcy courts have since been at pains to determine the effectiveness of the Texas law with respect to ERISA related exemptions.²⁰²

Prior to the 1987 legislative session, at which the retirement-benefit exemption was passed, both the Family Law and Tax Sections of the State Bar of Texas perceived a need for debtor protection under Texas law in relation to retirement benefits. The Tax Section was motivated by the 1983 decision of the Fifth Circuit court in *In re Goff*,²⁰³ holding that a self-settled retirement plan was not exempt under federal law. The court said that ERISA

194. See McKnight, *Family Law, Husband and Wife, Annual Survey of Texas Law*, 42 Sw. L.J. 1, 37 (1988).

195. *Williams v. Texas Commerce Bank—First State*, 766 S.W.2d 344, 346 (Tex. App.—El Paso 1989, no writ) (individual retirement account).

196. See *Steves & Sons, Inc. v. House of Doors, Inc.*, 749 S.W.2d 172, 176 (Tex. App.—San Antonio 1988, writ denied) (property code exemption not in effect when case was filed).

197. TEX. CONST. art. I, § 16.

198. TEX. PROP. CODE ANN. § 42.0021 (Vernon Supp. 1990), as clarified and amended in 1989.

199. 26 U.S.C. § 401(a)(13) (1988); 29 U.S.C. § 1056(d)(1) (Supp. 1990).

200. 486 U.S. 825 (1988), discussed in McKnight, *Family Law, Husband and Wife, Annual Survey of Texas Law*, 43 Sw. L.J. 1 at 26-27 (1989). The fact that the holding in *Mackey* is confined to exemption law is emphasized by a later decision dealing with the ERISA presumption unrelated to exemptions in which *Mackey* is not so much as mentioned. *Massachusetts v. Morash*, 109 S.Ct. 1668, 104 L. Ed.2d 98 (1989).

201. The provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan covered by the statute." 29 U.S.C. § 1144(a) (1988). The scope of the phrase "relate to" has been the focus of much of the subsequent litigation.

202. The best treatment of the setting of the Texas law up to this point is Gote, *The Texas Exemption of Retirement Benefits: Interaction with the Bankruptcy Code and Possible Preemption by Mackey v. Lanier Collections Agency & Service*, 26 *Hous. L. Rev.* 497 (1989).

203. 706 F.2d 574 (5th Cir. 1983). For more recent developments related to *Goff*, see *In re Brooks*, 844 F.2d 258 (5th Cir. 1988); *In re Kirk*, 101 Bankr. 476 (Bankr. N.D. Tex. 1989).

did not make a self-settled plan exempt²⁰⁴ and that the Bankruptcy Code did not change this conclusion.²⁰⁵ The Family Law Section, on the other hand, was concerned that although the Bankruptcy Code offered some protection to retirement benefits in a bankruptcy context, a broadly defined state exemption was also called for to exempt retirement benefits from seizure in a non-bankruptcy context.²⁰⁶ Because the Family Law Section was much concerned with other exemption legislation, amendment of the law with respect to retirement benefits was left to the Tax Section. It is noteworthy that many other states, particularly those opting out of applicability of federal bankruptcy exemptions²⁰⁷ for their citizens in bankruptcy, have now passed similar legislation.²⁰⁸

In four recent cases Texas bankruptcy courts have wrestled with the issues raised by the Texas statute on exemption of retirement benefits and its relationship to ERISA.²⁰⁹ *In re Laxson*²¹⁰ is somewhat analogous to *Mackey* in that it dealt with the exemption of an individual retirement account, exempt under Texas law but not under ERISA. The court held that the preemption doctrine was, therefore, not in issue and upheld the state exemption.²¹¹ In three other cases, however, the preemption problem was squarely in issue. In *In re Dyke*²¹² the bankruptcy court was constrained by the *Goff* and *Mackey* decisions to sustain the debtor's reliance on the Texas exemption law. Furthermore, the court rejected the debtor's argument that the Supreme Court in *Mackey* implicitly overruled the conclusion in *Goff* that the provisions of the Bankruptcy Code²¹³ do not provide protection to a debtor not subject to ERISA preemption.

On the other hand, *In re Volpe*²¹⁴ looked to congressional intent as the touchstone for resolution of the controversy. Examining the Texas statute in light of federal law, the court stated that if the Texas exemption provision purports to regulate retirement plans and their administration, it is pre-

204. *Goff*, 706 F.2d at 582.

205. *Id.*

206. Although some members of the Council of the Family Law Section were concerned to put a financial cap of at least \$100,000 on the amount of pension benefits that could be shielded from creditors (and some bankruptcy judges thought that amount outrageously high), the Tax Section favored no cap at all. New York's statute has a \$30,000 limit on exempt retirement benefits. N.Y. CIV. PRAC. L. & R. 282-283 (McKinney Consol. Supp. 1990).

207. Bankruptcy Code, 11 U.S.C. § 522(d) (1988).

208. See, e.g., ARIZ. REV. STAT. ANN. § 33-1126B (Supp. 1990); ARK. STAT. ANN. § 16-66-220 (1987); CAL. CIV. PRAC. CODE § 703.140(10)(E) (West Supp. 1990); COLO. REV. STAT. § 13-54-104 (1988); ILL. CODE CIV. PRAC. § 12-1006 (Supp. 1990); LA. REV. STAT. ANN. § 20:33 (West 1986); MISS. CODE ANN. § 85-3-1(1)(b)(iii) (Supp. 1990); N. MEX. STAT. ANN. §§ 42-10-1, 42-10-2 (Supp. 1990); N.Y. CIV. PRAC. L. & R. §§ 282-283 (McKinney Consol. Supp. 1990); OKLA. STAT. ANN. tit. 31, § 1(20) (West Supp. 1990).

209. These developments are discussed in Peele, *Retirement Plan Benefits—Are They Exempt?*, 53 *Tex. B.J.* 114 (1990); see also Ballard, *Bankruptcy Courts Split Over Seizing Pension Funds*, 5 *TEXAS LAWYER* 6 (No. 7, May 8, 1986).

210. 102 Bankr. 85 (Bankr. N.D. Tex. 1989).

211. *Id.* at 89.

212. 99 Bankr. 343 (Bankr. S.D. Texas 1989).

213. Bankruptcy Code, 11 U.S.C. § 541(c)(2) (1988).

214. 100 Bankr. 840 (Bankr. W.D. Tex. 1989).

empted by ERISA. But the court²¹⁵ concluded that the state law merely deals with retirement benefits in their relation to third-party rights and therefore is not preempted by federal law. The analysis is ingenious, but it does not squarely address the decision of the Supreme Court in *Mackey*.

In *In re Komet*²¹⁶ Judge Clark of the federal Western District of Texas withdrew an earlier opinion in that case²¹⁷ and proceeded to resolve the exemption problem in bankruptcy. While continuing to acknowledge preemption of section 42.0021 by ERISA,²¹⁸ the court concluded that the ERISA exemptions are nonetheless effective under section 522(b)(2)(A),²¹⁹ which allows a bankrupt debtor asserting state exemptions to claim any other property exempt under federal law apart from the Bankruptcy Code. Thus, the debtor may claim ERISA-protected retirement benefits as exempt because the provisions of ERISA²²⁰ require that qualified retirement plans contain provisions against seizure of plan funds by creditors.²²¹ Since this analysis is contrary to the statement in *Goff*²²² that Congress did not intend to include ERISA plan exemptions within the provisions of sections 522(b)(2)(A) and 541(c)(2) of the Bankruptcy Code, the court rejected this conclusion of the Fifth Circuit court as mistaken.²²³

IV. DIVISION ON DIVORCE

Jurisdiction. Commencing a bankruptcy case is sometimes used as a device to deter the filing of a divorce petition or as a means of bringing a divorce proceeding to a temporary halt.²²⁴ The Bankruptcy Code²²⁵ provides that any judicial proceeding against the debtor is automatically stayed upon a bankruptcy filing. In *Thiel v. Thiel*²²⁶ the debtor husband attempted to use this means of stalling an appeal from a divorce decree entered in a proceeding that he himself had brought. The attempt was unsuccessful. The appellate court granted the wife's motion to proceed with the appeal, holding that this was not a proceeding "against the debtor" but the completion of a proceeding brought by the debtor.²²⁷

In *Knops v. Knops*²²⁸ a decree awarding separation of the spouses was

215. *Id.* at 854-55.

216. 104 Bankr. 799 (Bankr. W.D. Tex. 1989).

217. *In re Komet*, 93 Bankr. 498 (Bankr. W.D. Tex. 1988).

218. *Komet*, 104 Bankr. at 804-805.

219. Bankruptcy Code, 11 U.S.C. § 522(b)(2)(A) (1988).

220. 26 U.S.C. § 401(a)(13) (1988); 29 U.S.C. § 1056(d)(1) (Supp. 1990).

221. Although this provision is usually termed an "anti-alienation provision", it is, of course, more than that. It not only prohibits alienation by the debtor but also precludes seizure by a debtor's creditors.

222. *Goff*, 706 F.2d at 580.

223. *Id.*

224. For an early instance of this sort of tactic, see *Parr v. White*, 543 S.W.2d 44 (Tex. Civ. App.—Corpus Christi 1976, no writ), discussed in McKnight, *Family Law, Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 130 (1977).

225. Bankruptcy Code, 11 U.S.C. § 362(a)(1) (1988).

226. 780 S.W.2d 930 (Tex. App.—San Antonio 1989, no writ).

227. *Id.*

228. 763 S.W.2d 864 (Tex. App.—San Antonio 1988, no writ).

entered by a New Mexican court in 1987 while the spouses were living in New Mexico. Property was awarded to each spouse as separate property and responsibility for certain outstanding debts was also adjudicated. In a subsequent appeal from a Texas divorce, the appellate court sustained the trial court's denial of the wife's plea in abatement as well as her plea in bar.²²⁹ There was no proceeding in another court on account of which the proceeding should have been abated. Furthermore, the New Mexican decree of separation did not constitute a bar to the Texas divorce unless the only facts alleged in favor of a divorce were those before the New Mexican court in 1987 and that court had the power to grant either a separation or a divorce on those facts. If grounds arising since the New Mexican decree were before the Texas court, the prior decree seems irrelevant to the Texas court's power to grant a divorce. As the appellate court held,²³⁰ however, the divorce court lacked jurisdiction to nullify any orders as to property or liability previously adjudicated in New Mexico.

In *McCaskill v. McCaskill*²³¹ the wife commenced a suit for divorce in November, 1985. Her husband then counterclaimed for divorce. Each of them plead compliance with domiciliary and residence requirements.²³² The court granted the divorce in August, 1987. As is often appropriate, the court did not state to which party the divorce was awarded.²³³ The wife appealed, asserting, among other things, that her allegation of residence was false. Acknowledging that the residence requirement is not jurisdictional but merely prescribes a qualification that must be met before a divorce is granted, the court held that the wife's judicial admission of residence barred her from challenging compliance with that requirement.²³⁴ Section 3.21,²³⁵ however, states that the residence of either "the petitioner or the respondent" will meet the requirement. Hence, the unchallenged recital of the husband's residence met the statutory requirement, whether or not the wife's allegation was true. Assuming that the parties had not moved from the state or county, and that residence requirements had not been met when the petition and cross-petition were filed, either party could have amended his or her pleadings and offered proof to show that residence requirements were met prior to the court's adjudication of divorce in 1987.²³⁶

On completion of a term of office, a judge loses authority to adjudicate cases already heard unless properly assigned to sit as a judge of the court. In *Martinez v. Martinez*²³⁷ Judge A heard a suit for divorce and took the mat-

229. *Id.* at 867.

230. *Id.*

231. 761 S.W.2d 470 (Tex. App.—Corpus Christi 1988, writ denied).

232. TEX. FAM. CODE ANN. § 3.21 (Vernon 1975).

233. Clay v. Clay, 550 S.W.2d 730, 733 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); Smitheal v. Smitheal, 518 S.W.2d 842, 848 (Tex. Civ. App.—Fort Worth (1975)), *cert. denied*, 423 U.S. 928 (1975).

234. *McCaskill*, 761 S.W.2d at 473.

235. TEX. FAM. CODE ANN. § 3.21 (Vernon 1975).

236. Skubal v. Skubal, 584 S.W.2d 45 (Tex. Civ. App.—San Antonio 1979, writ *dism'd*); Shankles v. Shankles, 445 S.W.2d 803, 805-807 (Tex. Civ. App.—Waco 1969, no writ).

237. 759 S.W.2d 522 (Tex. App.—San Antonio 1988, no writ).

ter under advisement. Judge B then succeeded Judge A on the bench. Thereafter A purported to enter a decree in the case. Such a decree is void.²³⁸

Interlocutory Orders. While the judiciary strives to deal with existing rules, the legislature continues to refine the process of granting and enforcing orders made in the course of a divorce proceeding. Under section 3.58,²³⁹ as amended in 1983, on filing a suit for divorce a spouse could not be excluded from occupancy of the family residence by a temporary restraining order. Such orders were available, however, under section 71.15²⁴⁰ prior to filing for divorce. It was, therefore, common practice to use the latter section in order to circumvent the provisions of section 3.58. After the 1989 amendments to sections 71.15 and 3.58, this process is still available, but its potential for abuse has been reduced by the requirement of an affidavit, testimony, and judicial findings.²⁴¹ In 1989 references to section 3.581²⁴² were also added to section 3.58,²⁴³ and sections 3.581 and 3.582²⁴⁴ were clarified in relation to protective orders concerning family violence.

Whatever the scope of such orders, enforcement by contempt is not available unless the order is specific and unambiguous.²⁴⁵ An abstract direction not to act "with intent to obstruct the authority of the Court to order a division of the estate of the parties in a manner that the Court deems just and right," though quoted from the statute itself,²⁴⁶ is not sufficiently specific to support an order for civil contempt. The person to whom the order is directed is not thereby apprised of the specific acts which are ordered not to be performed.²⁴⁷

It is now well established that valid temporary orders may be entered on the basis of a prima facie showing of an informal marriage.²⁴⁸ If the divorce court then makes an interlocutory finding of an informal marriage, such an order is not a final judgment from which an appeal may be taken.²⁴⁹ Nor may an appellate court use a writ of prohibition or mandamus to disturb such an interlocutory ruling of the trial court.²⁵⁰

In *Minns v. Minns*²⁵¹ the petitioner filed for divorce in 1982. Soon thereafter the petitioner commenced an action for personal injury against the re-

238. *Id.* at 523.

239. TEX. FAM. CODE ANN. § 3.58(b)(2)(A) (Vernon Supp. 1990).

240. *Id.*

241. *Id.* § 71.15(g),(h).

242. *Id.* § 3.581.

243. *Id.* § 3.58(b),(d).

244. *Id.* § 3.581-3.582.

245. *Ex parte Glover*, 701 S.W.2d 639, 640 (Tex. 1985); *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967).

246. TEX. FAM. CODE ANN. § 3.58(a)(6) (Vernon Supp. 1990).

247. *Ex parte Higginbotham*, 768 S.W.2d 4, 5 (Tex. App.—Fort Worth 1989).

248. *Ex parte Threet*, 160 Tex. 482, 484, 333 S.W.2d 361, 363-64 (1960); *Winfield v. Daggett*, 775 S.W.2d 431, 434 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Ex parte Ortega*, 759 S.W.2d 191, 192 (Tex. App.—Houston [14th Dist.] 1988 no writ).

249. *Winfield*, 775 S.W.2d at 433.

250. *Id.* at 433-34.

251. 762 S.W.2d 675 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

spondent and others. The court consolidated these causes for trial in 1984. After a series of preliminary procedural skirmishes²⁵² and an order that the divorce proceeding be held in abeyance until the personal injury action was completed,²⁵³ the trial court sanctioned the plaintiff by striking her pleadings and rendered judgment for the defendants on issues pertaining to liability for injury.²⁵⁴ The plaintiff thereupon appealed the order. The appellate court concluded that because the suit for divorce was not severed from the personal injury action,²⁵⁵ the order was interlocutory and not subject to appeal.

Denial of a motion for continuance is also interlocutory but is subject to review on appeal after final judgment. A motion for continuance may be motivated by a variety of objectives. For instance, respondent in *Babineaux v. Babineaux*²⁵⁶ was serving a term in prison for a criminal offense. A trial setting was ordered at the behest of respondent's counsel, who certified that all matters of discovery had been completed. Respondent's counsel thereafter filed a motion for continuance because of his client's imprisonment. The court denied the motion and entered a decree of divorce following a hearing on the petition. The appellate court held that the trial court's exercise of discretion in refusing the motion for continuance was not abusive.²⁵⁷ The movant's failure to show that an improper judgment had been rendered as a result of the denial of his motion was fatal to his appeal.²⁵⁸

Agreements Incident to divorce. A property settlement agreement made in anticipation of divorce is encouraged by statute.²⁵⁹ Although the agreement may be incorporated in the decree, violation of the terms of the agreement are enforceable as contractual terms²⁶⁰ and are not subject to enforcement by contempt.²⁶¹ The interpretation of those terms are subject to the law of contracts rather than the law of judgments.²⁶² Thus, most disputes with respect to property settlement agreements arise after a decree of divorce is entered.

Although the dispute in *Comeaux v. Comeaux*²⁶³ turned principally on the enforcement of a child-support order entered on divorce, there was also a property settlement agreement that the court construed as independent of the child-support agreement. With respect to both sorts of agreements, the court, with one judge dissenting, laid down a startlingly broad rule for reformation of such agreements: "to reflect the true, bona fide intent of the con-

252. *Id.* at 676.

253. *Id.* at 677.

254. *Id.*

255. *Id.* at 676. Judge Dunn, concurring, took a somewhat narrower view in treating the order as interlocutory and therefore unappealable. *Id.* at 677.

256. 761 S.W.2d 102 (Tex. App.—Beaumont 1988, no writ).

257. *Id.* at 103.

258. *Id.* (citing TEX. R. APP. P. 81).

259. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1990).

260. *Francis v. Francis*, 412 S.W.2d 29, 32-33 (Tex. 1967).

261. TEX. FAM. CODE ANN. § 3.631(b) (Vernon Supp. 1990).

262. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984).

263. 767 S.W.2d 500 (Tex. App.—Beaumont 1989, no writ).

tracting parties.”²⁶⁴ In practice, this formulation may not go very far beyond the rule enunciated in *Allen v. Allen*²⁶⁵ that a property settlement agreement may be reformed for mutual mistake. The seeming breadth of the rule, however, may unduly burden the courts with pleas for reformation and thereby diminish the usefulness of property settlement agreements, which give the parties great flexibility in adjusting their property rights as well as the certainty of the terms that are reduced to writing.

Many disputes arising out of property settlement agreements, like those involving other contractual arrangements, are resolved by the interpretation of the terms of agreement. Hence, because a particular decision may deal with very special terms of a contract, its precedential value may be very limited. But such decisions nevertheless suggest admonitions to the draftsmen of settlement agreements. In *Smith v. Smith*²⁶⁶ the court dealt with an agreement between the spouses to share expenses of particular community property pending its sale. Although most of the opinion is taken up with interpretation of the contract's particular terms, the court also conveys the general message that if a particular remedy is specified, other remedies are not necessarily ruled out unless the contract so provides.²⁶⁷ In drafting the document before the court in *Tharp v. Tharp*,²⁶⁸ the husband's counsel evidently sought to provide for the disposition of all overlooked community property in favor of his client. After an enumeration of items specifically set aside to either the husband or the wife, the property settlement agreement provided that “the remainder of the marital estate of the parties shall be set aside as the separate estate”²⁶⁹ of the husband. Sixteen years later the ex-wife asserted that the ex-husband's community retirement benefits were not disposed of by the agreement and were therefore subject to partition.²⁷⁰ The gist of the ex-wife's argument was that retirement benefits were not contemplated when the residuary clause was included in the agreement, and therefore the terms of that clause could not have referred to those benefits. The trial court, nevertheless, found that there was no genuine issue of fact and rendered summary judgment in favor of the ex-husband. The appellate court pointed out that whether a contract is ambiguous is a question of law for the court.²⁷¹ The terms of the agreement were unambiguous. Relying on

264. *Id.* at 503 (Burgess, J., dissenting, at 504).

265. 717 S.W.2d 311, 313 (Tex. 1986), commented on in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 41 Sw. L.J. 1, 29-30 (1987).

266. 777 S.W.2d 798 (Tex. App.—Beaumont 1989, no writ).

267. *Id.* at 799-800.

268. 772 S.W.2d 467 (Tex. App.—Dallas 1989, no writ).

269. *Id.* at 468.

270. In *Kirby v. Mellenger*, 715 F. Supp. 349, 350 (S.D. Fla. 1989), a Florida federal court applied this much of Texas law, but overlooked the holding in *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983), by which the partitionable share is limited to the retirement interest at the date of divorce. See *Hudson v. Hudson*, 763 S.W.2d 603, 604-605 (Tex. App.—Houston [14th Dist.] 1989, no writ); see also *Baxter v. Ruddle*, 780 S.W.2d 888, 889-90 (Tex. App.—El Paso 1989, writ granted) (clarifying pre-*Berry* decree on account of its failure to comply with *Berry*, in spite of the doctrine of *res judicata*).

271. 772 S.W.2d at 469.

cases in which similar language had been employed,²⁷² the Dallas court of appeals affirmed the judgment of the trial court.²⁷³

In *McCaskill v. McCaskill*²⁷⁴ the spouses entered into a property settlement agreement pursuant to Family Code section 3.631²⁷⁵ in which they agreed that specific items of property should be set aside to each of them, but the agreement contained no clause dealing with the residue. In open court, however, the judge asked the wife whether the husband was to have the rest of the property, and she said that he was. The court thereupon awarded the remainder of the community property to the husband, and the appellate court held that the wife's judicial admission supported the trial court's decree.²⁷⁶ The only respect in which the court departed from the parties' agreement was by awarding two automobiles to the husband. The agreement specified that the cars should belong to their possessors, but the court awarded them to the husband without hearing evidence of possession. In remanding the case for a determination of the fact of possession and a division of the automobiles according to the agreement, the appellate court noted that this was not a case requiring a reconsideration of the entire division under *Jacobs v. Jacobs*.²⁷⁷ The trial court had previously undertaken to follow the agreement of the parties. Making a division of the cars as agreed would give the agreement full effect.²⁷⁸

*Turner v. Rose*²⁷⁹ illustrates the problems faced by a trial court trying to interpret an agreement that is not fully formulated. Both spouses had received a tract of land as a gift from the husband's parents. At the final hearing both testified to an understanding to create a trust in the property for their children. The trial court merely ordered that they hold the property as tenants in common. A decree, approved by both parties, was subsequently entered. On motion of the ex-husband filed seven months later, the court entered a nunc pro tunc order creating a trust of the property in favor of the children. The appellate court set aside this order in response to the ex-wife's appeal, holding that if the trial court had committed an error, it was a judicial error that could not be corrected by a nunc pro tunc order.²⁸⁰ Apparently the ex-wife argued that there was no error because the parties had agreed to hold the property as coparceners and to create a trust for their children in the future.²⁸¹ The ex-husband, on the other hand, argued that the trust was meant to be created at the time of the decree, and therefore the decree should have been reworded by the nunc pro tunc order to achieve that result.

272. See *Jacobs v. Cude*, 641 S.W.2d 258, 259 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Teaff v. Ritchey*, 622 S.W.2d 589, 591 (Tex. App.—Amarillo 1981, no writ).

273. 772 S.W.2d at 469.

274. 761 S.W.2d 470 (Tex. App.—Corpus Christi 1988, writ denied).

275. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1990).

276. 761 S.W.2d at 474.

277. 687 S.W.2d 731 (Tex. 1985).

278. *McCaskill*, 761 S.W.2d at 474.

279. 770 S.W.2d 62 (Tex. App.—Tyler 1989, writ denied).

280. *Id.* at 64-65. In case of a mere clerical error, a nunc pro tunc order is appropriate.

281. *Id.* at 65.

The court in *Rose v. Rose*²⁸² applied the contract-interpretation doctrine and concluded that a failure on the part of a claimant to prove that payment of interest on an amount owed was agreed to as a *term of the contract* precluded interest on the amount ordered in the judgment in accordance with an agreement. Thus, the law of contracts controls not only interpretation of property settlement agreements but also their enforcement. On this latter point Chief Judge Cadena took strong exception to what he construed as an agreed judgment for a sum certain: "It is the judgment which earns the interest" not the term of the contract.²⁸³

The appellate progress of the contract issue presented in *Herbert v. Herbert*²⁸⁴ has been tortuous and slow, but the ultimate remand by the Fort Worth court of appeals in 1989 differed in only one important respect from the same court's remand in 1985. In 1983 the ex-wife sued to collect part of her ex-husband's military retirement benefits in accordance with their property settlement agreement. The ex-husband asserted material breach of the agreement by his ex-wife with the result that he was absolved from performance. The jury's finding supported the ex-husband's assertion, and judgment was entered in his favor. On appeal, the Fort Worth court reversed on the ground that the jury's verdict was inconsistent with the great weight and preponderance of the evidence as to the materiality of the breach and that the ex-husband could not assert material breach on the part of the ex-wife on remand.²⁸⁵ In a holding that illustrates the unsettled state of the Texas Supreme Court's view of its jurisdiction to review the standards applied by the courts of appeal in reviewing insufficient evidence points rather than the weight that the court below attaches to the evidence, a very divided Texas Supreme Court (3-3-1)²⁸⁶ remanded to the court of appeals for reconsideration of the jury's verdict.

In remanding the case to the trial court, the Fort Worth court of appeals interpreted the verdict just as it had done in 1985. The appellate court, however, did not in any way restrict the trial judge on relevant evidence that might be introduced. As the court of appeals summarized the evidence, it is subject to a variety of interpretations,²⁸⁷ and because the testimony was conflicting, the result would turn on the demeanor of the witnesses and their credibility. The ultimate outcome of the case, however, depends upon the application of the law of contracts to the facts before the court. The difficulties in *Herbert* dramatize the shortcomings of looking to the law of contracts

282. 770 S.W.2d 938, 941 (Tex. App.—San Antonio 1989, no writ).

283. *Id.* at 942 (Cadena, C.J., dissenting).

284. 699 S.W.2d 717 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.), commented on in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 41 Sw. L.J. 1, 31 (1987); 754 S.W.2d 141 (Tex. 1988), commented on in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 Sw. L.J. 1, 32 (1989); 774 S.W.2d 1 (Tex. App.—Fort Worth, 1989, no writ).

285. 699 S.W.2d at 726-27.

286. Three judges for remand to the court of appeals, three judges for affirmance of the trial court, and one judge for remand to the trial court for a new trial (two judges not participating).

287. See *Herbert*, 774 S.W.2d at 3-7.

alone to settle disputes concerning the division of community property in situations involving property settlement agreements and agreed judgments.

Property Not Subject to Division. Texas courts have consistently adhered to the rule that veterans' disability benefits are not divisible on divorce,²⁸⁸ either before or after *McCarty v. McCarty*.²⁸⁹ The United States Supreme Court's conclusion in *Mansell v. Mansell*²⁹⁰ that the Uniformed Services Former Spouses' Protection Act (USFSPA) did not make such benefits divisible has not altered the climate of Texas law.²⁹¹ The El Paso court of appeals held²⁹² that Veterans Administration disability benefits of a spouse are nonetheless subject to consideration by a divorce court in making a division of community property, as is the case with respect to other property not subject to division on divorce.²⁹³

Like other separate property of a spouse, a separate homestead is not subject to divestiture.²⁹⁴ As an element of child support it is, nevertheless, often appropriate for the court to award occupancy of one ex-spouse's separate homestead to the managing conservator during the minority of their children. To award that ex-spouse a life estate in the property, however, constitutes a divestiture of the owner's separate property interest.²⁹⁵ In *Hirsch v. Hirsch*,²⁹⁶ the court observed that a divestiture of the husband's separate property does not occur when a divorce court puts a lien on non-exempt separate realty for the discharge of a promissory note made by the husband to the wife to compensate for the larger share of community property partitioned in favor of the husband.

Making the Division. The process of division of the community estate falls into four stages: identification of the spouses' property interests, characterization of those interests as either separate or community property, valuation of the community property, and division of the community. Proper characterization is particularly important because an error in characterization can require repetition of the entire process.²⁹⁷

Valuation issues arise in several contexts. When valuing the goodwill of a community property interest in a professional partnership, special care must be exercised to exclude the value of the personal skill and reputation of the

288. *Ex parte* Burson, 615 S.W.2d 192, 194 (Tex. 1981); *Ex parte* Johnson, 591 S.W.2d 453, 456 (Tex. 1979).

289. 453 U.S. 210 (1981).

290. 109 S. Ct. 2023, 104 L. Ed.2d 675 (1989).

291. *Berry v. Berry*, — S.W.2d —, 33 Tex. Sup. Ct. J. 357 (Tex. 1990).

292. *Rothwell v. Rothwell*, 775 S.W.2d 888, 891-92 (Tex. App.—El Paso 1989, no writ).

293. *fcisSee* *Mattern v. Mattern*, 624 S.W.2d 400, 400 (Tex. Civ. App.—Fort Worth 1981, no writ). *But see* *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979) (seeming misapplication of blend of federal and California principles in Texas context).

294. *Eggemeyer v. Eggemeyer*, 623 S.W.2d 462, 466 (Tex. App.—Waco 1981, writ *dism'd*).

295. *LeBlanc v. LeBlanc*, 761 S.W.2d 450, 452-53 (Tex. App.—Corpus Christi 1988, writ denied).

296. 770 S.W.2d 924, 927 (Tex. App.—El Paso 1989, no writ).

297. *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985). *See* *Dawson v. Dawson*, 767 S.W.2d 949, 951 (Tex. App.—Beaumont 1989, no writ).

spouse in making the valuation.²⁹⁸ In *Keith v. Keith*²⁹⁹ during the marriage the husband formed a business partnership with his son. A formula was included in the partnership agreement for determining the market value of the partnership in the event of termination of the partnership. The wife joined in the agreement. Because the partnership was not being terminated, however, the trial court regarded the formula as inapplicable to making a valuation of the husband's partnership share on divorce. Relying on the opinion of Judge Stewart in *Finn v. Finn*,³⁰⁰ the appellate court held that such an agreement was not necessarily determinative of the value of an on-going business.³⁰¹

When a jury puts a valuation on assets, the court cannot treat those values as merely advisory. In *Archambault v. Archambault*³⁰² the court held that a grossly disparate division on the basis of such a finding in the absence of any reasonable basis for doing so constituted an abuse of discretion.³⁰³

New Trial. The Texas Supreme Court has reaffirmed that the elements of proof required to obtain³⁰⁴ a new trial following a default judgment applies to default judgments taken in divorce cases on failure of a defendant to file an answer and those entered upon for a failure to appear for trial.³⁰⁵ In the case before the court, however, no default was found, even though the husband failed to appear personally, because he was represented at trial by counsel.³⁰⁶

Appeal. In response to the 1983 decision of the Texas Supreme Court in *Ex parte Boniface*,³⁰⁷ section 3.58 of the Family Code³⁰⁸ was amended to give trial courts power to enter and enforce protective orders within thirty days of the perfection of an appeal. These powers include ordering support of either spouse during the pendency of an appeal.³⁰⁹ The trial court cannot act on a motion for support filed beyond the thirty-day period.³¹⁰

When a party requests findings of fact and conclusions of law from a trial court, the court must file such findings and conclusions within thirty days of the date of judgment.³¹¹ If the judge fails to file findings and conclusions as required, the requesting party must call the omission to the court's attention within five days after the thirty days has expired.³¹² The judge is presumed

298. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972); *Rothmell v. Morrison*, 732 S.W.2d 6, 17 (Tex. App.—Houston [14th Dist.] 1987, no writ).

299. 763 S.W.2d 950 (Tex. App.—Fort Worth 1989, no writ).

300. 658 S.W.2d 735, 742 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). In this respect, the opinion of Judge Stewart is a dissent and not a concurrence as it is marked.

301. 763 S.W.2d at 953.

302. 763 S.W.2d 50, 51 (Tex. App.—Beaumont 1989, no writ).

303. *Id.*

304. *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 390, 133 S.W.2d 124, 126 (1930).

305. *LeBlanc v. LeBlanc*, 778 S.W.2d 865 (Tex. 1989) (per curiam).

306. *Id.* at 865.

307. 650 S.W.2d 776 (Tex. 1983).

308. TEX. FAM. CODE ANN. § 3.58(h) (Vernon Supp. 1990).

309. *Id.* § 3.58(h)(1).

310. *Mullins v. Wright*, 772 S.W.2d 580, 581 (Tex. App.—Fort Worth 1989, no writ).

311. TEX. R. CIV. P. 296-297. See *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989).

312. TEX. R. CIV. P. 297.

to be aware of a reminder filed within the five-day period.³¹³ If the judge then fails to respond to the request, an appeal must be abated until the findings and conclusions are entered.³¹⁴

Bill of Review. In *Hanks v. Rosser*³¹⁵ the Texas Supreme Court laid down three basic prerequisites for a bill of review: (1) a meritorious defense on the part of the petitioner, (2) a reason based on fraud, accident, or wrongful act of the other party justifying the petitioner's failure to make the defense, and (3) lack of fault on the part of the petitioner in failing to make the defense. The court in *Baker v. Goldsmith*³¹⁶ outlined the pretrial procedure to be used in bill-of-review cases so that prima facie proof of a meritorious defense could be addressed and examined to determine whether a further inquiry should be made.³¹⁷ In cases turning on lack of notice, however, the United States Supreme Court held in *Peralta v. Hights Medical Center, Inc.*,³¹⁸ that this ground was sufficient for granting the bill without examining other elements. With one judge dissenting, the San Antonio court of appeals held in *Morris v. Morris*³¹⁹ that failure of an attorney ad litem to demonstrate inadequacy of service by publication³²⁰ does not bar a review. When a contested issue of fraud is raised in a bill of review context, an issue of fact will usually be presented that precludes a summary judgment in favor of the respondent.³²¹ If the court grants a bill of review and sets aside the prior judgment, the new judgment is not final and appealable.³²² The court then sets the case for trial on the merits.

Undivided Property. The Family Code³²³ was amended in 1987 to provide for a just and right division of community property left undivided in a prior suit for divorce or annulment. *Haynes v. McIntosh*³²⁴ concerned a claim for division of military retirement benefits earned by the respondent and not dealt with in a decree of divorce entered in March, 1982.³²⁵ The suit for division was brought in 1985 and tried in 1986 but was not decided until mid-1988. The 1987 statute was applicable to orders entered on or after November 1, 1987.³²⁶ The trial court awarded all the benefits to the respon-

313. *Berry v. Berry*, 770 S.W.2d 90, 92 (Tex. App.—Dallas 1989, no writ); *Anzaldua v. Anzaldua*, 742 S.W.2d 782, 783 (Tex. App.—Corpus Christi 1987, writ denied).

314. *Berry*, 770 S.W.2d at 92.

315. 378 S.W.2d 31, 31 (Tex. 1964). In a general sense, *Hanks* thus replaced *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (1950), as the fundamental authority on bills of review.

316. 583 S.W.2d 404 (Tex. 1979).

317. For an application of this principle, see *Beck v. Beck*, 771 S.W.2d 141 (Tex. 1989).

318. 485 U.S. 80 (1988).

319. 759 S.W.2d 707, 710-11 (Tex. App.—San Antonio 1988, no writ). Judge Butts, dissenting at 711-12, distinguished between failure to give proper notice (*void*) and improper notice or insufficient notice (*voidable*).

320. TEX. R. CIV. P. 329.

321. See *Maddux v. Brownen*, 759 S.W.2d 183 (Tex. App.—Waco 1988, writ denied).

322. *Palmer v. D.O.K.K. Benevolent Ins. Ass'n*, 160 Tex. 513, 334 S.W.2d 149 (1960); *State v. Buentello*, 771 S.W.2d 708, 710 (Tex. App.—Corpus Christi 1989, no writ).

323. TEX. FAM. CODE ANN. §§ 3.90-3.93 (Vernon Supp. 1990).

324. 776 S.W.2d 784 (Tex. App.—Corpus Christi 1989, writ denied).

325. The judgment thus followed the decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), but preceded the enactment of the USFSPA on September 9, 1982.

326. The effective date provision of the 1987 statute was clarified in 1989 so that the act

dent in a take-nothing judgment. The petitioner appealed. Because no findings of fact or conclusions of law were filed, the appellate court had to presume that the trial court's judgment was supported by the facts presented at trial, though only some of them were revealed by the incomplete record. The appellate court concluded that the 1987 statutes governed the division and presumed that the statute was properly applied.³²⁷ The court went on to observe that in such a case the trial court must consider how the remainder of the property was divided in making a just and right partition.³²⁸

Other Post-Divorce Disputes. After five unsuccessful efforts to attack a pre-McCarty³²⁹ award of part of his military retirement pay to his ex-wife, the ex-husband brought suit to quash his ex-wife's application to the Air Force Accounting Center, arguing that it constituted a writ of garnishment. The trial court dismissed the suit and imposed sanctions for a frivolous suit. The appellate court affirmed the trial court's order and applied further sanctions for taking a groundless appeal.³³⁰

The federal courts were slightly more tolerant of a third attempt to defeat a 1984 state court order in favor of an ex-wife for a portion of military retirement pay. The ex-husband sought a mandamus against the Army Accounting Center. The federal district court dismissed the proceeding as one properly within the state court system. The federal appeals court affirmed the lower court and joined it in a warning to the litigant "to cease filing frivolous pleadings."³³¹

Although debts for alimony and child-support or their equivalents³³² are not dischargeable in bankruptcy, debts incurred by way of a property settlement on divorce are dischargeable.³³³ But an award of property in a divorce decree cannot be undone by recourse to a voluntary bankruptcy proceeding. In *In re Eichelberger*³³⁴ the divorce decree designated the husband a trustee of the interest awarded to the wife in the husband's retirement plan. In her ex-husband's bankruptcy the former wife sought a determination that the damages she had suffered by the ex-husband's defalcation as trustee were not discharged in bankruptcy. The bankruptcy court found³³⁵ that the divorce court had imposed an express trust in the ex-husband, and therefore the

relates to decrees rendered "before, on, or after November 1, 1987." 1989 TEX. GEN. LAWS 1462, 1466 ch. 371, § 10(b). The 1987 amendments to other provisions of Chapter 3, including § 3.70(d), "apply to a cause of action pending on or brought after November 1, 1987." *Id.* § 10(a).

327. *Haynes*, 776 S.W.2d at 786.

328. *Id.* at 788.

329. *McCarty v. McCarty*, 453 U.S. 210 (1981).

330. *Goad v. Goad*, 768 S.W.2d 356, 360 (Tex. App.—Texarkana 1989, no writ).

331. *Chandler v. Commander, Army Finance and Accounting Center*, 863 F.2d 13, 15 (5th Cir. 1989).

332. Bankruptcy Code, 11 U.S.C. § 523(a)(5) (1988). See *In re Nunnally*, 506 F.2d 1024 (5th Cir. 1975); *In re Calhoun*, 92 Bankr. 686 (Bankr. W. D. Tex. 1987); *In re Fox*, 5 Bankr. 317 (Bankr. N.D. Tex. 1980).

333. *In re Worth*, 100 Bankr. 834, 837 (Bankr. N.D. Tex. 1989).

334. 100 Bankr. 861 (Bankr. S.D. Tex. 1989).

335. *Id.* at 864.

exception to discharge in section 523(a)(4)³³⁶ of the Bankruptcy Code applied to the damages claimed by the ex-wife.³³⁷

The bankrupt ex-husband in *In re Worth*³³⁸ sought to avoid a lien on business property imposed in favor of the ex-wife to secure a note for her share of the property. The court held³³⁹ that such a lien is not dischargeable under the Bankruptcy Code³⁴⁰ as a lien impairing an exemption to which the debtor was entitled. Though the property may have been a business homestead of the debtor, the encumbrance that had been fixed thereon by the divorce court was in the nature of a purchase money lien.³⁴¹ In dictum the court indicated that it viewed the lien as attaching only to that part of the property previously owned by the wife.³⁴²

336. Bankruptcy Code, 11 U.S.C. § 523(a)(4) (1988).

337. *Eichelberger*, 100 Bankr. at 865-67.

338. 100 Bankr. 834 (Bankr. N.D. Tex. 1989).

339. *Id.* at 836-39.

340. Bankruptcy Code, 11 U.S.C. § 522(f)(1) (1988).

341. *Worth*, 100 Bankr. at 837-38.

342. *Id.* at 840.