



January 1976

Family Law

Joseph W. McKnight

Recommended Citation

Joseph W. McKnight, *Family Law*, 30 Sw L.J. 68 (1976)
<https://scholar.smu.edu/smulr/vol30/iss1/5>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

FAMILY LAW

by

Joseph W. McKnight*

EIGHT years after enactment of the first increment of large scale family law recodification and revision, the 1975 amendments to the Family Code completed the statutory reform. With its rule-making power the Supreme Court of Texas joined the legislature in simplifying the process for settlement of disputes involving missing persons and non-residents. But in one striking instance our highest court has seemingly interpreted the legislative restatement of marital property law in a way that may give marital property management law a new direction.

The bar, which began to certify its members as family law specialists, was provided with a newly packaged compendium of authorities, still sailing under the colors of Speer. As state law develops in its inexorable way, one senses the probability of substantial federal encroachment in the field of family law as a result of the enactment of the Social Services Amendments Act of 1974 and the seeming willingness of the federal courts to exercise jurisdiction in those matters from which they have so long abstained.

I. SPOUSES

A. Status

After much hesitation to treat the matter forthrightly, rationally, and practically,¹ the legislature accepted the carefully considered recommendation of the Family Law Section of the State Bar of Texas to reinstate the age of fourteen as the minimum age of marriage for females and to extend it to males.² Fourteen was the minimum age for females from 1866 through 1969,³ when legislative uncertainty set in.⁴ The new legislation makes parental consent a prerequisite to issuance of a new marriage license to

* B.A., The University of Texas; B.C.L., M.A., Oxford University; LL.M., Columbia University. Professor of Law, Southern Methodist University.

1. McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 295-98 (1974).

2. TEX. FAM. CODE ANN. § 1.52 (Supp. 1975-76).

3. Ch. 76, § 1, [1866] Tex. Laws 72, 5 H. GAMMEL, LAWS OF TEXAS 990 (1898). From 1837 to 1866 the minimum age for marriage for females was 12 and the minimum age for males was 14. In 1866 the minimum ages were changed to 14 and 16, respectively.

4. Much of the legislative hesitation in this regard was prompted by discussion and dispute with respect to codification and perpetuation of the principle of informal marriage.

The pre-1969 age disparity for males and females would no longer stand under the Equal Rights Amendment. TEX. CONST. art. 1, § 3a. See, e.g., *Texas Women's Univ. v. Chayklintaste*, 521 S.W.2d 949 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds*, 530 S.W.2d 927 (Tex. 1975). In *Chayklintaste* the court of civil appeals held that a state university's policy refusing off-campus living privileges to females under age 23 violated the amendment. See also Blumberg, Book Review, 53 TEXAS L. REV. 1354 (1975).

persons of either sex between the ages of fourteen and eighteen,⁵ and absent parental consent, judicial consent to marry may now be granted to such persons, and even to those below the age of fourteen.⁶

The legislature also amended those sections of the Family Code dealing with the marriage licensing process to conform to those with respect to age of marriage, and added additional provisions so that formal remarriage could not be achieved within thirty days of judicial dissolution of a prior marriage.⁷ Section 1.86 of the Family Code was added in 1975 to give statutory authorization for issuance of a duplicate returned and recorded license to persons whose marriage is so evidenced.⁸ It had been the practice in many counties to issue a duplicate license when the returned and recorded license had been lost or destroyed. This section also allows parties to a marriage performed pursuant to a valid license which was not recorded following the ceremony to acquire a duplicate license by submitting to the county clerk proof of their identity and an affidavit stating that as recipients of the original license they were married by a person authorized to conduct a ceremony as provided in section 1.83, the name of that person, and the date on which the ceremony was conducted. Both parties to a marriage must apply for the duplicate license under this section.⁹

With respect to the law of marriage, judicial activity was most marked in considering comparative validity of successive marriages. The rule is succinctly stated in the Family Code that a subsequent marriage is presumed to be valid in relation to an earlier one until the continued validity of the earlier marriage is proved.¹⁰ If, of course, the validity of the earlier marriage *is proved*, the subsequent marriage may still be putative as long as the party claiming thereunder is in good faith unaware of impediments to its validi-

5. TEX. FAM. CODE ANN. §§ 1.51-.52 (Supp. 1975-76).

6. *Id.* §§ 1.51-.53. In 1973 judicial consent to marry was made available for persons under 16. Ch. 577, § 7, [1973] Tex. Laws 1600. In 1975 §§ 1.52 and 1.53 were amended and simplified to conform to the changes in age and judicial and parental consent as provided in § 1.51. The changes include a provision affording a child the ability to petition for judicial consent and to an "early hearing" without a jury. TEX. FAM. CODE ANN. §§ 1.53(a), (f) (Supp. 1975-76). The second sentence was added to subsection (d) to provide for single publication in cases of citation by publication in order to conform with similar provisions in §§ 3.26, 3.521, 11.05, and 11.051. This change was made to make the rule of publication consistent with that in § 11.05, for the overall purpose of reducing the extent of effort involved in a purposeless exercise (except for jurisdictional purposes) and to reduce costs. Regrettably, the last purpose has not been achieved.

Section 2.41 was amended to conform to the provisions of §§ 1.51, 1.52, and 1.53.

7. TEX. FAM. CODE ANN. § 1.07(a)(7) (Supp. 1975-76). This section was added in response to TEX. ATTY GEN. OP. No. H-581 (1975) expressing the view that a license might be issued by a clerk under then-prevailing law if the wedding date were set more than 30 days following a divorce of a person seeking the license, although the license was sought during the 30-day period. The objective is to insure compliance with § 3.66, previously sought to be achieved in a different form by the 1969 version of § 1.07(c). See TEX. ATTY GEN. OP. Nos. M-768 (1971), M-604 (1970). The provisions of the Code dealing with an absent applicant for a license to marry were also amended to avoid circumvention of § 3.66. TEX. FAM. CODE ANN. § 1.05(c)(2) (Supp. 1975-76).

8. TEX. FAM. CODE ANN. § 1.86 (Supp. 1975-76).

9. Although it seems widely believed that the provisions of § 3.66 may still be circumvented by entry into an informal marriage within 30 days of judicial dissolution of a prior marriage, that view is clearly contrary to § 3.66 itself. See McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 343 (1974).

10. TEX. FAM. CODE ANN. § 2.01 (1975).

ty.¹¹ In *Wood v. Paulus*¹² it was disputed whether the first of two marriages was dissolved by divorce, and whether the second was entered into either formally or informally. The court concluded that the facts were sufficient to permit the question of the validity of the second marriage to go to a jury and to shift the burden to the proponent of the first marriage to demonstrate its continued existence. A somewhat similar dispute was before the court in *Rosetta v. Rosetta*¹³ where the husband petitioned for dissolution of an alleged informal marriage. The alleged wife denied the existence of any marriage to dissolve, as she had, subsequent to cohabitation with the petitioning husband, contracted a ceremonial marriage with another. The court noted that a later marriage is presumed valid until the validity of the prior marriage is proved, but went on to state that "the presumption of validity of a ceremonial marriage is stronger than that of a previous common law marriage . . ."¹⁴ This proliferation of presumptions was unnecessary¹⁵ and should not be taken out of context to suggest that *any* formal marriage has a presumption of validity superior to *any* informal marriage.¹⁶

In *Felsenthal v. McMillan*¹⁷ the supreme court concluded that criminal conversation constitutes a cause of action in Texas. By way of obiter dictum the court then stated that a wife has a right of action to recover on this ground as well as the husband—a conclusion equally applicable to recovery for alienation of affection or loss of consortium.¹⁸ In *Felsenthal* the court stated that in an action for criminal conversation the "aggrieved spouse is surely injured whether or not the affections of the conversing spouse have been alienated," thereby making it clear that criminal conversation and alienation of affection are independent causes of action.¹⁹ The court also pointed out that in addition to adultery, "rape is included in the tort of criminal conversation."²⁰ Hence, by adding a provision to the Family Code²¹ abolishing the tort of criminal conversation, both aspects of the tort (in favor of the non-participating spouse) have been abolished. However, the tort of alienation of affection was unaffected in spite of the fact that the

11. *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67-68 (1975).

12. 524 S.W.2d 749 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

13. 525 S.W.2d 255 (Tex. Civ. App.—Tyler 1975, no writ).

14. *Id.* at 261.

15. The petitioner in *Rosetta* failed to prove the three elements of an informal marriage. TEX. FAM. CODE ANN. § 1.91(a) (1975); see *Flavin v. Flavin*, 523 S.W.2d 94 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

16. Any argument that a *prior* ceremonial marriage has presumptive validity over a later informal marriage is contrary to TEX. FAM. CODE ANN. § 2.01 (1975). Spouses may record an informal marriage in spite of a subsequent ceremonial marriage. See McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 68 (1975). The Family Code also authorizes issuance of a license for a ceremonial marriage to persons already informally married. TEX. FAM. CODE ANN. § 1.07(b) (1975).

17. 493 S.W.2d 729 (Tex. 1973), commented on in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66-67 (1974).

18. In *Hopkins v. Blanco*, 457 Pa. 90, 320 A.2d 139 (1974), the wife was allowed recovery for loss of consortium; the court's opinion was founded upon the Pennsylvania Equal Rights Amendment, PA. CONST. art. 1, § 27. In admiralty there *may* be no cause of action for loss of consortium for the wife of an injured seaman. *Francis v. Pan Am. Trinidad Oil Co.*, 392 F. Supp. 1252 (D. Del. 1975).

19. 493 S.W.2d 729, 730 (Tex. 1973).

20. *Id.*

21. TEX. FAM. CODE ANN. § 4.05 (Supp. 1975-76).

caption of the added section seems to indicate that result.²² The Code Construction Act provides that "section captions do not limit or expand the meaning of any statute,"²³ and the soundness of this rule is demonstrated in this instance.

With respect to the existing causes of action for loss of consortium and alienation of affection, the recovery by a plaintiff-spouse constitutes separate property of that spouse since the quantum of recovery is not measured by loss of earning power,²⁴ although earning power might be somehow affected by the loss. At the same time the legislature formulated this rule with regard to characterization of personal injury recovery, it repealed the last remaining vestige of the law regarding separate acknowledgements of married women. Enacted originally in 1846²⁵ to protect married women from undue influence of their husbands, the rule was that a married woman must acknowledge a transaction separately and apart from her husband after its effect had been explained to her by a witnessing authority. If the acknowledgement were not made in accordance with the statutory prerequisite, the transaction was void as to the married woman involved. Even though all requirements of married women's separate acknowledgements were repealed in 1963 and 1967,²⁶ they are still applicable to contracts entered into before they were repealed. In *Click v. Seale*,²⁷ for example, the court held that a suit for specific performance would not lie in favor of an optionee against a married woman who had granted the option in 1962, since the option was executory in its nature and could be disaffirmed or resisted by the grantor at any time in the future.

In *Mitchim v. Mitchim*²⁸ the Texas Supreme Court recognized Arizona's long-arm divorce jurisdiction over a Texas defendant and was thereby the catalyst for revision of Texas' long-arm jurisdiction²⁹ and a significant change in the rules of civil procedure.³⁰ The legislature enacted two long-arm jurisdiction statutes—section 3.26 with respect to divorce and section 11.051 with respect to the parent-child relationship. These are "minimum contact" statutes designed to extend the personal jurisdiction of Texas courts in domestic relations matters to respondents who reside outside the state. With respect to the former, if the petitioner is a resident or domiciliary of Texas when a suit is commenced to dissolve or avoid a marital relationship, a non-resident respondent is subject to personal jurisdiction if (1) Texas was

22. The caption was consistent with the text of the proposed statute which provided for abolition of actions for criminal conversation and alienation of affection, but in the legislative process reference to alienation of affection was stricken from the text but allowed to stand in the caption.

23. TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.04 (Supp. 1975-76).

24. TEX. FAM. CODE ANN. § 5.01(a)(3) (1975).

25. [1846] Tex. Laws 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1898).

26. Ch. 309, § 6, [1967] Tex. Laws 735; ch. 473, § 1, [1963] Tex. Laws 1189.

27. 519 S.W.2d 913 (Tex. Civ. App.—Austin 1975, no writ).

28. 518 S.W.2d 362 (Tex. 1975), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 74, 103-04 (1975); Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 29 Sw. L.J. 244, 249-52 (1975); Comment, *State Court Jurisdiction: The Long-Arm Reaches Domestic Relations Cases*, 6 TEX. TECH L. REV. 1021 (1975).

29. TEX. FAM. CODE ANN. §§ 3.26, 11.051 (Supp. 1975-76).

30. TEX. R. CIV. P. 108.

the last site of marital cohabitation which occurred within two years of the date of filing the suit, or (2) "there is *any* basis consistent with the Constitution of this state or the United States for the exercise of the personal jurisdiction."³¹ The two-year time limit is inserted in the first provision in the interest of basic fairness since "minimum contacts are eroded by passage of time."³² This provision is not necessarily applicable to the second basis of personal jurisdiction, nor need the last instance or period of marital cohabitation have occurred within Texas. If, for example, Texas domiciliaries move from the state and separate shortly thereafter, and one spouse immediately returns to Texas, personal jurisdiction may be asserted under the second jurisdictional ground.³³ The statute goes on to provide that a court acquiring jurisdiction under its provisions "also acquires jurisdiction in a suit affecting the parent-child relationship"³⁴ under section 11.051, the counterpart long-arm statute in chapter 11. The provision in chapter 11 does not, however, confer marital long-arm jurisdiction as a corollary to jurisdiction in matters of parent-child relationship. That result might nevertheless follow under the provisions of section 3.26(a)(2) or the amended version of Texas Rule of Civil Procedure 108, hitherto dealing merely with service of process on non-residents but now providing that a defendant served with process outside Texas is bound "to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam."³⁵ Finally, though the statute has a specified effective date of September 1, 1975, it is asserted that it has retroactive effect since it is "remedial and procedural in form."³⁶ This view is consistent with the construction of statutes enacted to achieve procedural reform,³⁷ but is inconsistent with the date specified for effect.

With respect to resident spouses, the most commonly employed means of effecting service in divorce proceedings is waiver of process, but waiver is ineffective if made before institution of suit.³⁸ In *Deen v. Deen*³⁹ the wife

31. TEX. FAM. CODE ANN. § 3.26(a)(2) (Supp. 1975-76).

32. See Sampson, *Long-Arm Jurisdiction Marries the Texas Family Code*, 38 TEX. B.J. 1023, 1027 (1975), where Professor Sampson, the principal draftsman of the long-arm provisions, gives extensive discussion of those provisions as well as comments on their legislative history.

33. *Id.*

34. TEX. FAM. CODE ANN. § 3.26(b) (Supp. 1975-76).

35. TEX. R. CIV. P. 108. In a note to its order of July 22, 1975, the Supreme Court of Texas stated that the purpose of the amendment "is to permit acquisition of in personam jurisdiction to the constitutional limits." Professor Sampson remarks that this amended version of rule 108 could make the long-arm amendments to the Family Code redundant. Sampson, *supra* note 32, at 1026. On the other hand, Professor Baade asserts that the rule's amendment is "an impermissible extension of the Texas long-arm statute" under TEX. CONST. art. V, § 25. Baade, *Letter*, 38 TEX. B.J. 988 (1975). Sampson responds that it is not only unlikely that the rule will be found unconstitutional but also that it may be construed "as merely a procedural enabling provision to ratify existing long-arm statutes." Sampson, *supra* note 32, at 1033 n.20. Sampson further asserts that the amendment of rule 108 in conjunction with the enactment of the domestic relations long-arm provisions has the result of giving the "continuing jurisdiction" concept extraterritorial effect. *Id.* at 1031.

36. Sampson, *supra* note 32, at 1032.

37. See *Harrison v. Cox*, 524 S.W.2d 387 (Tex. Civ. App.—Fort Worth 1975, writ *ref'd n.r.e.*); *Hoehn v. District Court*, 159 Colo. 451, 412 P.2d 428 (1966); *Annot.*, 19 A.L.R.3d 138 (1968).

38. TEX. REV. CIV. STAT. ANN. art. 2224 (1971).

39. 530 S.W.2d 913 (Tex. Civ. App.—Fort Worth 1975, no writ).

waived service of process on June 21, and the husband's suit for divorce was filed the following day. The wife failed to appear and a default judgment was entered granting the divorce. After the husband's death the wife sought to have the default set aside by equitable bill of review. The trial court found that since the wife was at all times cognizant of the proceeding, she had been negligent in allowing the judgment to be entered against her, and denied equitable relief under *Alexander v. Hagedorn*.⁴⁰ The court of civil appeals reversed, holding that since there was no effective service or waiver thereof, the wife "had no duty to do anything. It is elementary that where there exists no duty to do or refrain from doing any act there could not be negligence by action or inaction."⁴¹

In *In re Earin*⁴² a Texas prisoner brought suit for divorce against a foreign domiciliary in the county of his incarceration rather than in the Texas county in which he had lived prior to imprisonment and to which he intended to return upon his release. The appellate court affirmed the conclusion of the trial court that the petitioner had failed to meet the residence requirements prescribed in section 3.21 of the Family Code.⁴³ Although the court went on to say that a prisoner might become a resident of the county in which incarcerated if he intends to be an inhabitant of that county permanently, it is questionable whether mere intention would be sufficient in such circumstances. In *Brown v. Brown*⁴⁴ the wife brought suit against her non-domiciliary husband who, in a stipulation attached to a special appearance, agreed that in the event of his failure to make monthly alimony payments his special appearance would be considered a general appearance. The husband failed to make timely payments as agreed and was treated as having submitted to the personal jurisdiction of the court. Further, his failure to present himself at the trial was treated as a waiver of his right to a record of the evidence. *Dugie v. Dugie*⁴⁵ was distinguished as a case in which the record showed that the defendant had a valid reason to believe that the case would not go to trial on the merits and that he was absent for that reason. Here the court concluded that the husband's absence

40. 148 Tex. 565, 226 S.W.2d 996 (1950). *Hagedorn* requires that the successful petitioner for bill of review show (1) a meritorious defense to the cause of action, (2) which the petitioner was prevented from making by the fraud, accident or wrongful act of the other party, (3) unmixd with any fault or negligence of his own.

41. The court concluded that the judgment was void for want of jurisdiction over the wife. The court assumed, however, that a bill of review constituted the *sole* means of obtaining relief and that requiring the wife to show lack of negligence on her part as well as a meritorious defense to the original cause of action would violate due process of law. Compare with *Deen* the court's more conventional treatment of equitable bill of review and the grounds therefor in *Ragsdale v. Ragsdale*, 530 S.W.2d 839 (Tex. Civ. App.—Fort Worth 1975, no writ).

Not to be confused with equitable bill of review is the more restrictive procedural device of statutory bill of review, available only to a defendant allegedly served with process by publication. TEX. R. CIV. P. 329. For a discussion of the grounds for statutory bill of review, see *McCarthy v. Jespersion*, 527 S.W.2d 825 (Tex. Civ. App.—El Paso 1975, no writ).

42. 519 S.W.2d 892 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

43. TEX. FAM. CODE ANN. § 3.21 (1975).

44. 520 S.W.2d 571 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

45. 511 S.W.2d 623 (Tex. Civ. App.—San Antonio 1974, no writ), *commented on in McKnight, Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 71 (1975).

was either intentional or due to conscious indifference. The Dallas court of civil appeals concluded in *Cook v. Jones*⁴⁶ that a petitioner for divorce may proceed in forma pauperis and be entitled to compel the county to effect service of citation by publication and make return of citation at public expense.⁴⁷ The highest court of New York has held, however, that in the absence of statutory authorization an indigent petitioner for divorce is not entitled to counsel at public expense.⁴⁸

If a party fails to demand a jury and pay the jury fee until after the opposing party has set the case for trial on the nonjury docket, the trial court may properly deny a setting on the jury docket.⁴⁹ In *Roberts v. Roberts*⁵⁰ a default judgment was entered against the wife for failure to appear. However, the default was entered two days prior to the date on which the wife was cited to answer. The court of civil appeals set aside the default judgment on petition for writ of error, since neither default nor waiver of jury trial can occur prior to answer date.

Temporary orders may be entered with or without discovery proceedings⁵¹ and the trial court may enforce such orders through its contempt powers.⁵² A proper citation for contempt, however, runs from the court and not the person of the judge toward whom particular conduct of the contemner is directed. If, for example, the judge of court *B* sits as the judge of court *A* in which a divorce proceeding is filed, the judge may cite a party for contempt only in his capacity as judge of court *A* and not as judge of court *B*.⁵³ In *Ex parte Gnesoulis*⁵⁴ the court entered a temporary order to pay child support. After trial nearly two years later the judge informed counsel for the parties that judgment should be entered along the lines which he indicated therein. After receipt of this letter payments of child support ceased to be made in accordance with the temporary order but, rather, were paid as indicated in the letter, and temporary alimony ceased entirely. The trial court found the failure to pay contemptuous, and a writ of habeas corpus was brought. The court of civil appeals denied the writ, pointing out that the letter did not constitute a rendition of judgment and the temporary order remained in effect.

Apart from the enactment of the Social Services Amendments Act of 1974, the most significant development in federal law with respect to family

46. 521 S.W.2d 335 (Tex. Civ. App.—Dallas 1975, no writ).

47. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); Annot., *Right of Indigent To Proceed in Marital Action Without Payment of Costs*, 52 A.L.R.3d 844 (1973).

48. *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 359 N.Y.S.2d 1118 (1975).

49. *Jackson v. Jackson*, 524 S.W.2d 308 (Tex. Civ. App.—Austin 1975, no writ).

50. *Roberts v. Roberts*, 525 S.W.2d 268 (Tex. Civ. App.—Waco 1975, no writ).

51. For a general discussion of discovery, see Gliberman, *Discovery Tactics in a Divorce Case*, 11 TRIAL, March-April 1975, at 56.

52. *Ex parte Butler*, 523 S.W.2d 309 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). But a part of a final order (in this instance an order to vacate premises) is not enforceable by contempt until the final judgment is entered. *Ex parte Valdez*, 521 S.W.2d 724 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). For other disputes concerning finality of a decree see *Schwartz v. Jefferson*, 520 S.W.2d 881 (Tex. 1975), which also dealt in part with the right to occupy premises; *Davis v. Davis*, 521 S.W.2d 952 (Tex. Civ. App.—Fort Worth 1975, no writ).

53. *Ex parte Lowery*, 518 S.W.2d 897 (Tex. Civ. App.—Beaumont 1975, no writ).

54. 525 S.W.2d 205 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

litigation is a seeming break in the almost consistently applied principle of abstention to entertain matters of family law. In *Barber v. Barber*⁵⁵ the United States Supreme Court set forth the basic abstention doctrine as it applies in domestic relations matters: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony."⁵⁶ The Court, however, carved an exception to this rule by characterizing the controversy between the former spouses as a mere contract dispute between two people who were no longer husband and wife.⁵⁷ Based upon the *Barber* exception, federal courts sitting in diversity have continued to entertain actions to enforce state alimony decrees. However, these suits have generally been instituted in federal court by non-resident former wives against resident former husbands to enforce a decree of a court of a different state.⁵⁸

Two recent cases involved federal court actions by resident wives to enforce alimony judgments against non-resident former husbands. In *Zimmerman v. Zimmerman*⁵⁹ the former wife, a resident of Pennsylvania, sued her husband, a Florida resident, in a federal court in Pennsylvania to recover support payments due under two written contracts executed by the parties and incorporated by the Florida state court in a divorce decree.⁶⁰ Although the court stated that domestic relations suits have traditionally been litigated in state courts due to their expertise in such matters, the court noted that there was growing authority for the proposition that suits to enforce separation agreements and property settlements could be maintained in federal court provided the state court had resolved all issues involving the parties' status, obligations to one another, and obligations to their children.⁶¹ As the case presented for determination did not involve those issues, the court held that subject matter jurisdiction was satisfied.

In the second case, *Hemphill v. Hemphill*,⁶² a federal district court in Georgia was petitioned by a resident former wife to enforce an alimony decree entered by a Georgia state court against the former husband, a resident of North Carolina. The court ruled that where the requisite diversity and amount in controversy requirements are satisfied under 28 U.S.C. § 1332, the federal courts will entertain suits to recover alimony arrearages.⁶³

55. 62 U.S. 582 (1858). See also *In re Burrus*, 136 U.S. 586 (1890) (child custody case held to be within province of state judicial supervision); *Williamson v. Williamson*, 306 F. Supp. 516 (W.D. Okla. 1969) (wife's prayer for declaration of her matrimonial property rights not within judicial power of federal courts), discussed in McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 41 (1971).

56. 62 U.S. at 584.

57. *Id.* at 595. A further exception has evolved regarding federal abstention in this area. In *De La Rama v. De La Rama*, 201 U.S. 162 (1899), the Supreme Court announced that *Burrus* did not apply to the jurisdictional parameters of the territorial courts or the appellate jurisdiction over those courts.

58. See, e.g., *Harrison v. Harrison*, 214 F.2d 571 (4th Cir. 1954); *Cain v. King*, 313 F. Supp. 10 (E.D. La. 1970); *Spindel v. Spindel*, 283 F. Supp. 797 (E.D.N.Y. 1968); *Richie v. Richie*, 186 F. Supp. 592 (E.D.N.Y. 1960).

59. 395 F. Supp. 719 (E.D. Pa. 1975).

60. *Id.* at 721.

61. *Id.*

62. 398 F. Supp. 1134 (N.D. Ga. 1975).

63. *Id.* at 1138. The *Hemphill* court nevertheless dismissed the action for lack of in

The significance of *Zimmerman* and *Hemphill* is that the federal district courts are opening their doors to *resident* wives in cases involving domestic relations issues. This is contrary to the former federal practice of allowing only *non-resident* wives to sue resident husbands in federal court. It is arguable that this expanded subject matter jurisdiction will result in forum shopping. However, if the cases are limited to *enforcing* rather than *imposing* alimony or child support payments, a striking extension of jurisdiction can be obviated; a federal court would merely be giving full faith and credit to the state court decree. Thus, there would not be any advantage in terms of the substantive law.

In *Soloman v. Soloman*⁶⁴ the Third Circuit determined that subject matter jurisdiction was lacking in the domestic relations controversy presented. The court stated that federal courts lack subject matter jurisdiction if (1) the suit involves custody of a child, (2) there is a pending case in state court involving the same parties and issues, and (3) there is a threat that the federal and state courts are being played off against each other.⁶⁵ Since the case presented involved all these elements, the court dismissed for what it termed a lack of subject matter jurisdiction.⁶⁶ Finally, in *Armstrong v. Armstrong*⁶⁷ the First Circuit ruled that comity and common sense dictated federal judicial abstention in cases involving a husband's continuing obligation to support his family. For this reason the court dismissed the case for lack of subject matter jurisdiction. Perhaps *Soloman* and *Armstrong* indicate the circuit courts will be less enthusiastic than some district courts about entertaining domestic relations cases.

Little need be said of the grounds for divorce. In *Baxla v. Baxla*⁶⁸ a suit for divorce was brought on grounds of insupportability, and the petitioner testified that the marriage had irreparably broken down and that there was no hope for reconciliation. The Dallas court of civil appeals concluded that a prima facie case for dissolution is satisfied by the declaration of petitioner that the marriage is insupportable, and that evidence of the petitioner's state of mind in this regard is sufficient. The point was also made in *Smitheal v. Smitheal*⁶⁹ that the state of the divorce law at the time of marriage is not an implied term of the contract of marriage.

B. Characterization of Marital Property

Since all acquisitions of spouses during marriage are presumed to be their community property,⁷⁰ the burden of proof on the issue of ownership is

personam jurisdiction, finding that the execution of a settlement agreement did not constitute "doing business" under the applicable state long-arm statute. *Id.*

64. 516 F.2d 1018 (3d Cir. 1975).

65. *Id.* at 1025.

66. *Id.* at 1026.

67. 508 F.2d 348 (1st Cir. 1974). See also *La Montagne v. La Montagne*, 394 F. Supp. 1159 (D. Mass. 1975).

68. 522 S.W.2d 736 (Tex. Civ. App.—Dallas 1975, no writ).

69. 518 S.W.2d 842 (Tex. Civ. App.—Fort Worth 1975, writ dismissed).

70. TEX. FAM. CODE ANN. § 5.02 (1975); see *Spector v. L Q Motor Inns, Inc.*, 517 F.2d 278, 282-83 (5th Cir. 1975).

placed on the spouse asserting separate character.⁷¹ In *Newland v. Newland*⁷² the court of civil appeals commented that, despite the general requirement of "clear and convincing" evidence, the uncorroborated testimony of a spouse may suffice to rebut the presumption of community character. Corroboration ordinarily is necessary when the facts at issue are by their nature susceptible to recordation or knowledge by third persons.⁷³ In any event, the "clear and convincing" nature of uncorroborated testimony would certainly bear an inverse relationship to the degree of probability that testimony of that nature, if true, would be amenable to corroboration. Proof of separate ownership becomes particularly onerous when a spouse's separate property becomes an integral part of the spouse's ordinary business activities, because it is necessary in such situations to trace original separate ownership to property on hand at the time of marital dissolution.⁷⁴ In *Smoak v. Smoak*⁷⁵ the husband proved ownership of fifty head of cattle prior to a marriage of long duration, during which the herd increased. This evidence was insufficient to show separate ownership of either the original number or the augmented herd, but reimbursement may still be available.⁷⁶

In *Cockerham v. Cockerham*⁷⁷ the husband and his brother each owned an undivided one-half interest in realty. During the marriage the husband and his wife sought to purchase the brother's share and did so (for reasons not indicated in the opinion) by the tortuous route of a judicial proceeding by which a receiver of the entire property was appointed to convey it to the spouses. The conveyance recited consideration of about \$12,000 borrowed from a third person and about \$12,000 in cash supplied by the spouses. The latter element of consideration was wholly fictitious and merely represented the husband's undivided half interest in the property. In the divorce proceeding instituted seventeen years after the purchase, the wife's trustee in bankruptcy intervened, asserting that the entire tract was community property. The trustee relied on the general presumption that acquisitions during marriage constitute community property.⁷⁸ The supreme court concluded, however, that the husband "clearly trace[d] the original separate property into the particular assets on hand during the marriage,"⁷⁹ with the result that the tract was one-half the husband's separate property and one-half community. The court emphasized the trial court's finding that the "partition suit

71. *Jackson v. Jackson*, 524 S.W.2d 308 (Tex. Civ. App.—Austin 1975, no writ). The presumption in this respect is complete, *i.e.*, the presumption is not displaced merely by a showing which tends to prove separate ownership (merely "bursting the bubble"). See generally Note, *Pleading Separate Property in a Divorce Case*, 27 BAYLOR L. REV. 784 (1975).

72. 529 S.W.2d 105 (Tex. Civ. App.—Fort Worth 1975, writ dismissed).

73. See *Hampshire v. Hampshire*, 485 S.W.2d 314 (Tex. Civ. App.—Fort Worth 1972, no writ), discussed in McKnight, *Matrimonial Property*, *Annual Survey of Texas Law*, 27 Sw. L.J. 27, 33 (1973); *Patterson v. Metzger*, 424 S.W.2d 255 (Tex. Civ. App.—Corpus Christi 1967, no writ), discussed in McKnight, *Matrimonial Property*, *Annual Survey of Texas Law*, 23 Sw. L.J. 44, 48 (1969).

74. See generally, Comment, *The Commingling of Separate and Community Property*, *The Requirement of Tracing in Texas*, 6 ST. MARY'S L.J. 234 (1974).

75. 525 S.W.2d 888 (Tex. Civ. App.—Texarkana 1975, writ dismissed).

76. See notes 116-21 *infra* and accompanying text.

77. 527 S.W.2d 162 (Tex. 1975).

78. TEX. FAM. CODE ANN. § 5.02 (1975); 527 S.W.2d at 167.

79. 527 S.W.2d at 165 n.1.

and sale was . . . only 'a means of convenience provided by law to complete the purchase of the whole'⁸⁰ Accepting this conclusion, the trustee went on to assert that the transaction had the end result of vesting half the property in the wife as her separate property, with the other half in the community. The trustee's argument was that because the husband had used separate property to pay for land acquired in the name of both spouses, there was a presumed gift to the wife of the husband's half. Although the court recognized the existence of such a presumption,⁸¹ it held that the husband had been successful in establishing the lack of intention to make a gift. The court noted the wife's admission that no gift was intended and also the testimony of both spouses that their intention was merely to acquire the brother's half and they were unaware of the legal means by which the result was achieved.

The court's conclusion that the property was an undivided cotenancy between the husband's separate estate and the community may be analyzed as a conclusion in favor of substance over form. The court's approach may also be characterized as a return to the consideration of intention as a significant factor in the determination of the nature of marital property acquisitions.⁸²

As a result of the curious results achieved in interpretation of the then-existing simultaneous death act in *Brown v. Lee*⁸³ the Probate Code was amended⁸⁴ in 1965. *Pritchard v. Snow*⁸⁵ concerned competing claims to the proceeds of the husband's life insurance policy after the husband and wife were simultaneously killed in an accident. The policy was acquired by the husband prior to marriage, and his wife was named as principal beneficiary with his estate as secondary beneficiary should his wife not survive him. The couple was not survived by descendants. The court concluded that section 47(b) of the Probate Code is applicable only to life insurance proceeds of a community policy and not to the proceeds of a separate policy. Hence, the husband's estate was solely entitled to the proceeds of the policy.⁸⁶

80. Since the receiver's deed contained no recital of the character of the property conveyed, the parol evidence rule, as applied in *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1968), and *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952), was seemingly deemed inapplicable. *Cf. Brick & Tile, Inc. v. Parker*, 143 Tex. 383, 186 S.W.2d 66 (1945).

81. *Smith v. Strahan*, 16 Tex. 314 (1856). In his dissent Justice Reavley referred to the presumption as "a very weak one." 527 S.W.2d at 175. He also points out that the presumption is equally applicable to a wife's acts in favor of her husband.

82. *See McClintic v. Midland Grocery & Dry Goods Co.*, 106 Tex. 32, 154 S.W. 1157 (1913); *Rath v. Rath*, 218 S.W.2d 217 (Tex. Civ. App.—Galveston 1949, no writ).

83. 371 S.W.2d 694 (Tex. 1963).

84. TEX. PROB. CODE ANN. § 47(b) (1973).

85. 530 S.W.2d 889 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

86. For a clarification of the amount includable for federal estate tax purposes in the estates of spouses dying in close succession, by reason of their community ownership of a life insurance policy on the life of the husband, *see Rev. Rul. 75-100*, 1975 INT. REV. BULL. NO. 12, at 15. The Service's ruling is that when the wife predeceases the husband and no settlement of the wife's interest in the policy is made prior to the husband's death, the amount includable in the wife's estate is one-half the value of the policy on the date of her death, determined by the interpolated terminal reserve method. With respect

In Revenue Ruling 75-504⁸⁷ the Revenue Service takes the position that when a Texas spouse transfers separate property to the other, one-half of the value of the transferred property and one-half of the income on hand is includable in the donor's estate.⁸⁸ The reasoning is that under Texas law income from separate property is community property, and, therefore, the donor spouse has transferred property with a retention for life of the right to the income from one-half of the property. The Supreme Court of Texas has, however, stated on three occasions that the settlor of a trust or the donor of other *inter vivos* gifts may provide that the future income from the property shall be the separate property of the donee.⁸⁹ The Service's reasoning, therefore, does not cover all situations.⁹⁰

C. Division on Divorce

With respect to division of matrimonial property on divorce the trial court is directed by the legislature to do equity.⁹¹ Although the courts have indicated that certain unvested rights in property are not subject to division,⁹² there has been some disagreement as to whether certain vested

to the estate of the husband, one-half of the proceeds from the policy is includable in his gross estate.

With respect to estate tax treatment of the proceeds of a life insurance policy transferred in contemplation of death by the insured, who paid the subsequent premiums, see *In re Silverman*, 521 F.2d 574 (2d Cir. 1975). The Commissioner of Internal Revenue merely sought (and gained) affirmance of the Tax Court's holding that an estate tax was applicable to the proceeds less a pro rata share attributable to the premiums paid by the beneficiary. In its seeming reluctance to reduce the amount of proceeds subject to tax the appellate court brings back memories of Rev. Rul. 67-463, 1967-2 CUM. BULL. 327, replaced by Rev. Rul. 71-497, 1971-2 CUM. BULL. 329. For related cases see McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 32-33 (1973); McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 51-53 (1971); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 48-51 (1969).

87. Rev. Rul. 75-504, 1975 INT. REV. BULL. No. 47, at 14.

88. INT. REV. CODE OF 1954, § 2036.

89. *Strickland v. Wester*, 131 Tex. 23, 112 S.W.2d 1047 (1938) (dictum in case involving non-trust gift by husband to wife); *Cauble v. Beaver-Electra Ref. Co.*, 115 Tex. 1, 274 S.W. 120 (1925) (dictum in case not involving gifts between husband and wife but nevertheless decided the same day as *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925), which is relied on by the Service in its ruling); *Hutchison v. Mitchell*, 39 Tex. 487 (1872) (gift in trust by husband for wife providing that income should be her separate property).

Lower court decisions have reached the same conclusion. *Sullivan v. Skinner*, 66 S.W. 680 (Tex. Civ. App. 1902, writ ref'd); *McClelland v. McClelland*, 37 S.W. 350 (Tex. Civ. App. 1896, writ ref'd); *Monday v. Vance*, 11 Tex. Civ. App. 374, 32 S.W. 559 (1895, no writ); *Shepflin v. Small*, 4 Tex. Civ. App. 493, 23 S.W. 432 (1893, no writ). *But see* *Mercantile Nat'l Bank v. Wilson*, 279 S.W.2d 650 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

Some of these cases were discussed in *Commissioner v. Porter*, 148 F.2d 566 (5th Cir. 1945), where the court did not deal with this specific question. In reaching its conclusion the Revenue Service also rejected a dictum to the contrary in *United States v. Hines*, 180 F.2d 930 (5th Cir. 1950), *aff'd* 11 T.C. 314 (1948), *nonacquiesced*, 1949-1 CUM. BULL. 5.

90. See Tracy, *Taxation*, p. 356 *infra*, at 384-87. For a widow's income-tax-amortization of cost of a life estate in a trust created by her and her husband with community estate see *Kuhn v. United States*, 392 F. Supp. 1229 (S.D. Tex. 1975). For related cases see McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 53-54 (1971).

91. TEX. FAM. CODE ANN. § 3.63 (1975).

92. *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27 (1973); *Lumpkins v. Lumpkins*,

interests, although not capable of *direct* divestiture, are nonetheless subject to *indirect* divestiture either by way of an in personam order punishable by contempt or by a court-ordered division of other property.⁹³

Courts give consideration to the expectancies of the parties, but expectancies are always, by their nature, difficult to assess in making a division of property on divorce. Present earning capacity of a spouse and immediate future needs generally have been considered in making division resulting from fault. More remote expectancies, especially those having no nexus to the marriage to be dissolved, have dubious bearing on division, although one court apparently considered a spouse's anticipated inheritance.⁹⁴ Another court reviewed a property division which involved expectations of employment in a case of no-fault divorce.⁹⁵ The division of the trial court was

519 S.W.2d 491 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); Davis v. Davis, 495 S.W.2d 607 (Tex. Civ. App.—Dallas 1973, writ dismissed), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 73 (1974); *see* Goldman, *A Community Property Citizen's Plea to Congress*, 61 A.B.A.J. 1495 (1975); Sage, *Military Retired Pay in Texas: A New Outlook*, 7 St. MARY'S L.J. 28 (1975). *But see* Brown v. Brown, Civil No. L.A. 30463 (Cal. Sup. Ct., Jan. 16, 1976), *overruling* French v. French, 17 Cal. 2d 775 (1941). *See also* Note, *Pleading Separate Property in a Divorce Case*, 27 BAYLOR L. REV. 784 (1975).

In Echols v. Austron, Inc., 529 S.W.2d 840 (Tex. Civ. App.—Austin 1975, no writ), the court held that, because rights are fixed when a judgment is rendered, a bonus paid to a husband-corporate executive after rendition of the divorce judgment but prior to the entry of that judgment was not community property; therefore, the wife was not entitled to one-half of the bonus.

93. Foreign realty: Deger v. Deger, 526 S.W.2d 272 (Tex. Civ. App.—Waco 1975, no writ) (consideration of holdings in foreign realty in dividing other properties); Walker v. Walker, 231 S.W.2d 905 (Tex. Civ. App.—Texarkana 1950, no writ) (consideration of foreign realty acquired during marriage in making division of other property); *cf.* Estabrook v. Wise, 506 S.W.2d 248 (Tex. Civ. App.—Tyler 1974, writ granted, but dismissed *ab initio* as moot) (case involving foreign realty not dealt with or considered by the divorce court), *commented on* by Baade, *Domestic Relations in the Conflict of Laws*, in TEXAS FAMILY LAW AND COMMUNITY PROPERTY 63, and addendum (J. McKnight ed. 1975), and *noted in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 84 (1975); Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 29 Sw. L.J. 244, 253 (1975).

Rights under federal law: Arnold v. United States, 331 F. Supp. 42 (S.D. Tex. 1971), *noted in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 33 (1972); Miguez v. Miguez, 453 S.W.2d 514 (Tex. Civ. App.—Beaumont 1970, no writ), *noted in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 41 (1971).

Federal pension rights unaffected by the Pension Reform Act of 1974 are discussed in Ray, *Trusts and Pensions (including effects of Pension Reform Act of 1974)*, in TEXAS FAMILY LAW AND COMMUNITY PROPERTY 183 (J. McKnight ed. 1975). However, it has been argued that, because the federal government is subject to garnishment in the same way as any other debtor, federal pension rights are subject to *direct* division by state courts as an inferential result of the Social Services Amendments Act of 1974, Pub. L. No. 93-647 (Jan. 4, 1975) (codified in various sections of 28 U.S.C.), *commented on* in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 108 (1975).

Spendthrift trust interests or interests in income of a non-distributable discretionary trust: Currie v. Currie, 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ dismissed), *commented on* in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 76-77 (1975).

Certain interests which by their terms may be non-assignable under state law are, at least, subject to *indirect* disposition or may be taken into consideration in dividing other property on divorce. Gillis v. Gillis, 435 S.W.2d 171 (Tex. Civ. App.—Fort Worth 1968, writ dismissed), *commented on* in McKnight, *Family Law, Annual Survey of Texas Law*, 24 Sw. L.J. 49, 52 (1970). *See also* Projector, *Valuation of Retirement Benefits in Marriage Dissolutions*, 50 LOS ANGELES B. BULL. 229 (1975).

94. Whittenburg v. Whittenburg, 523 S.W.2d 797 (Tex. Civ. App.—Austin 1975, no writ).

95. Thomas v. Thomas, 525 S.W.2d 200 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

strikingly disproportionate: an award of approximately \$34,000 to one spouse and \$27,000 to the other. Although the husband received the larger amount, the sex of each was apparently irrelevant for purposes of the division. Both parties were employed and apparently in good health.

Neither party was alleged or shown to be to blame for ending the marriage The disparity between the shares awarded to the parties does not appear to be related to providing support or education for the children. The only factor we can find in the record which might influence an unequal division of the property in favor of the appellee was his testimony concerning his employment. He said that if [he should lose his job, he would be left with only] about \$12,500 in his retirement fund. . . . He testified that those who have left [his place of employment] found it almost impossible to find a job and that people in this area do not regularly hire aerospace engineers.⁹⁶

The court observed that this sort of information "does not furnish an equitable basis for the property division ordered in this case [and amounted to] an abuse of judicial discretion."⁹⁷ Future earning power unrelated to the cause of action should not, therefore, be considered in the division of property on divorce.

In some instances a spouse has so dealt with separate personalty as to justify its divestiture in favor of the other spouse. In *Wells v. Hiskett*⁹⁸ the court noted that if a spouse fraudulently expands separate corporate assets at the expense of the community, a divorce court may properly treat those assets as community property. If there is not significant community property to divide in order to do equity between the spouses, courts have resorted to separate personalty for that purpose. In *Dillingham v. Dillingham*⁹⁹ the court held that a separate corporate interest so closely held as to constitute the alter ego of a spouse would justify division of that separate property in favor of the other spouse.¹⁰⁰ And in *Uranga v. Uranga*¹⁰¹ a court of civil appeals once again concluded that a husband's separate corporate interest was so inextricably associated with his conduct of business affairs as to amount to his alter ego. It was therefore, treated as community property for purposes of division on divorce.¹⁰²

In dividing property under section 3.63 of the Family Code, some courts have failed to distinguish separate real and personal property,¹⁰³ but this

96. *Id.* at 202.

97. *Id.*

98. 288 S.W.2d 257 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.).

99. 434 S.W.2d 459 (Tex. Civ. App.—Fort Worth 1968, writ dism'd w.o.j.). See also *Mea v. Mea*, 464 S.W.2d 201 (Tex. Civ. App.—Tyler 1971, no writ).

100. In *Dillingham* the corporate-owner-husband did not complain of the court's abuse of discretion but rather of its treating separate property as though it were community property. In *Bell v. Bell*, 513 S.W.2d 20 (Tex. 1974), noted in 6 TEX. TECH L. REV. 259 (1975), the question was not abuse of discretion but whether the trial court considered separate corporate holdings in making its division on divorce. Neither the court of civil appeals nor the supreme court cited *Dillingham*. The supreme court concluded that the trial court had considered those separate holdings and thereby inferentially approved that approach under TEX. FAM. CODE ANN. § 3.63 (1975).

101. 527 S.W.2d 761 (Tex. Civ. App.—San Antonio 1975, writ dism'd).

102. The court relied on *Mea v. Mea*, 464 S.W.2d 201 (Tex. Civ. App.—Tyler 1971, no writ), as well as *Dillingham*.

103. See *Merrell v. Merrell*, 527 S.W.2d 250 (Tex. Civ. App.—Tyler 1975, writ ref'd

approach is subject to some dispute. After careful consideration of all prior reported cases, the Corpus Christi court of civil appeals concluded that a divorce court lacks power in the division of property to divest title to separate realty.¹⁰⁴ The court interpreted section 3.63 as a reenactment of old article 4638,¹⁰⁵ thereby employing a line of reasoning not pursued in other appellate decisions, but nevertheless appropriate in light of its legislative history.¹⁰⁶

Another problem faced by courts attempting to make an appropriate division of matrimonial property on divorce concerns the spouses' liability to third persons. Although section 3.63 and its statutory predecessors have been part of Texas jurisprudence since 1841, our appellate courts have given little guidance with respect to disposition of the liabilities of a marriage (as opposed to assets) upon divorce. Existing authority seems to be rooted in the dubious and perhaps now discredited opinion of the court of civil appeals in *Hubbard v. Hubbard*.¹⁰⁷ In that case the appellate court approved a judicial partition of community property on divorce in which the property set apart for the wife was freed of all charges of community debts previously incurred by the husband. This conclusion was amplified in 1924¹⁰⁸ with the enunciation of the proposition that a divorce court may require the husband to pay all debts incurred during the marriage. In 1944 the San Antonio court of civil appeals affirmed a decree in which the husband was ordered to pay a joint note incurred by the husband and wife during marriage.¹⁰⁹ All these cases, however, were decided before 1963, when a married woman had little, if any, general contractual capacity. Prior to 1963 most significant contractual indebtedness was incurred by the husband, or by the wife *as his agent*, generally as his agent of necessity. Even when the wife was the joint maker of a note with her husband for the purchases of family necessities, she was not personally liable.¹¹⁰ Since 1963, however, the wife's contractual capacity has become unlimited with respect to binding herself and since 1967 substantial community assets may be subject to her control and to the liability generated by her contracts. Prior to 1968 community debts were those contracted by the husband (or by the wife on his behalf) and all community property within the husband's control could be reached to satisfy them. Today the term "community debts" is less meaningful because it merely indicates that *some* community property (not

n.r.e.); *Baxla v. Baxla*, 522 S.W.2d 736 (Tex. Civ. App.—Dallas 1975, no writ). See also *Wilkerson v. Wilkerson*, 515 S.W.2d 52 (Tex. Civ. App.—Tyler 1974, no writ), commented on in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 79 (1975); Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209 (1975).

104. 524 S.W.2d 767 (Tex. Civ. App.—Corpus Christi 1975, no writ).

105. TEX. REV. CIV. STAT. art. 4638 (1925).

106. See McKnight, *Commentary to the Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 337-38 (1974). In 1975 the Texas House of Representatives passed H.R. 454 (64th Leg.) to restore the 1968 language of old art. 4638, but the bill died in the Texas Senate.

107. 38 S.W. 388 (Tex. Civ. App. 1896, no writ).

108. *Hughes v. Hughes*, 259 S.W. 180 (Tex. Civ. App.—Amarillo 1924, writ dismissed).

109. *Mangum v. Mangum*, 184 S.W.2d 338 (Tex. Civ. App.—San Antonio 1944, no writ).

110. *Humbles v. Hefley-Stedman Motor Co.*, 127 S.W.2d 515 (Tex. Civ. App.—Austin 1939, no writ).

necessarily that controlled by the husband) may be liable for satisfaction of the debt under section 5.61 of the Family Code.¹¹¹

Section 3.63 of the Family Code authorizes a divorce court to divide the estate of the spouses as it deems "just and right." The legislature does not, however, specifically mention either assets or liabilities, nor does it indicate whether it is speaking in terms of the net or gross estate. A decree ordering the husband to discharge liabilities incurred by him during the marriage usually constitutes a reiteration of his existing liability or a reflection that certain debts incurred by the wife were for *necessaries* for which the husband was liable both in his capacity as manager of the community estate and of his separate estate. Such decrees are seldom appealed. Since 1967 third parties have been allowed to participate in divorce proceedings in most courts of special and general jurisdiction in order that their rights may be resolved as well.¹¹² In *Broadway Drug Store v. Trowbridge*,¹¹³ where a creditor intervened in a divorce proceeding, the appellate court held it impermissible to vary the spouse's liability to a creditor even when the creditor is *before the court*. The inference is clear that the divorce court cannot alter the contractual relationships between a spouse and a prior creditor, thereby severely limiting the rule in *Hubbard*. This result is supported by numerous cases which conclude that divorce courts cannot, in the absence of a showing of fraud or like grounds, alter contracts—even those *between the spouses* for the division of property or for support of children. Nonetheless, in an effort to divide the community estate equitably, the trial courts have continued to order a particular spouse to discharge liabilities incurred by either—usually in circumstances when the spouse ordered to pay was personally liable anyway. By making such an order, the trial court is attempting to achieve the objective sought in *Hubbard*; that is, to exonerate community assets partitioned to the other spouse which would otherwise be liable for the satisfaction of the debt. Problems inherent in such decrees are most perceptively pointed out by the Texarkana court of civil appeals in *Dorfman v. Dorfman*¹¹⁴ where the court concluded that there are certain substantial "pitfalls" to this type of decree and that creditors' rights may not be prejudiced. The court did not speculate as to (1) whether such an order gives a creditor a right of recovery against the spouse ordered to pay; (2) whether the spouse who originally contracted the debt is given a right to recover from the spouse ordered to pay if the contracting spouse pays the debt voluntarily or if judgment is taken against him and his property is taken on execution;¹¹⁵ or (3) whether the divorce court could properly hold

111. See McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 81 (1974).

112. TEX. REV. CIV. STAT. ANN. arts. 2338-3, -5, -7, -8 to -9b.1, -10 to -11b, -13 to -20, -22, -23 (1975).

113. 435 S.W.2d 268 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

114. 457 S.W.2d 417, 423 (Tex. Civ. App.—Texarkana 1970, no writ).

115. In *Walker v. Walker*, 527 S.W.2d 200 (Tex. Civ. App.—Fort Worth 1975, no writ), this question was posed, though with insufficient particularity to permit resolution by the court. The problems resulted from an oversight of the trial court in dealing with marital debts in making a division of property upon divorce. The trial court's order reiterated the liability of each spouse for all obligations incurred and unpaid during the

the ordered spouse in contempt for failure to comply with the order.

Problems of reimbursement on divorce were before the appellate courts in several instances. As a general rule, on dissolution of marriage, a spouse whose separate property has been used for the benefit of the community estate or whose share of the community property has been used for the benefit of the separate estate of the other spouse, may seek reimbursement of those funds. The reimbursement is in an amount not to exceed the sum expended or the degree of enhancement, whichever is less.¹¹⁶ On the other hand, when community funds are used to discharge an indebtedness against separate property, or when separate funds are used for the same purpose to benefit a community estate, the cost and not enhancement is the proper measure of reimbursement.¹¹⁷ If the general division of property on divorce is seemingly equitable, however, some appellate courts do not look too closely at the underlying rules of reimbursement.¹¹⁸ For example, in *Carson v. Carson*¹¹⁹ the trial court's arguably arbitrary award based on the wife's payment for repairs to the husband's separate property was summarily upheld despite the apparent absence of fact findings concerning the degree of enhancement. Further, while trial courts have wide equitable discretion in assessing rights of reimbursement for improvements, the court in *Newland v. Newland*¹²⁰ made it clear that the degree of "enhancement . . . must be proved both as to the fact and amount" by the spouse seeking to recover by reimbursement.¹²¹

A divorce court may also exercise its equitable judgment in awarding attorneys' fees. The decision to award fees should be based upon a dual inquiry: first, *whether* to award fees as part of the division, and second, *how*

marriage, but the court failed to provide for the liability of one spouse to the other for contribution if one should make full discharge of a liability for which both were jointly and severally liable. In his concurring opinion Chief Justice Massey wisely suggests that provisions for this eventuality should be included in divorce decrees.

116. *Girard v. Girard*, 521 S.W.2d 714 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). However, should a court err in making its award for reimbursement, the spouse in whose favor the error runs will have no basis for complaint on appeal. *Id.* at 718. See also McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 44 (1971); cf. Comment, *Development of a Separate Property Oil and Gas Lease with Community Funds*, 27 BAYLOR L. REV. 743 (1975).

117. *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935). A contrary conclusion seems to have been reached in *Jackson v. Jackson*, 524 S.W.2d 308, 312 (Tex. Civ. App.—Austin 1975, no writ), but the equities of the situation are not discussed.

118. See, e.g., *Jackson v. Jackson*, 524 S.W.2d 308 (Tex. Civ. App.—Austin 1975, no writ); *Robbins v. Robbins*, 519 S.W.2d 507 (Tex. Civ. App.—Fort Worth 1975, no writ).

119. 528 S.W.2d 308 (Tex. Civ. App.—Waco 1975, no writ).

120. 529 S.W.2d 105 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

121. *Id.* at 110. See also *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952). In *Newland* the court likened dissolution of a business partnership to division on dissolution of a "marital partnership":

Save for the presumptions at law . . . there is not a distinction to be made from the analogous situation where two persons are partners in a business enterprise, while one of them is at the same time dealing in real estate as his private business . . . and where from time to time there is action resulting in indebtedness owing from the partners to the individual, or from the individual to the partners (or partnership account). . . . The question at any important time is whether the accounts of the partnership and the individual have been settled so neither owes the other, or if not settled what amount is owed from the one to the other.

529 S.W.2d at 109.

much should be awarded. Due to judicial habit resulting from the state of the law prior to 1963, courts have rarely given serious consideration to the first inquiry. Texas courts have traditionally characterized the attorney's fees incurred by a wife as a "necessary" of the marriage, and therefore, a liability of the husband. The reason for this characterization is that the wife, lacking full contractual capacity, acts as an agent of necessity for the husband in contracting for the "necessary" attorney's services.¹²² Now that wives are endowed with full contractual capacity,¹²³ characterization of the wife's attorney's fees as "necessaries" appears outmoded. It is more appropriate to treat attorney's fees as an element in the equitable division of marital property, or perhaps as a cost of dissolution. This was the trial court's approach in *Brown v. Brown*.¹²⁴ However, in exercising its discretion the divorce court should either consider *both* parties' attorneys' fees as a cost of winding up the marriage (deducting all fees from the community before division), or leave the parties to discharge their own fees.¹²⁵ Regardless of the juristic foundation of an award of attorney's fees, it is clear that an award must be supported by the pleadings. In *Carson v. Carson*¹²⁶ the wife had agreed to pay her attorney \$500, and that amount was claimed in her pleadings. The trial court awarded \$500 and went on to make a contingent award of an additional \$250, should there be an appeal. The additional award was stricken as unsupported by the pleadings. The clear lesson of *Carson* is that the prayer for attorney's fees should be couched generally.¹²⁷

The availability of direct or collateral attack of property divisions was questioned on several occasions. In one instance¹²⁸ the former wife sought by bill of review to set aside a judgment incorporating an agreed property

122. The term "necessary" had additional significance in that the wife has traditionally been the petitioner in divorce proceedings, with her claim traditionally founded upon fault. See McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 80-81 (1975).

123. TEX. FAM. CODE ANN. § 4.03 (1975).

124. 520 S.W.2d 571 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). In *Brown* the court discussed *Carle v. Carle*, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950): "In this case the court . . . fixed liability for the wife's attorney's fees as a part of its 'making an equitable division of the estate.'" 520 S.W.2d at 578-79. See also *Cooper v. Cooper*, 513 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1974), no writ), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 81 (1975). When the divorce court orders each party to discharge his or her own attorney's fees in a particular amount, there is no judgment as between attorney and client sufficient to support a writ of garnishment. *Douthit v. Anderson*, 521 S.W.2d 127 (Tex. Civ. App.—Dallas 1975, no writ). For ethical problems raised in this type of situation see TEX. ETHICS COMM. OP. NO. 374, 37 TEX. B.J. 1085 (1974), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 82 (1975). See also *Pate Receives Reprimand*, 39 TEX. B.J. 117 (1976).

125. Though the court may not make sex a determinant for award, the Equal Rights Amendment, TEX. CONST. art. I, § 3a, does not preclude a wife's recovery of fees, since either spouse may be so entitled under Texas law. *Lipshy v. Lipshy*, 525 S.W.2d 222 (Tex. Civ. App.—Dallas 1975, writ dismissed). *Contra*, interpreting Pennsylvania law, *De Rosa v. De Rosa*, 60 Pa. D. & C.2d 71 (C.P. Delaware County 1972); *Kehl v. Kehl*, 57 Pa. D. & C.2d 164 (C.P. Allegheny County 1972).

126. 528 S.W.2d 308 (Tex. Civ. App.—Waco 1975, no writ).

127. See also *Masters v. Stair*, 518 S.W.2d 439 (Tex. Civ. App.—San Antonio 1975, no writ), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 82 (1975).

128. *McFarland v. Reynolds*, 513 S.W.2d 620 (Tex. Civ. App.—Corpus Christi 1974, no writ).

settlement. She alleged that the husband fraudulently represented the value of the community estate and the amount of its debts, and the appellate court held that such was sufficient to state a cause of action.¹²⁹ In another case¹³⁰ an ex-wife sought by bill of review to set aside an agreed property settlement. However, the court not only failed to find any evidence of the ex-husband's fraud but also concluded that the ex-wife had failed to establish one of the vital elements entitling her to a bill of review—her lack of fault or negligence in connection with the prior proceeding. Although the ex-wife had been without counsel in the earlier matter, it was demonstrated that she was quite familiar with such proceedings and fully capable of procuring counsel. She conceded that she was under no compulsion to enter into the settlement. The court concluded that she was negligent in failing to make an accurate determination of the value of the property in question. Finally, another case¹³¹ involved a post-divorce assertion that certain property in issue between the ex-husband and third persons constituted community property not dealt with on divorce. The court, however, found no fraudulent concealment, and that the action actually involved *separate* property, thereby indicating that since the property was the husband's separate property, failure to divulge dealings concerning it was irrelevant.¹³² Although this may have been correct with respect to the particular facts of the case, this conclusion will not follow in all circumstances.¹³³

In *Peddicord v. Peddicord*¹³⁴ the former husband was sued for payments due under a decree embodying a property settlement agreement. The decree recited that the agreement was contractual in nature, and it was approved by the court and incorporated in the judgment. The husband did not argue that the trial court had made an impermissible grant of permanent alimony,¹³⁵ nor did the wife assert that the husband was barred by estoppel.¹³⁶ The husband asserted a contractual defense which was clearly inappropriate ground for collateral attack. In his concurring opinion Justice Keith discusses the problems of raising fraud and mistake "or other contractual defenses,"¹³⁷ concluding that they apply only to direct attacks, in which category he includes bills of review.¹³⁸

129. The dissenting judge, however, would have rejected her bill of review on the ground of evidence of fraud and negligence on her part. *Id.* at 628-36. On propriety of bill of review see note 40-41 *supra*.

130. *Crispin v. Crispin*, 529 S.W.2d 310 (Tex. Civ. App.—Austin 1975, no writ).

131. *Cowart v. Cowart*, 515 S.W.2d 359 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

132. *Id.* at 362.

133. See *Bell v. Bell*, 513 S.W.2d 20 (Tex. 1974), *rev'g* 504 S.W.2d 610 (Tex. Civ. App.—Beaumont 1974), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 79-80 (1975), *noted in* 6 TEX. TECH. L. REV. 259 (1974).

134. 522 S.W.2d 266 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

135. See *Francis v. Francis*, 412 S.W.2d 29 (Tex. 1967).

136. *Andrews v. Andrews*, 441 S.W.2d 244 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.).

137. 522 S.W.2d at 268.

138. Justice Keith further examined this question at the annual convention of the State Bar of Texas in Dallas on July 2, 1975, in his speech, "Separation Agreements Embodied in Divorce Proceedings—Contracts or Judgments?" He concluded that divorce decrees incorporating property settlements have the same effect as the terms of decrees entered by consent, except perhaps for purposes of enforcement by contempt. He

Federal tax consequences are significant in all divorce settlement agreements.¹³⁹ In *United States v. Mooney*¹⁴⁰ the Internal Revenue Service brought suit to recover an income tax refund overpayment. The Service had incorrectly divided an income tax refund on a joint return equally between the taxpayer and his former wife; the ex-wife, however, was entitled to a greater proportion of the refund under federal law because she had earned the greater proportion of the income. The court held that the Service was entitled to recover the overpayment from the taxpayer notwithstanding an agreement between the former spouses in which the wife released the husband from any duty to account to her for the disproportionate share of the refund he might receive.

A federal case heard in Massachusetts¹⁴¹ points up some tax consequences of vested contract rights and those acquired by judgment in connection with divorce. The court held that a Massachusetts alimony award was not subject to a federal tax lien against the ex-wife because the order was not final even with respect to payments due. However, the converse is true with respect to a vested contract right.¹⁴²

noted, however, that for these purposes the decree must be within the jurisdiction of the court (*i.e.*, in making a division of property) thereby disposing of the "permanent alimony" argument. He adds that if the contempt power is used for enforcement of property settlement decrees, the result might constitute imprisonment for debt. In *Ex parte Sutherland*, 526 S.W.2d 539 (Tex. 1975), however, the court held that confinement for contempt of a court's order to pay a portion of retirement benefits when received by the ex-husband did not constitute imprisonment for debt. An order for compliance with a property settlement decree in a case like *Peddicord* would seemingly have the same result except insofar as the settlement agreement included a provision for contractual alimony. However, it is difficult to establish that a provision is one for alimony rather than a property division in the contractual context.

By the principle of full faith and credit, accrued alimony installments unpaid under a final foreign alimony decree incorporating an agreed provision of a settlement agreement are enforceable debts in Texas courts. *Reysa v. Reysa*, 521 S.W.2d 746 (Tex. Civ. App.—Texarkana 1975, no writ).

139. Careful tax planning of the consequences of divorce has long been regarded as axiomatic. See Vaughan, *Texas Divorce, Planning the Tax Results*, 38 TEX. B.J. 1035 (1975); Vaughan, *Community Property Divorce: A Comprehensive Tax Planning Approach*, 2 COMM. PROP. J. 148 (1975); Vaughan, *Community Property Divorce: Preparing the Tax Returns*, 2 COMM. PROP. J. 213 (1975); cf. J. TAGGART, *SOME TAX ASPECTS OF SEPARATION AND DIVORCE* (1973); DuCanto, *Tax Aspects of Separation and Divorce*, 16 ABA FAMILY LAW SECTION BULL. Fall 1975, at 15; Winter 1975, at 11. See also Note, *The Recognition of Gain in Property Settlements Pursuant to Divorce—Wiles v. Commissioner*, 28 Sw. L.J. 1073 (1974).

140. 400 F. Supp. 98 (N.D. Tex. 1975). On the obligation of each spouse to pay tax on one-half of income see *Bowling v. United States*, 510 F.2d 112 (5th Cir. 1975).

141. *United States v. Rye*, 390 F. Supp. 528 (D. Mass. 1975).

142. The court further held that requiring a divorced husband to pay his former wife's income taxes for certain years was not an order which the United States had standing to enforce by direct action against the former husband. The Revenue Service was not, therefore, a third party beneficiary. On the other hand, if the order were part of a property settlement agreement confirmed and made part of a Texas divorce decree, it would seem difficult to resist enforcement by the Revenue Service.

Two other cases involved federal tax consequences of divorce settlements. In *Fox v. United States*, 510 F.2d 1330 (3d Cir. 1975), the court held that a former husband indebted for alimony payments over a period of years without income tax consequences to the ex-wife was not entitled to a deduction for imputed interest on installment payments under INT. REV. CODE OF 1954, § 483.

In *Gray v. United States*, 391 F. Supp. 693 (C.D. Cal. 1974), a property settlement agreement provided that the ex-husband should maintain a policy of life insurance on his life in favor of the ex-wife and this agreement was incorporated in the decree. After the husband's death his executor was entitled to deduct policy proceeds in computing the estate tax.

Disputes with respect to property undivided on divorce usually occur when counsel for both parties fail to recognize possible community assets.¹⁴³ The most common oversight is with respect to retirement benefits. Retirement benefits which vest during marriage are presumed to be community property,¹⁴⁴ and if undivided upon divorce, such benefits are held by the former spouses as tenants in common.¹⁴⁵ In *Clendenin v. Krock*¹⁴⁶ the court held that a divorce decree which recited that the parties had acquired no community property during marriage was not res judicata when the ex-wife subsequently sought partition of undivided retirement benefits. The crucial factor was that the retirement benefits had not "been before the court." If the characterization had been litigated and the property deemed separate property of the husband, the determination obviously would have been res judicata.¹⁴⁷

In *Fox v. Smith*¹⁴⁸ the husband was a participant in a funded employer profit-sharing plan, the interest in which was undivided upon his divorce. He subsequently remarried and designated his sister as the beneficiary of his share. After his death, his ex-wife was held entitled to one-half the fund. *Gaines v. Gaines*¹⁴⁹ involved a community interest in a joint venture. The divorce court awarded the husband specific property of the venture with the apparent concurrence of the other ventures and awarded the wife a fractional interest in the venture. After the divorce the ex-wife asserted that the award to the husband was improper and, therefore, ineffective. The court held that the division was unexceptional under the circumstances since there was no showing that the other venturers objected to the court's award. It may be surmised that while the divorce was pending the venturers had agreed to a partial dissolution to be accomplished by carving the property (later awarded the husband) out of the venture.¹⁵⁰

On several occasions the federal courts have examined the impact of a husband's subsequent bankruptcy on his obligations under a divorce settlement. In *In re Nunnally*¹⁵¹ the Fifth Circuit held that a money judgment

143. The severe consequences of malpractice in this regard are exemplified in *Smith v. Lewis*, 13 Cal. 3d 315, 530 P.2d 589, 118 Cal. Rptr. 621 (1975). In that case the court upheld an award of \$100,000 in damages against an attorney who had failed to conduct adequate legal research to determine that certain retirement benefits of the husband were community property and subject to division on divorce. See 107 TIME, Jan. 12, 1976, at 53.

144. *Fulton v. Duhaime*, 525 S.W.2d 62 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

145. *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *Clendenin v. Krock*, 527 S.W.2d 471 (Tex. Civ. App.—San Antonio 1975, no writ).

146. 527 S.W.2d 471 (Tex. Civ. App.—San Antonio 1975, no writ).

147. See the concurring opinion in *Clendenin*, *id.* at 474.

148. 531 S.W.2d 654 (Tex. Civ. App.—Waco 1975, no writ).

149. 519 S.W.2d 694 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

150. Difficulties encountered in enforcing a decree involving an award of shares in a corporation closely held by the family of an ex-spouse are illustrated by *Earthman's, Inc. v. Earthman*, 526 S.W.2d 192 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). Regarding the unavailability of garnishment of a state agency to obtain satisfaction of a money judgment in a divorce decree, see *Addison v. Addison*, 530 S.W.2d 920 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). See generally *Rudberg, Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645 (1974).

151. 506 F.2d 1024 (5th Cir. 1975), commented on in *McKnight, Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 92 (1975).

awarded to an ex-wife for reimbursement or repayment of a loan constituted "alimony" for purposes of bankruptcy and was, therefore, not subject to discharge in the husband's proceeding.¹⁵² The court pointed out that, in spite of the fact that permanent alimony is not awarded on divorce by Texas courts, a property division may take into account future support needs. Hence, a Texas property division contains "a substantial element of alimony-substitute, support, or maintenance, however termed,"¹⁵³ and, therefore, falls within the "alimony" exception to debts discharged in bankruptcy. In *In re Hodges*¹⁵⁴ a property settlement agreement between the spouses had been approved and incorporated in the decree of divorce. As part of the property settlement the husband agreed to pay the wife \$56,000 at the rate of \$300 a month. The court was concerned that this constituted "alimony substitute" within the doctrine of *Nunnally*. Looking behind the decree, the court concluded that one of the principal reasons why the husband agreed to periodic payments was to provide for the support and maintenance of his wife; hence the indebtedness constituted "alimony substitute." The bankruptcy court's conclusion is, therefore, that in applying *Nunnally* to a particular situation the bankruptcy court must determine whether a particular indebtedness arising out of a court decree or contractual property settlement constitutes an "alimony substitute" as a matter of *fact*.¹⁵⁵

D. Management of Marital Property

A purported gift of community property, even if subject to the donor spouse's sole management, is subject to attack by the non-donor spouse as a constructive fraud upon the latter's interest. When the gift is not supported by a moral obligation, as to a close relative, the donee has the burden of proving the reasonableness of the gift in light of the surrounding circumstances.¹⁵⁶ In *Great American Reserve Insurance Co. v. Sanders*¹⁵⁷ the Texas Supreme Court inferred that an ex-wife conservator might not be a "close relative" and, therefore, would have the burden of showing reasonableness.¹⁵⁸ When the gift is founded upon a moral obligation, for example a gift to children of the marriage, apparently the non-donor spouse must show that the gift is unreasonable under the circumstances. In *Becknal v.*

152. Bankruptcy Act, § 17(a), 11 U.S.C.A. § 35(a) (Supp. 1975).

153. In *Girard v. Girard*, 521 S.W.2d 714 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ), the court enunciated the established principle that adjustment of property rights does not constitute "alimony" under Texas law.

154. No. BK 3-74-72 (Bk. Ct. N.D. Tex. Nov. 17, 1975).

155. In *In re Parnass*, No. BK 3-3473-F (N.D. Tex. Oct. 24, 1974), the court held that an award of \$200,000 for "support to be received in addition to the [wife's] portion of the community property" as provided in the property settlement decree was discharged in bankruptcy: "the alleged debt . . . was void because it was based on permanent alimony to be paid after divorce by court order."

156. *Givens v. Girard Life Ins. Co.*, 480 S.W.2d 421 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), discussed in *McKnight, Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 79-80 (1974).

157. 525 S.W.2d 956 (Tex. 1975).

158. *Id.* at 959. The supreme court, however, upheld the trial court's determination that the ex-wife-conservator had successfully rebutted the widow's prima facie case of constructive fraud. The policy was apparently taken out in lieu of the husband's discharge of his delinquent support obligation for his children by the ex-wife.

*Atwood*¹⁵⁹ the husband created an irrevocable spendthrift trust of virtually all of the community estate with his wife as trustee and children as beneficiaries. After the husband's death one of the children instituted a proceeding against the trustee-widow contesting the validity of the trust. The trial court concluded as a matter of law that the husband's conveyance of his wife's share of the community property was a nullity as a constructive fraud upon her interest, and that the conveyance operated to partition the community property. The appellate court rejected this conclusion; apart from the fact that the wife-trustee's active role in the trust plan negated any issue of deceit, the widow made no assertion as to the invalidity of the transfer.¹⁶⁰

The most significant decision of the year is *Cockerham v. Cockerham*,¹⁶¹ which represents the final blow, perhaps predetermined by preliminary punches in *Cooper v. Texas Gulf Industries, Inc.*¹⁶² and *Dulak v. Dulak*,¹⁶³ to the intended meaning of section 5.22 of the Family Code.¹⁶⁴ In subsection (a) of section 5.22 it is provided that a spouse has sole management of that community property which he or she would have owned if single, including, but not limited to, personal earnings, revenues from separate property, recoveries for personal injuries, and the increase in mutations of those interests. Subsection (b) provides that if community property subject to the sole management of one spouse is combined with that subject to the sole management of the other spouse, the resulting mixture or combination is subject to joint management of the spouses. Finally, subsection (c) provides that community property that does not come within the purview of subsection (a) is also subject to the spouses' joint management. Whereas the draftsmen intended subsection (c) as a residuary clause to cover any unanticipated omissions from coverage under subsections (a) and (b), the supreme court appears to treat subsection (c) as applicable to most situations involving the management of community property. This result is not due to any presumptive applicability of subsection (c), but rather a narrowing of the scope of subsections (a) and (b). The court seems to read subsection (a) as providing that each spouse has sole management of community property that he or she would have owned *solely* if single and subsection (b) as applying only to *actual* combining or mixing of community

159. 518 S.W.2d 593 (Tex. Civ. App.—Amarillo 1975, no writ).

160. Somewhat related to the constructive fraud situation is the problem that arose in *Box v. Southern Farm Bureau Life Ins. Co.*, 526 S.W.2d 787 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.), where the husband designated his second wife as beneficiary of an insurance policy on his life. The original beneficiaries, designated pursuant to a property settlement in dissolution of the first marriage, were children of the insured's first marriage. The appellate court held that, terms of the insurance policy notwithstanding, the husband could not alter the prior obligation to his children.

161. 527 S.W.2d 162 (Tex. 1975).

162. 513 S.W.2d 200 (Tex. 1974), noted in 6 ST. MARY'S L.J. 933 (1975).

163. 513 S.W.2d 205 (Tex. 1974).

164. TEX. FAM. CODE ANN. § 5.22 (1975). For the draftsmen's plan see McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 358-61 (1974); McSwain, *Revision of Marital Property Rights Statutes*, 31 TEX. B.J. 1013 (1968); McKnight, *Recodification of Matrimonial Property Law*, 29 TEX. B.J. 1000 (1966). For a more general treatment see McKnight, *Texas Community Property Law—Its Course of Development and Reform* in ESSAYS IN THE LAW OF PROPERTY PRESENTED TO CLYDE EMERY 30, 48-54 (Southern Methodist University 1975).

interests subject to sole management. *Cockerham* involved two distinct business operations. One was a dairy operated by the husband on property owned as a tenancy in common shared by his separate estate and the community.¹⁶⁵ The other business was a dress shop which was operated by the wife, but which was initially financed with community funds supplied by the husband. It was the wife's practice, acquiesced in by her husband, to write checks for dress shop purchases on her husband's account, and the husband had on two occasions paid dress shop debts himself. With respect to the dairy, the court concluded that it was subject to joint management because it was operated in part on jointly managed community property which was so classified because the spouses had jointly acquired it. The husband, therefore, would not have owned the business if he had been single. The necessary implication is that the husband would not have been the *sole* owner of the dairy business if he had been single. With respect to the dress shop, there was evidence of actual use of the resources controlled by the husband in the wife's business venture as well as the appearance of his being a principal in its activities. Thus, the supreme court seems to conclude that management of community property is governed primarily by section 5.22(c) unless subsections (a) or (b) are *clearly* applicable; whereas the draftsmen intended that subsection (c) be applicable only when subsections (a) or (b) are *clearly* inapplicable. The decision in *Cockerham* requires that clients be advised as to the manner of conducting their business affairs so that the business operations of each client-spouse will not be considered joint ventures of the spouses.¹⁶⁶ As a primary rule, property to be used for business purposes should be acquired by and in the name of the spouse who intends to use it. The spouse acquiring property in his or her sole behalf should be further advised to insulate his or her business dealings from those of the other spouse through the use of funds subject to the sole management of that spouse. If the husband, for example, should want to provide capital for his wife, a partition of community property or a gift to the wife would provide separate property for such a purpose. The profits of the wife's venture would be community property subject to her sole management.

E. *Liability of Marital Property*

In addition to the questions concerning characterization and management of marital property, the supreme court in *Cockerham*¹⁶⁷ spoke to the issue of marital property liability. The husband and wife were engaged in distinct and respective businesses: the husband's dairy and the wife's dress shop. As pointed out above,¹⁶⁸ the dairy business constituted jointly managed com-

165. See notes 77-82 *supra* and accompanying text.

166. The pitfalls of such activities, separate liability of both "venturers," is discussed in notes 170-72 *infra* and accompanying text. Magee, *Marital Property Rights Under the Texas Family Code and the Equal Credit Opportunity Act*, 30 PERS. FINANCE L.Q. Winter 1975, at 14, examines the law principally from the point of view of those who lend money to spouses with or without security.

167. 527 S.W.2d 162 (Tex. 1975), discussed in notes 77-82 *supra* and accompanying text (characterization) and notes 161-66 *supra* and accompanying text (management).

168. See notes 77-82 *supra* and accompanying text.

munity property because the dairy was located in part on land jointly acquired and held by the spouses. The dress shop was jointly managed community property because it had been the object of managerial activities of each spouse.¹⁶⁹ For purposes of liability, however, *Cockerham* is essentially a case of holding-out and ratification within the law of agency. The court held that the debts of the dress shop business were "joint liabilities" of the spouses. With respect to the wife, she incurred the debts directly; as to the husband, he allowed his wife to use his bank account in paying her dress shop debts and on a few occasions paid debts himself or acknowledged his indebtedness for them. Hence, the husband made the wife's debts his own. Consequently, the dress shop debts were subject to satisfaction from the husband's separate property as well as the jointly managed community property.¹⁷⁰

With proper advice the results of *Cockerham* could easily have been avoided. In the first place, there was no need for the wife's participation in the acquisition of the dairy situs, which was crucial to the conclusion that the dairy business was a jointly-managed community enterprise. Second, a different conclusion would have been reached with respect to the dress shop if the husband had documented the transfer of initial capital as a loan, and had caused the wife to establish separate bank accounts. Further, if the husband had avoided any apparent responsibility for the debts incurred by his wife, no particular significance would have been attached to the fact that the couple filed a joint federal income tax return and took deductions for depreciation and losses with respect to the dress shop. The lesson of *Cockerham* is simple.¹⁷¹ If one spouse wishes to engage in business and the only available capital is community property subject to the sole management of the other spouse or subject to joint management of the spouses, the spouses should be very cautious in structuring the business venture. In light of the supreme court's opinion they should be advised of three possible approaches: (1) a loan of community funds to be repaid from the separate property of the debtor-spouse; (2) a gift to that spouse; or (3) a partition of the community. Additionally, the non-involved spouse should be careful to avoid any future involvement in the management of the business. If these simple rules are followed, the adverse, unexpected effects of *Cockerham* can easily be avoided.¹⁷²

169. See notes 165-66 *supra* and accompanying text.

170. If there had been solely managed community property of each spouse, it would also have been liable. TEX. FAM. CODE ANN. § 5.61(c) (1975).

171. The lesson is *not*, as is suggested by Rosenstein, *Recent Developments in Bankruptcy*, 13 BULL. OF THE SECTION ON CORP., BANKING & BUS. L. NO. 3, Nov. 1975, at 5, that the husband's prime sin of omission was his failure to participate in the wife's bankruptcy proceeding.

172. By way of dictum in *Texas Commerce Bank Nat'l Ass'n v. Tripp*, 516 S.W.2d 256 (Tex. Civ. App.—Fort Worth 1974, writ granted), the court emphasized that under TEX. FAM. CODE ANN. § 5.61(a) (1975) separate property of the wife is not liable for debts contracted by the husband nor is income produced by her separate property. In the latter regard, the court emphasizes the history of the rule by citing *United States F. & G. Co. v. Milk Prod. Ass'n*, 383 S.W.2d 181 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.). See Comment, *The Concept of Indissolubility: Separate Creditors and the Community*, 27 BAYLOR L. REV. 263 (1975). See also *Skeen v. Glenn Justice Mortgage Co., Inc.*, 526 S.W.2d 252 (Tex. Civ. App.—Dallas 1975, no writ).

In *Short v. United States*¹⁷³ the Service asserted a tax lien against the husband on community property subject to the wife's control and gratuitously transferred by her while insolvent prior to the time the lien attached. The property was clearly subject to tax liability,¹⁷⁴ and the donee failed to show that the transfer was supported by consideration or that the transferor was solvent. The Internal Revenue Service has ruled that a spouse may not wholly avoid future tax liability on income from a share of separate or community property given outright to the other spouse. As has been pointed out above, however, if the donor makes the gift in trust and specifies that the income is payable to the beneficiary as his or her separate property, the objective of tax savings may be achieved.¹⁷⁵ The Revenue Service has also ruled¹⁷⁶ that with respect to a qualified employee benefit plan, a non-employee's surviving spouse is subject to gift tax liability if the benefits of the plan are paid to a third party beneficiary at the death of the employee-spouse. Though a gift by an employee of *his* community property interest in a qualified employee pension plan is not subject to gift taxes¹⁷⁷ and the non-employee's surviving spouse's community interest in the plan is exempt from estate taxes on the death of the employee,¹⁷⁸ the Internal Revenue Code is silent concerning gift tax consequences of the non-employee's share distributed to a third person on the death of the employee. Not surprisingly, the Revenue Service's ruling interprets the void in its favor.

Though a homestead is not immune from seizure for federal tax liability,¹⁷⁹ state law has been liberally construed to preserve the home from the satisfaction of other types of debt, provided the fact of homestead use is adequately proved.¹⁸⁰ In *Vistron Corp. v. Winstead*,¹⁸¹ for example, the debtor maintained a residential homestead in an incorporated town and successfully claimed as his business homestead a two-and-one-half-acre tract two-tenths of a mile beyond the city limits of the town, upon which he conducted his business. Evidence indicated that there were other places of business located along the highway beyond the premises of the debtor and that the business property was, therefore, sufficiently within the urban community of residence to establish a business homestead. The pro-exemption approach is also exemplified by the conclusion that one who has failed to acquire a lien on homestead property by proper joinder of the spouses in granting the lien cannot assert a right of subrogation to the

173. 395 F. Supp. 1151 (E.D. Tex. 1975).

174. See *Brodoy v. United States*, 455 F.2d 1097 (5th Cir. 1972), discussed in McKnight, *Matrimonial Property*, *Annual Survey of Texas Law*, 27 Sw. L.J. 27, 42 (1973).

With respect to the innocent spouse defense for income tax liability under INT. REV. CODE OF 1954, § 6013 see *Allen v. Commissioner*, 514 F.2d 908 (5th Cir. 1975); *Stroman v. McCannless*, 391 F. Supp. 1344 (N.D. Tex. 1975).

175. *McFarland v. Campbell*, 213 F.2d 855 (5th Cir. 1954).

176. Rev. Rul. 75-240, 1975 INT. REV. BULL. No. 25, at 16.

177. INT. REV. CODE OF 1954, § 2517(a). *Id.* § 2039(c) provides for a similar estate tax exclusion.

178. *Id.* § 2039(d).

179. See *Stroman v. McCannless*, 391 F. Supp. 1344 (N.D. Tex. 1975).

180. See *Bouldin v. Woosley*, 525 S.W.2d 276 (Tex. Civ. App.—Waco 1975, no writ).

181. 521 S.W.2d 754 (Tex. Civ. App.—Eastland 1975, no writ).

position of the taxing authorities after paying taxes assessed against the property.¹⁸² The attorney general has also expressed the opinion that counties may not deprive a person over sixty-five of a special ad valorem tax exemption because he has failed to make an assertion of homestead claim before a certain date.¹⁸³ On the other hand, in *Valley Bank of Nevada v. Skeen*¹⁸⁴ a federal district court restrictively construed the homestead exemption. A creditor sought to enforce a judgment lien against property which had been acquired as a homestead when the exemption with respect to the lot was \$5,000. The lien fixed on the property after the exempt amount had been raised to \$10,000 in late 1969.¹⁸⁵ At all times until the judgment creditor's lien fixed on the property the value of the lot was \$13,000, and when the creditor sought to foreclose its lien the value of the lot was \$40,000. It was concluded in *Hoffman v. Love*¹⁸⁶ that when a homestead is established on land worth more than the exempt maximum and the value of the land continues to appreciate thereafter, the exempt portion is in the same ratio to the ground value at any relevant time as was the ratio of the exempt amount to the actual value at the time of homestead designation. Until the time of the increase in the homestead exemption, therefore, the homestead exemption would be in the ratio of 5 to 13. The homestead claimant asserted that in late 1969 the ratio would have changed to 10 to 13. In *Skeen* the court, relying on the precedent of *Linch v. Broad*,¹⁸⁷ which rests in turn on *McLane v. Paschal*,¹⁸⁸ concluded that the prior ratio was, in effect, permanently fixed. Though the result is contrary to the liberal construction rule,¹⁸⁹ the decision is consistent with both the authority relied upon and the applicable constitutional language: "[t]he homestead in a city . . . shall consist of lot, or lots, not to exceed in value Ten Thousand Dollars, at the time of their designation as the homestead"¹⁹⁰ This interpretation can nevertheless produce anomalous results. For example, suppose that *A* and *B* are both purchasers of identical adjacent homes on comparable lots in the same urban housing development. Both lots were worth \$15,000 when purchased with identical improvement. If *A* bought in mid-1969 and *B* bought in early 1970 and each took up residence immediately upon purchase, the ratio of exempt to the non-exempt portion of *A*'s lot is one-half that of *B*'s. In *Skeen* the homestead claimant, conceding that the 1969 amendment did not have retroactive effect, argued that the relevant date for purposes of the lien is that on which the adverse right attached, and that at that time the exemption stood at \$10,000. The court responded that

182. *Great Eastern Life Ins. Co. v. Jones*, 526 S.W.2d 268 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

183. TEX. ATT'Y GEN. OP. NO. H-364 (1974). See also *id.* No. H-309.

184. 401 F. Supp. 139 (N.D. Tex. 1975).

185. The date on which the constitutional amendment became effective is subject to some dispute. See McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 93 (1975), and authorities there cited.

186. 494 S.W.2d 591 (Tex. Civ. App.—Dallas), writ ref'd n.r.e., 499 S.W.2d 295 (Tex. 1973) (per curiam), noted in 5 TEX. TECH L. REV. 865 (1974).

187. 70 Tex. 92, 6 S.W. 751 (1888).

188. 62 Tex. 102 (1884).

189. See *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929).

190. TEX. CONST. art. XVI, § 51 (emphasis added).

it would then seem appropriate to consider the value of the property at that time. The suggestion is reasonable but difficult to reconcile with the constitutional language, unless as a matter of law the claimant is allowed to make a notional redesignation of his homestead (without prejudice to the rights of pre-existing lien holders, of course) at the date of the increase in the exemption. But though the results may be appealing, the artificiality of the argument is patent.¹⁹¹

II. CHILDREN

A. Status

Several disputes arose concerning the status of minors as persons. In other jurisdictions a federal court has held that a juvenile curfew ordinance is a reasonable exercise of local police power,¹⁹² while another has held that minors may not be deprived of the right to purchase contraceptives.¹⁹³ For purposes of suit in Texas a minor with a guardian is a proper party;¹⁹⁴ it is well settled that a judgment taken against a minor without a guardian is merely voidable rather than void.¹⁹⁵ The attorney general has expressed the view that as a consequence of the Emancipation Act of 1973¹⁹⁶ students have statutory authority to choose their place of residence¹⁹⁷ and that minors may acquire permits to operate taxicabs.¹⁹⁸

In 1973 the United States Supreme Court invalidated the Texas rule denying illegitimate children a judicially enforceable right to support from their natural fathers.¹⁹⁹ Since the paternity suit is novel to most Texas lawyers and judges, some initial misunderstandings are to be expected. In *Williams v. Stewart*²⁰⁰ a mother sought a writ of mandamus to compel a

191. The claimant further contended that in order to satisfy the creditor, the court can only order sale of the non-exempt undivided interest. This contention was rejected out of hand. *Whiteman v. Burke*, 115 Tex. 400, 282 S.W. 788 (1926). "Although the courts favor allowing a defendant to pay the excess value without resorting to sale of the entire property and division of the proceeds . . . the court is empowered to order the latter procedure if a defendant is unable to make up the deficiency." 401 F. Supp. at 140.

192. *Bykofsky v. Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975); *cf. People v. Chambers*, 335 N.E.2d 612 (Ill. App. 1975), in which a curfew law requiring that all persons under 18 be off the street by 11 o'clock on weekdays and midnight on weekends was declared unconstitutional as a needless infringement on minors' freedom of travel and rights of free speech, association, assembly, and religion.

193. *Population Servs. Int'l v. Wilson*, 398 F. Supp. 321 (S.D.N.Y. 1975). See generally Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975).

194. *Texas Employers' Ins. Ass'n v. Williams*, 522 S.W.2d 549 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

195. *Wallis v. Stuart*, 92 Tex. 568, 50 S.W. 567 (1899).

196. TEX. REV. CIV. STAT. ANN. art. 5923b (Supp. 1975-76).

197. See, e.g., TEX. ATT'Y GEN. OP. No. H-713 (1975).

198. *Id.* No. H-687.

199. *Gomez v. Perez*, 409 U.S. 535 (1973). See also Annot., *Supreme Court's View as to the Status and the Rights of Illegitimate Children*, 41 L. Ed. 2d 1228 (1975); *Massey v. Weinberger*, 397 F. Supp. 817 (D. Md. 1975) (social security); *Wood v. Paulus*, 524 S.W.2d 749 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (meaning of "lawfully begotten children" in will); Annot., *Insurance: Term "Children" as Used in Beneficiary Clause of Life Insurance Policy as Including Illegitimate Child*, 62 A.L.R.3d 1329 (1975).

200. 525 S.W.2d 710 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

domestic relations court to take jurisdiction of her claim for child support from the alleged father. The court of civil appeals held that the domestic relations court had jurisdiction of the paternity suit but concluded that the petitioner should proceed by appeal. The Paternity Act of 1975²⁰¹ provides that an action brought under it must be commenced within one year of the birth of the child.²⁰² A similar limitation has been elsewhere held unconstitutional as a violation of the equal protection clause.²⁰³

Determination of paternity has long presented difficult problems of proof.²⁰⁴ In *Guerra v. DeLuna*²⁰⁵ an admission of cohabitation was treated as a hearsay exception. Evidence of *some* cohabitation, however, will by no means establish cohabitation at time of conception. With respect to disproof of paternity, the Texas Supreme Court in *Davis v. Davis*²⁰⁶ disavowed Lord Mansfield's Rule²⁰⁷ in holding that either alleged parent may testify as to non-access at the time of conception.²⁰⁸

Other devices than a mother's suit to prove paternity have been employed in attempts to achieve a parental relationship. In one instance²⁰⁹ a man who asserted that he was the biological father of a child sought to adopt the child. The parental rights of the husband and wife during whose marriage the child was born had been terminated and a county agency was appointed managing conservator. The appellate court held that the alleged father's position was the same as that of any other person seeking to adopt a child, and the trial court's finding that adoption of the child would not be in the child's best interest was sustained. No proof was made that the petitioner was in fact the child's father, and the court pointed out that the petitioner did not seek custody as a discrete remedy. In a similar case²¹⁰ the alleged father of an illegitimate child responded to a county agency's suit to terminate the parent-child relationship between the child and mother by filing a petition for voluntary legitimation. The trial court rejected the alleged father's petition and terminated the rights of the mother and the

201. TEX. FAM. CODE ANN. §§ 13.01-09 (Supp. 1975-76). *Henson v. Brown*, 524 S.W.2d 412 (Tex. Civ. App.—Austin 1975, no writ), was a paternity suit brought prior to the enactment of the Paternity Act of 1975. The court held that venue is properly laid in the county where the child resides as in suits affecting the parent-child relationship generally. See TEX. FAM. CODE ANN. § 11.04 (Supp. 1975-76). But the rule is otherwise under *id.* § 13.41.

202. TEX. FAM. CODE ANN. § 13.01 (Supp. 1975-76).

203. *Cessna v. Montgomery*, 28 Ill. App. 3d 887, 329 N.E.2d 861 (1975). See also, *Jensen v. Voshell*, 193 N.W.2d 86 (Iowa 1971); Annot., 59 A.L.R.3d 685 (1974).

204. Proof of mother's prior chastity: *Dewey v. Funk*, 211 Kan. 54, 505 P.2d 722 (1973); Annot. 59 A.L.R.3d 659 (1974). Exhibition of child: *Glascok v. Anderson*, 83 N.M. 725, 497 P.2d 727 (1972); Annot. 55 A.L.R.3d 1087 (1974). See generally *Holz, The Trial of a Paternity Case*, 50 MARQ. L. REV. 450 (1967).

205. 526 S.W.2d 225 (Tex. Civ. App.—Austin 1975, no writ).

206. 521 S.W.2d 603 (Tex. 1975).

207. *Goodright ex dem. Stevens v. Moss*, 2 Cowp. 591, 98 Eng. Rep. 1257 (K.B. 1777).

208. *Accord, Commonwealth ex rel. Savruk v. Derby*, 344 A.2d 624 (Pa. 1975). See generally Comment, *Presumptions of Legitimacy in Texas*, 27 BAYLOR L. REV. 340 (1975); *Commonwealth ex rel. Leider v. Leider*, 434 Pa. 293, 254 A.2d 306 (1969); Annot., 49 A.L.R.3d 212 (1973). Regarding "non-access" due to the alleged father's sterility, see *S. v. S.*, 520 S.W.2d 652 (Mo. App. 1975).

209. *Furlow v. Harris County Child Welfare Unit*, 527 S.W.2d 802 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

210. *In re K.*, 520 S.W.2d 424 (Tex. Civ. App.—Corpus Christi 1975, writ granted).

alleged father. The mother had executed an irrevocable affidavit of relinquishment²¹¹ accompanied by an affidavit of status.²¹² The alleged father's petition failed because he failed to show that the witnesses to his affidavit were credible adults,²¹³ and his statement of paternity was not filed *before* the petition for legitimation. With respect to the latter point, the court appears to be finding a requirement in the statute not supplied by the legislature. However, from the evidence adduced, the court did not abuse its discretion in refusing to consent to the alleged father's petition for legitimation.²¹⁴

In termination proceedings affecting a resident parent there must be service of process to give the court power to terminate parental rights²¹⁵ unless the parent affected appears voluntarily.²¹⁶ The applicable law is that of chapter 15 of the Family Code, enacted in 1973,²¹⁷ as amended in 1975.²¹⁸ There is a presumption that the best interest of the child will be served by its being in the care of its parent, and the burden of rebutting this presumption is upon the one who asserts that parental responsibility should reside with another. The burden may be met without showing that the parent is unfit as long as the facts establish that the parent has committed one of the acts justifying termination of parental rights²¹⁹ and termination is in the best interest of the child.²²⁰ In *D.F. v. State*²²¹ Justice Peden commented that termination of the parent-child relationship should not necessarily result from a parent's

lack of intelligence or training, illness, or misfortune [by which the parent] is unable to provide a desirable degree of physical care and support for his or her children . . . but a lack of adequate love and affection may be evidenced by the parent's deliberate neglect in failing to provide a reasonable measure of care and comfort for the child.²²²

211. TEX. FAM. CODE ANN. § 15.03 (Supp. 1975-76).

212. *Id.* § 15.04 (1975).

213. *Id.* § 13.22 (Supp. 1975-76), amending ch. 543, § 1, [1973] Tex. Laws 1421.

214. TEX. FAM. CODE ANN. § 13.21 (1975-76).

215. *Keith v. Spratlan*, 530 S.W.2d 348 (Tex. Civ. App.—Tyler 1975, no writ).

216. *Toler v. Travis County Child Welfare Unit*, 520 S.W.2d 834 (Tex. Civ. App.—Austin 1975, no writ). In two instances appellate courts were called on to point out that when both parents' rights are sought to be terminated, one has no standing to raise issues on appeal for the sole purpose of protecting the other. *Keith v. Spratlan*, 530 S.W.2d 348 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); *D.F. v. State*, 525 S.W.2d 933 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

217. The Act of June 15, 1973, ch. 543, [1973] Tex. Laws 1411, took effect Jan. 1, 1974, but is also applicable to cases commenced prior to that date unless applicability would not be feasible or would work injustice. *Id.* § 4, at 1459. See *Ex parte Collins*, No. 6453 (Tex. Civ. App.—El Paso July 9, 1975, no writ); *D.F. v. State*, 525 S.W.2d 933 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); *Floyd v. Seward*, 520 S.W.2d 873 (Tex. Civ. App.—El Paso 1975, no writ).

218. Act of June 19, 1975, ch. 476, [1975] Tex. Laws 1253 (effective Sept. 1, 1975).

219. TEX. FAM. CODE ANN. § 15.02 (1975). This section was amended in 1975 by the addition of new subsections (1)(C) and (1)(K) and some new language in subsection (1)(H) renumbered as (1)(J).

220. *In re R.D.P.*, 526 S.W.2d 135 (Tex. Civ. App.—Dallas 1975, no writ). Even if the parent is guilty of one of the acts justifying termination, the child's best interest may not be served by termination. *White v. Chamberlain*, 525 S.W.2d 273 (Tex. Civ. App.—Austin 1975, no writ).

221. 525 S.W.2d 933 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

222. *Id.* at 940. See also *In re Salinas*, 530 S.W.2d 633 (Tex. Civ. App.—Corpus Christi 1975, no writ); *Kennedy v. Becker*, 530 S.W.2d 923 (Tex. Civ. App.—Waco 1975, no writ).

Regarding failure to support for the requisite statutory period, the Texas Supreme Court held in *Cawley v. Allums*²²³ that a resumption of substantial support within the period tolls the period of non-support. In one later case²²⁴ the court distinguished *Cawley* when support was of an insignificant amount. In *Wiley v. Spratlan*²²⁵ another court drew a distinction between the pre-1974 law under which *Cawley* was decided and the provisions of the Family Code,²²⁶ under which the court found a wider judicial discretion.

In termination cases, particularly those to which a state agency is a party, much of the evidence is developed through a social study made by a public agency at the behest of the court.²²⁷ Though the Family Code²²⁸ provides that the report of the social study "shall be made a part of the record of the suit," it is also provided that the rules of evidence apply in such suits as in other civil cases²²⁹ and that the person making such report is subject to direct and cross-examination.²³⁰ Reading these provisions together it is concluded that a social study report not introduced as evidence cannot be the basis of the court's findings.²³¹

Termination of parental rights and adoption are distinct concepts within the provisions of the Family Code,²³² often applied in separate proceedings.²³³ As a result of this development there are relatively few disputes with respect to the adoption process.²³⁴ One dispute did arise with respect to the rights of the parents of a deceased parent. In *Deweese v. Crawford*²³⁵ the court considered the impact of section 14.03(d) of the Family Code²³⁶ on a stepfather adoption adjudicated prior to January 1, 1974. Section 14.03(d) provides that a court may grant "reasonable visitation rights to maternal or paternal grandparents." The court concluded that the parents of the children's deceased father were not "parental grandparents" within the meaning of the statute, since under statutory law at the time of the adoption "all legal relationships and all rights and duties between such [adopted] child and its natural parents [except rights of inheritance] shall cease."²³⁷ In *Deweese* the trial court refused to appoint

223. 518 S.W.2d 790 (Tex. 1975).

224. *Coffey v. Lechler*, 523 S.W. 762 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.); cf. *Floyd v. Seward*, 520 S.W.2d 873 (Tex. Civ. App.—El Paso 1975, no writ).

225. 529 S.W.2d 616 (Tex. Civ. App.—Tyler 1975, writ granted).

226. TEX. FAM. CODE ANN. § 15.02(1)(E) (1975), *renumbered as* § 15.02(1)(F) (Supp. 1975-76).

227. *Id.* § 11.12 (1975). In an adoption proceeding the social study is mandatory. *Id.* § 11.12(b).

228. *Id.* § 11.12(d).

229. *Id.* §§ 11.14(e), 11.15.

230. *Id.* § 11.14(f).

231. *D.F. v. State*, 525 S.W.2d 933, 939 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); *Magallon v. Texas*, 523 S.W.2d 477, 480 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

232. TEX. FAM. CODE ANN. chs. 15, 16 (1975), *as amended*, (Supp. 1975-76).

233. The proceedings may, however, be joined under *id.* § 16.03 (1975). *See id.* § 16.08 (Supp. 1975-76).

234. The applicability of the doctrine of adoption by estoppel, however, tends to expand. *Devoroex v. Nelson*, 529 S.W.2d 510 (Tex. 1975), *aff'g* 517 S.W.2d 658 (Tex. Civ. App.—Houston [14th Dist.] 1974), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 99 (1975).

235. 520 S.W.2d 522 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

236. TEX. FAM. CODE ANN. § 14.03(d) (1975).

237. Ch. 249, § 1, [1951] Tex. Laws 388. There are correlative provisions in TEX.

the adoptive father and actual mother as managing conservators as they had prayed. In affirming the judgment of the trial court, the appellate court merely said the power to appoint managing conservators is discretionary.²³⁸ In this instance such an appointment would have been pointless since parents who have not been appointed managing conservators have the same powers as those who have been so appointed.²³⁹

B. Conservatorship

Although proposals are put forward that would significantly alter traditional rules,²⁴⁰ the underlying rule which governs a child's relationship with its parents on the one hand, and third persons on the other, provides that the parent is entitled to the services of the child. Any interference with the child's well-being is deemed an interference with a right of the parent.²⁴¹ Parental neglect which causes injury to the child is attributable to the parent,²⁴² and the parent may be answerable for damage intentionally²⁴³ or negligently caused by a child. Prior to 1957²⁴⁴ a Texas parent was liable for a tort committed by a child if the parent negligently permitted conduct likely to cause injury, directed the child to commit the injury, or an actual agency relationship between the parent and the child had given rise to the injury. Legislation of 1957 provided for parental liability to the extent of damages of up to \$300 for the willful conduct of a child between the ages of ten and eighteen. This act was amended in 1965²⁴⁵ to increase the amount of damages recoverable to \$5,000. On January 1, 1974, the rule was incorporated in the Family Code²⁴⁶ and the minimum age was raised to twelve.²⁴⁷

In *Aetna Insurance Co. v. Richardelle*²⁴⁸ a child of eleven committed willful damage prior to January 1, 1974, but suit was brought after that date. The statutory right of action had, therefore, been abolished by the legislature after a right of action had accrued. The court held that relief could not be granted under the repealed statute when the legislature failed to provide for

FAM. CODE ANN. § 16.09 (1975). See Smith, *Commentary to Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 454 (1974). If the grandparent should be domiciled in a jurisdiction that requires mention of descendants of deceased children in order to exclude their claims as pretermitted heirs, a nice question would arise as to the status of actual Texas grandchildren adopted by a stepparent.

238. TEX. FAM. CODE ANN. § 14.01(a) (1975).

239. Compare *id.* §§ 12.04, 14.02(a).

240. See H. FOSTER, A BILL OF RIGHTS FOR CHILDREN (1974).

241. See, e.g., TEX. ATT'Y GEN. OP. NO. H-600 (1975), to the effect that a minor may volunteer to donate blood with parental consent. See also Comment, *Consent to the Medical Treatment of a Minor under the Family Code*, 27 BAYLOR L. REV. 319 (1975).

242. See *Meadows v. Gregory*, 484 S.W.2d 860 (Ky. 1972); Annot., *Permitting Child To Walk to School Unattended is Contributory Negligence of Parents in Action for Death of Child*, 62 A.L.R.3d 541 (1975).

243. See *Parsons v. Smithey*, 109 Ariz. 49, 504 P.2d 1272 (1973); Annot., *Parents' Liability for Injury or Damage Intentionally Inflicted by Minor Child*, 54 A.L.R.3d 974 (1974).

244. Ch. 320, § 1, [1957] Tex. Laws 783.

245. Ch. 217, § 1, [1965] Tex. Laws 430.

246. Ch. 543, § 1, [1973] Tex. Laws 1411.

247. TEX. FAM. CODE ANN. § 33.01 (1975).

248. 528 S.W.2d 280 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

the saving of causes of action which had arisen under it.²⁴⁹ Although the doctrine of parental immunity is still operative in Texas with respect to causes of action that might be brought by a child against a parent, the principle does not operate to protect the parent's employer from liability.²⁵⁰

Texas courts have generally asserted jurisdiction in matters involving children if the child is domiciled or physically present in the state.²⁵¹ But if a person is not subject to the court's in personam jurisdiction, it is generally concluded that he is not bound by the decree.²⁵² In response to a need for expansion of personal jurisdiction the legislature enacted section 11.051 of the Family Code in 1975.²⁵³ This section provides for personal jurisdiction over absent persons if (1) the child was conceived in Texas and the person over whom jurisdiction is sought is a parent or probable father of the child, (2) the person has permitted or directed an act which results in the child's residing in Texas, (3) the person has resided in Texas with the child, or (4) the state or federal constitutions would not be offended by exercise of jurisdiction over the person.²⁵⁴ Since the breadth of the language of the first and third grounds may be read to cover inappropriate situations for exercising jurisdiction, the courts should be wary of a literal interpretation of the statute in every instance. Under the first ground, for example, jurisdiction may be asserted if the child is conceived by a couple on a brief visit to Texas, though the parent over whom jurisdiction is sought has no later contact with the state and has no responsibility for the child's being here.²⁵⁵ Under the first or third grounds jurisdiction of the absent person may be asserted when that person has left the state with the child, even if the child is not determined to be domiciled in Texas and has not been removed from Texas in anticipation of litigation. In this instance, the law of another state may be more appropriate to resolve the disputes involved in the parent-child relationship.²⁵⁶ It is also worthy of note that although section 3.26(b) provides that a court acquiring jurisdiction of an inter-spousal dispute also acquires jurisdiction over a suit affecting the parent-child relationship under

249. *Id.* at 286. With respect to non-liability of an insured parent for damages resulting from unauthorized use of child's insured automobile, see *Government Employee's Ins. Co. v. Edelman*, 524 S.W.2d 546 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

250. *Farley v. M M Cattle Co.*, 529 S.W.2d 751 (Tex. 1975).

251. *Ex parte Birmingham*, 150 Tex. 595, 244 S.W.2d 977 (1952); *cf. Hinds v. Hinds*, 491 S.W.2d 448 (Tex. Civ. App.—San Antonio 1973, no writ), *discussed in McKnight, Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 93 (1974).

252. *May v. Anderson*, 345 U.S. 528 (1953); see Sampson, *Long-Arm Jurisdiction Marries the Texas Family Code*, 38 Tex. B.J. 1023 (1975). See also Comment, *State Court Jurisdiction: The Long-Arm Reaches Domestic Relations Cases*, 6 TEX. TECH L. REV. 1021 (1975); Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289 (1973).

253. TEX. FAM. CODE ANN. § 11.051 (Supp. 1975-76). The principle purpose of the section is "to enlarge the protection of Texas families against those who seek to avoid their obligations by staying outside of this state when family difficulties have made legal action necessary." Smith, *1975 Amendments to Titles 1 and 2 of Texas Family Code*, STATE BAR SECTION REPORT: FAMILY LAW, Nov. 1975, at 7. See also McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 103 (1975).

254. TEX. FAM. CODE ANN. § 11.051 (Supp. 1975-76).

255. In that instance the principal draftsman of the statute suggests that "[a] court should refuse to apply the long-arm [statute] on due process grounds." Sampson, *supra* note 252, at 1028.

256. *Id.* at 1031.

section 11.051, there are instances when an independent spousal dispute *may not* be subject to a court's jurisdiction though the court is competent to deal with disputes involving the parent-child relationship.²⁵⁷

The great bulk of litigation involving the parent-child relationship involves conservatorship²⁵⁸ and the duty to support. Disputes with respect to conservatorship arising out of cases adjudicated before January 1, 1974, are treated as new cases under the Family Code.²⁵⁹ After January 1, 1974, the court in which a suit involving the parent-child relationship is first filed maintains continuing jurisdiction of subsequent disputes concerning the parent-child relationship, at least until the child's adoption causes a new parent-child relationship.²⁶⁰ The court may, however, transfer a dispute to a court in another county for purposes of venue²⁶¹ or for the convenience of parties or witnesses. Such interlocutory orders of the courts are unappealable.²⁶²

If a party who has been personally served appears for a temporary hearing before the answer date and informs the court orally of his intentions to contest jurisdiction, he has not thereby "answered" as a matter of law, and his representation has no effect on the subsequent course of the proceeding. Without further participation he can make no complaint concerning the judgment rendered against him.²⁶³ Nor should those intervening in a suit affecting the parent-child relationship expect to be granted a protracted continuance, especially if they had become aware of the suit months before intervening.²⁶⁴ A jury trial is waived by a party who does not demand it prior to hearing.²⁶⁵ If the trial court orders a report of the welfare department but proceeds to enter an order of conservatorship before receiv-

257. *Id.*

258. See generally Ragland, *Some Thoughts on Child Custody Litigation*, 10 TRIAL LAW. F., July-Sept. 1975, at 30.

259. See McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 99-100 (1975), and authorities there cited; *In re Martinez*, 522 S.W.2d 230 (Tex. Civ. App.—Waco 1975, no writ). For what may be the last example of the cumbersome pre-January 1, 1974, rules, see *Hawkins v. Hawkins*, 515 S.W.2d 738 (Tex. Civ. App.—Eastland 1974, writ dismissed). Cases brought prior to Jan. 1, 1974, and *sub judice* thereafter, are subject to the provisions of the Family Code unless their application "would not be feasible or would work injustice." Act of June 15, 1973, ch. 543, § 4, [1973] Tex. Laws 1459.

260. TEX. FAM. CODE ANN. §§ 11.05(a), (b) (1975). Section 11.05 was clarified by amendment in 1975 to provide for exigencies of a termination proceeding *inter alia*. *Id.* § 11.05(d) (Supp. 1975-76). Section 11.07 was also clarified with respect to the filing of a petition for further action that is not a motion to modify under § 14.08. *Id.* § 11.07 (Supp. 1975-76). The legislature also added § 11.071 to provide a means for identifying the court of continuing jurisdiction. *Id.* § 11.071.

261. *Id.* §§ 11.06(a), (b) (1975).

262. *Id.* §§ 11.06(c), (f). See *Guillory v. Davis*, 530 S.W.2d 870 (Tex. Civ. App.—Beaumont 1975, no writ). In 1975 § 11.06 was amended by the addition of subsection (g) to clarify the situation when two or more children were the subjects of the parent-child relationship and a subsequent dispute arises with respect to only one of them. TEX. FAM. CODE ANN. § 11.06(g) (Supp. 1975-76).

263. *Brown v. Brown*, 521 S.W.2d 730 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

264. *Sralla v. Sralla*, 524 S.W.2d 557 (Tex. Civ. App.—San Antonio 1975, no writ).

265. *Garcia v. Garcia*, 526 S.W.2d 152 (Tex. Civ. App.—Corpus Christi 1975, writ refused n.r.e.). In *Lipshy v. Lipshy*, 525 S.W.2d 222 (Tex. Civ. App.—Dallas 1975, writ dismissed), the court reiterated the holding in *Perkins v. Freeman*, 518 S.W.2d 532 (Tex. 1974), that if parties to a suit concerning conservatorship have interests that are not antagonistic, they are not entitled to separate peremptory jury challenges.

ing the report, the suit ceases to be one in which a study has been ordered and no party has cognizable rights therein.²⁶⁶ If a public entity is neither an actual nor a nominal party in the suit, the court has no authority to order payment of fees for a guardian *ad litem* from public funds.²⁶⁷

Once an appeal from an order of the trial court is filed, the trial court may not disturb the status quo of that appeal. In *Blackmon v. Blackmon*²⁶⁸ the court pointed out that section 11.19(c) of the Family Code²⁶⁹ "pertains only to the suspension of orders and decrees which are the subject matter of an existing appeal [and] . . . does not . . . provide a basis for the suspension of an order which is subsequently entered in the same proceeding, even though the lower court may have lacked authority to enter such an order."²⁷⁰ This section may also anticipate a suspension prior to appeal rather than while the appeal is pending. If objection is not raised to the court's failure to record an interview in chambers with minor children, any error therein is waived.²⁷¹ Testimony from a prior hearing on the same matter may be considered by a court in its later disposition of a dispute between the same parties.²⁷²

In a proceeding to appoint a managing conservator the primary consideration is the best interest of the child. The sex of the parent is only one of the many factors that the court must consider.²⁷³ The finder of fact must make this determination. The wishes of the child are not given controlling effect, nor is an undertaking between parents in a divorce settlement agreement that the child may choose his parental custodian after reaching a particular age.²⁷⁴ In a proceeding to modify conservatorship the burden of proof is

266. *Brown v. Brown*, 521 S.W.2d 730 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). For a discussion of English practices with respect to welfare reform and the pros and cons of openness versus secrecy, see Murch, *Divorce Court Welfare Reports—Should Parents See Them?*, 125 NEW L.J. 736 (1975). See also *I. v. I.*, 523 S.W.2d 103 (Mo. Ct. App. 1975); Annot., *Right, in Child Custody Proceedings, To Cross Examine Investigating Officer Whose Report is used by Court in Its Decision*, 59 A.L.R.3d 1337 (1974).

267. *County of Dallas v. Gibbs*, 525 S.W.2d 500 (Tex. 1975).

268. 525 S.W.2d 711 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

269. TEX. FAM. CODE ANN. § 11.19(c) (1975).

270. 525 S.W.2d at 713.

271. *Wilkinson v. Evans*, 515 S.W.2d 734 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); TEX. FAM. CODE ANN. § 14.07 (1975).

272. *Jones v. Jones*, 525 S.W.2d 912 (Tex. Civ. App.—El Paso 1975, no writ). See also *Briley v. Brown*, 521 S.W.2d 357 (Tex. Civ. App.—Waco 1975, no writ).

273. *Adams v. Adams*, 519 S.W.2d 502 (Tex. Civ. App.—El Paso 1975, no writ). In a recent much publicized Dallas case a jury was called upon to make this determination as between a heterosexual father and a homosexual mother. *Risher v. Risher*, 107 TIME, Jan. 12, 1976, at 54; See also *In re J.S. & C.*, 324 A.2d 90 (N.J. Ch. Div. 1974).

274. *Radtke v. Radtke*, 521 S.W.2d 749 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); cf. *In re Carrigan*, 517 S.W.2d 817 (Tex. Civ. App.—Tyler 1974, no writ), with respect to an infant's selection of a guardian under TEX. PROB. CODE ANN. § 118(b) (1956).

TEX. FAM. CODE ANN. § 14.07 (1975) as passed in 1973 was drafted with the presupposition that the section would be applied by the court sitting without a jury (as § 11.13(b) was originally drafted) with a jury verdict as "advisory only." On several occasions the Council of the Family Law Section of the State Bar of Texas in 1974 discussed amendment of § 11.13(b) and the relevance of TEX. R. CIV. P. 277 to it. The reference added in 1975 is with respect to non-jury cases. TEX. FAM. CODE ANN. 14.07(c) (Supp. 1975-76).

A New York court suggests that wishes of children are relevant to a change of custody instituted by the custodian who desires a change in career that would be hindered by

upon the movant to show changed circumstances either with respect to managing²⁷⁵ or possessory conservatorship.²⁷⁶ With respect to modification, the trial court may not refuse to consider the motion or refuse to take action concerning a prior order of conservatorship, even within one year, when it is alleged that the present environment of the child endangers the child's physical health and impairs the child's emotional development.²⁷⁷ A writ of habeas corpus is not a proper means of initiating a contest with respect to conservatorship (as opposed to enforcing obedience of an existing order),²⁷⁸ nor is a motion for contempt to be used as a vehicle for changing rights of managing or possessory conservatorship.²⁷⁹

C. Support

A number of jurisdictional matters may be put aside without extensive comment because their subject matter is in all likelihood non-recurrent as a result of the applicability of new law.²⁸⁰ Moreover, the breadth of the 1975 long-arm statute²⁸¹ will enhance recourse to substituted service in situations where the new law is applicable. In *Ex parte Limoges*²⁸² the husband was served by publication in a child support case after he had left the state.

continued conservatorship of that parent—in that instance a mother who desired to join the army. *LaRosa v. LaRosa*, 373 N.Y.2d 985 (Sup. Ct. 1975).

275. *Penshorn v. Penshorn*, 527 S.W.2d 516 (Tex. Civ. App.—San Antonio 1975, no writ); *In re Y*, 516 S.W.2d 199 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); *Becerra v. Garibaldo*, 526 S.W.2d 780 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). See generally Comment, *Child Custody Modification and the Family Code*, 27 BAYLOR L. REV. 725 (1975).

276. *Howard v. Pullicino*, 519 S.W.2d 254 (Tex. Civ. App.—Austin 1975, no writ). The court stressed that since the petitioner had prevailed in the trial court but failed to file a brief on appeal, the losing respondent's statement of the record would be accepted by the court as a correct statement of facts without resort to the trial court's statement of facts or the record. TEX. R. CIV. P. 419.

277. TEX. FAM. CODE ANN. § 14.08(d) (1975); *DeLeon v. Perriman*, 530 S.W.2d 174 (Tex. Civ. App.—Amarillo 1975, no writ). A writ of mandamus will issue to require the court to act. The 1975 amendment to § 14.08 provides that modification of conservatorship may be based on materially changed circumstances of the child or parent. Each party whose rights may be affected is entitled to 30 days' notice. TEX. FAM. CODE ANN. §§ 14.08(b), (c) (Supp. 1975-76).

278. *Ainsworth v. Homes of St. Mark*, 530 S.W.2d 877 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

279. *Martin v. Martin*, 519 S.W.2d 900, 523 S.W.2d 252 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). The writ of habeas corpus may be used to enforce a valid foreign judgment adjudicating conservatorship as a domestic one. *Russell v. McMurtrey*, 526 S.W.2d 270 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); *Seaberg v. Brogunier*, 515 S.W.2d 398 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.), but the court's dictum with respect to changed conditions is beside the point. Cf. *Clayton v. Newton*, 524 S.W.2d 368 (Tex. Civ. App.—Fort Worth 1975, no writ), which deals with a void foreign order. But see *Follak v. Brown*, 530 S.W.2d 882 (Tex. Civ. App.—Beaumont 1975, no writ).

280. In *Clewis v. Clewis*, 519 S.W.2d 274 (Tex. Civ. App.—Tyler 1975, no writ), the initial order for support was entered in 1970 and a motion to modify that order was made in 1972. Since the hearing was apparently before Jan. 1, 1974, the law in effect at that time was applicable. If the matter had been under consideration by the trial court after that time, the new law of that date would be applicable unless its application "would not be feasible or would work injustice." Ch. 543, § 4(a), [1973] Tex. Laws 1459. See *Howard v. Pullicino*, 519 S.W.2d 254 (Tex. Civ. App.—Austin 1975, no writ); *Seaberg v. Brogunier*, 515 S.W.2d 398 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

281. TEX. FAM. CODE ANN. § 11.051 (Supp. 1975-76).

282. 526 S.W.2d 707 (Tex. Civ. App.—Austin 1975, no writ).

Having been ordered to make support payments, he was jailed for contempt for failure to do so upon his later return to the state. His attack on the judgment, however, was sustained for lack of *in personam* jurisdiction. Cases of this sort are unlikely to occur in the future, but in instances when the long-arm statute may be inapplicable a court must now be more wary of false statements with respect to substituted service than before.

*Charvis v. Charvis*²⁸³ stemmed from a suit for child support commenced in Louisiana under the Uniform Reciprocal Enforcement of Support Act.²⁸⁴ In a Texas divorce action the court had found that there were no children of the marriage, and in a subsequent suit for child support the father asserted the earlier judgment as a bar. The court held, however, that the judgment was not *res judicata* as to the child whose right of support is independent of the suit for divorce.²⁸⁵ In the trial of a child support case a record should be made as required by statute,²⁸⁶ but if a record is not made and no objection is made at the trial, fundamental error is not necessarily committed.²⁸⁷

Although each parent has an equal statutory duty to support his or her minor children,²⁸⁸ the burden need not be discharged by mathematically equal contributions, nor does the Texas Bill of Rights require this result in its provision that "[e]quality under the law shall not be denied . . . because of sex . . ."²⁸⁹ The father's duty to support an illegitimate child is also perfectly clear.²⁹⁰ Termination of the parent-child relationship does not absolve a parent from the duty of discharging past due support obligations.²⁹¹ *Templeton v. Templeton*²⁹² presented an unusual situation of apparent "dual paternity." The wife and her first husband were divorced in

283. 529 S.W.2d 814 (Tex. Civ. App.—Tyler 1975, no writ).

284. *E.g.*, TEX. FAM. CODE ANN. §§ 21.01-.66 (1975).

285. TEX. FAM. CODE ANN. § 14.05 (1975). But after a mother has litigated facts concerning delinquencies in child support payments, joinder of the child in a subsequent suit will not allow her relitigation of the same matter. *Gonzales v. Gonzales*, 532 S.W.2d 382 (Tex. Civ. App.—San Antonio 1975, writ filed).

286. TEX. FAM. CODE ANN. § 11.14(d) (1975); TEX. REV. CIV. STAT. ANN. art. 2324 (Supp. 1975-76).

287. *Ducoff v. Ducoff*, 523 S.W.2d 264 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). But the rule is otherwise when punishment may result from failure to comply with the judgment. *Schwartz v. Jefferson*, 520 S.W.2d 881 (Tex. 1975).

288. TEX. FAM. CODE ANN. § 4.02 (1975).

289. TEX. CONST. art. I, § 3a; *Friedman v. Friedman*, 521 S.W.2d 111 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). Texas law makes no distinction between male and female children for purposes of support, hence, *Stanton v. Stanton*, 421 U.S. 7 (1975), will have no impact on Texas law in this regard. See also Annot., *Liability of Parent for Support of Child Institutionalized by Juvenile Court*, 59 A.L.R.3d 636 (1974). Liability may also extend beyond minority in the case of a child in need of special care. TEX. FAM. CODE ANN. § 14.05(b) (1975). With respect to temporary child support see Annot., *Wife's Possession of Independent Means as Affecting her Right to Child Support Pendente Lite*, 60 A.L.R.3d 832 (1974).

290. *Gomez v. Perez*, 409 U.S. 535 (1973); *In re R.V.M.*, 530 S.W.2d 921 (Tex. Civ. App.—Waco 1975, no writ). See Annot., *Death of Putative Father as Precluding Action for Determination of Paternity or for Child Support*, 58 A.L.R.3d 188 (1974).

Attorney's fees may be awarded against the father as a necessary element of providing support for an illegitimate child, *In re R.V.M.*, 524 S.W.2d 921 (Tex. Civ. App.—Waco 1975, no writ), as in other cases of child support. *Uhl v. Uhl*, 524 S.W.2d 534 (Tex. Civ. App.—Fort Worth 1975, no writ). The Texas Attorney General expressed the opinion that county agencies may not charge a fee for handling child support payments. TEX. ATTY GEN. OP. No. H-647 (1975).

291. *Walker v. Sheaves*, No. 15421 (Tex. Civ. App.—San Antonio Jan. 14, 1976, no writ).

292. 521 S.W.2d 348 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

Oklahoma in 1965 and the husband was ordered to support their unborn child. The wife and her second husband were married several days later, and the child was born one month later. In the dissolution of his marriage the second husband was ordered to support the child which was found to have been born of his marriage to the mother. By a bill of review the second husband sought unsuccessfully to deny paternity and terminate support. It was clear from the record that if there was any failure to present evidence to the divorce court, it was his own.

A court may entertain a motion to increase or reduce the amount ordered for support within one year after the initial decree is entered.²⁹³ In considering a motion for reduction the court must, in any case, consider all the facts adduced to sustain the motion;²⁹⁴ however, changed conditions of the child need not be shown.²⁹⁵ The court "encourages parties . . . [to] enter into *written* agreements containing provisions for support of the children, subject to a determination by the court that such agreement is in the best interest of the children."²⁹⁶ Absent an agreement between the parties, it is improper for the court to order a formula for support based on a fixed percentage of a parent's gross income.²⁹⁷

It is well settled that the proper remedy to review a contempt proceeding is by a writ of habeas corpus,²⁹⁸ and in the absence of commitment that remedy is not available.²⁹⁹ If the court ordering support has jurisdiction of the parent ordered to pay, that party is not entitled to any notice of the judgment as a matter of due process.³⁰⁰ With respect to an order to show cause why a parent should not be held in contempt, ten days notice before trial is mandatory unless he appears earlier and is willing for the trial to be held.³⁰¹ The person ordered to pay support cannot be held in contempt of court for failure to comply with the order unless the order is certain and unambiguous,³⁰² nor should he be held in contempt if unable to comply with the order in a situation not attributable to his own fault.³⁰³ In *Ex parte*

293. TEX. FAM. CODE ANN. § 14.08(d) (Supp. 1975-76). See *In re Whittington*, 521 S.W.2d 121 (Tex. Civ. App.—Beaumont 1975, no writ), decided under TEX. FAM. CODE ANN. § 14.08 as it stood before amendment in 1975, after which no difficulty of statutory interpretation should arise.

294. *Bell v. Sykes*, 521 S.W.2d 752 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

295. *Jackman v. Jackman*, No. 15350 (Tex. Civ. App.—San Antonio Apr. 30, 1975, no writ).

296. *Doss v. Doss*, 521 S.W.2d 709, 713 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (emphasis added); See *McIntyre v. McFarland*, 529 S.W.2d 857 (Tex. Civ. App.—Tyler 1975, no writ). See also *In re McLemore*, 515 S.W.2d 356 (Tex. Civ. App.—Dallas 1974, no writ), discussed in *McKnight, Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 107-08 (1975).

297. *Doss v. Doss*, 521 S.W.2d 709 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

298. *Holder v. Holder*, 528 S.W.2d 113 (Tex. Civ. App.—Tyler 1975, no writ); *Doss v. Doss*, 521 S.W.2d 709 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

299. *Doss v. Doss*, 521 S.W.2d 709 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

300. *Ex parte Loftin*, 522 S.W.2d 591 (Tex. Civ. App.—Tyler 1975, no writ).

301. *Ex parte Hoover*, 520 S.W.2d 483 (Tex. Civ. App.—El Paso 1975, no writ).

302. *Ex parte Dean*, 529 S.W.2d 585 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); *Ex parte Stroope*, 524 S.W.2d 378 (Tex. Civ. App.—Dallas 1975, no writ); *Ex parte Hart*, 520 S.W.2d 952 (Tex. Civ. App.—Dallas 1975, no writ); cf. *Ex parte Miles*, 525 S.W.2d 236 (Tex. Civ. App.—Dallas 1975, no writ).

303. *Ex parte Hart*, 524 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, no writ).

*Hart*³⁰⁴ a party was held in contempt, but the court provided for suspension of its order upon his making certain payments ordered. The order went on to provide that process would be issued for commitment on the recurrent failure to comply with the court's order as verified by the affidavit of the party to whom payment was ordered to be made. After the relator was apprehended and jailed under this order, a writ of habeas corpus was granted. Such a recommitment cannot properly be had without notice and a hearing³⁰⁵ at which a record of testimony must be made.³⁰⁶ A motion for continuance by the party ordered to show cause should not be denied arbitrarily. In *Ex parte Blackmon*³⁰⁷ the father, who was the object of a show-cause order, was the managing conservator of the child. The court's denial of the father's motion, based on his failure or refusal to produce the child, was held to be arbitrary under the circumstances.

Section 14.09(c) of the Family Code³⁰⁸ gives the additional remedy of a money judgment for enforcing arrearages of child support payments. In *Harrison v. Cox*³⁰⁹ the court termed this a "procedural statute" which applies to unpaid child support payments accrued before its effective date of January 1, 1974.³¹⁰ In the case of a consent judgment or a property settlement order dealing with child support, suit for arrearages may be brought as on a contract.³¹¹ In *Prewitt v. Smith*,³¹² however, the court held that trustees of a state retirement fund are not required to comply with the provisions of section 14.05(c) of the Family Code³¹³ for disbursement of trust funds to satisfy support obligations of a trust beneficiary. Further, the court held that such funds are part of the state employee's wages not subject to garnishment.³¹⁴ The scope of effective garnishment of the federal government under the Social Services Amendments of 1974³¹⁵ is as yet undetermined.³¹⁶

304. *Ex parte Hart*, 520 S.W.2d 952 (Tex. Civ. App.—Dallas 1975, no writ).

305. *Id.* Notice of a related cause will not suffice if both causes are not consolidated. *Blackmon v. Blackmon*, 529 S.W.2d 574 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

306. *Ex parte Hart*, 520 S.W.2d 952 (Tex. Civ. App.—Dallas 1975, no writ); *Ex parte Thompson*, 520 S.W.2d 955 (Tex. Civ. App.—Dallas 1975, no writ).

307. 529 S.W.2d 570 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

308. TEX. FAM. CODE ANN. § 14.09(c) (1975).

309. 524 S.W.2d 387 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

310. The argument does not appear to have been made that retroactive effect of the statute is improper because the original order was made in contemplation of enforcement only by contempt. See McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 107-08 (1975).

311. *Holder v. Holder*, 528 S.W.2d 113 (Tex. Civ. App.—Tyler 1975, no writ). There is no mention of TEX. FAM. CODE ANN. § 14.09(c) (1975). There is, however, a brief but inconclusive discussion of the applicability of the statute of limitations to such situations.

312. 528 S.W.2d 893 (Tex. Civ. App.—Austin 1975, no writ).

313. TEX. FAM. CODE ANN. § 14.05(c) (1975).

314. 528 S.W.2d at 896. In *Addison v. Addison*, 530 S.W.2d 920 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ), the court held that a state instrumentality is not subject to garnishment for satisfaction of a judgment debt.

315. Pub. L. No. 93-647 (Jan. 4, 1975).

316. *But see* *Bolling v. Howland*, 398 F. Supp. 1313 (M.D. Tenn. 1975).