



January 1977

Family Law: Husband and Wife

Joseph W. McKnight

Recommended Citation

Joseph W. McKnight, *Family Law: Husband and Wife*, 31 Sw L.J. 105 (1977)
<https://scholar.smu.edu/smulr/vol31/iss1/4>

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: HUSBAND AND WIFE

by

Joseph W. McKnight*

I. STATUS

A New Jersey court¹ has considered an issue not yet addressed by a Texas appellate court: What constitutes a woman for purposes of marriage? In a dispute arising in the licensing process the court held that a transsexual male may enter into a valid marriage. As enacted in 1969, section 1.01 of the Family Code² provided that "persons" intending to enter into a formal marriage acquire a license to marry. The ensuing discussion of the modes of marriage³ caused the legislature, out of an abundance of caution, to substitute the phrase "a man and a woman" for "persons," although the attorney general of Texas had already expressed the view that "marriage" connoted a bisexual union.⁴ The Texas informal marriage statute⁵ contains provisions similar to those found in section 1.01.

In establishing an informal marriage, proof that the couple held themselves out to the public as married is often the easiest element to prove through the testimony of third persons. The best evidence in such a circumstance will generally come from those persons who would be most likely apprised of the relationship: the couple's families, close friends, and associates. In *Till v. Till*⁶ there was testimony from such persons that supported conflicting conclusions. The couple had evidently made representations of being married to the man's relatives and his employer, but the woman's relatives were merely told that the couple were *going to be married*. The couple's own testimony also conflicted with respect to their agreement to marry. On the basis of all of the evidence the trial court concluded that there was an informal marriage, and the appellate court found sufficient evidence in the record to support this conclusion.

Section 1.91(b)⁷ provides that if cohabitation as husband and wife and holding out as husband and wife are proved, an agreement of the couple to be married may be inferred. This section must mean that the court may infer that fact in the absence of evidence on the matter. If either party to the alleged

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

1. *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

2. TEX. FAM. CODE ANN. § 1.01 (Vernon 1975). Pennsylvania law, PA. STAT. ANN. tit. 48, § 1-5(h) (Purdon 1965), provides that a married person "guilty of adultery," may not be granted a license to marry the correspondent during the lifetime of the ex-spouse. A request for a three-judge federal court to test the constitutionality of the statute was denied on the ground that a state court would have to determine whether the statute meant *criminally* guilty of adultery or merely the commission of an act of adultery. *Chlystek v. Kane*, 412 F. Supp. 20 (W.D. Pa. 1976). At any rate, the court went on to observe that the couple who sought to attack the statute might circumvent any impediment posed by the statute by entering into an informal marriage.

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

4. TEX. ATT'Y GEN. OP. NO. M-1216 (1972).

5. TEX. FAM. CODE ANN. § 1.91(a) (Vernon 1975).

6. 539 S.W.2d 381 (Tex. Civ. App.—Tyler 1976, no writ).

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

marriage testifies to an agreement to marry, the court is not entertaining an inference but is merely making its finding on the basis of the evidence adduced.⁸ If all the evidence offered as to an agreement tends to disprove its existence, there is no room to infer it. In *Durr v. Newman*⁹ a couple had initially agreed to be married, cohabitated, and held themselves out as husband and wife. But during all this time one of them was still married to someone else. After the impediment was removed, they continued to cohabit and hold themselves out as husband and wife *but outside Texas*. No new agreement was proved. In this instance the court held that no new agreement was necessary, and recourse to section 1.91(b) was unnecessary. Section 2.22,¹⁰ which deals with the effects of removal of an impediment, simply validates the subsisting invalid union. In this instance the couple entered into the initial relationship which would have constituted an informal marriage but for the impediment. Their only cohabitation and holding out as a married couple after the removal of the impediment occurred after they had ceased to be residents of Texas although presumably still domiciled there. The court concluded that the provisions of section 2.22 do not require that all of the facts supporting its application occur within Texas.¹¹

The appellate courts have recently twice rejected the argument that the law of the place of marriage in force at the time of marriage provides an implied term of the marriage. In each instance¹² it was asserted that the existing grounds for divorce, mainly fault grounds now amplified with a no-fault ground, were implicitly accepted at the inception of the marriage as the only means by which it might be dissolved. Section 4.01¹³ of the Family Code and its predecessor enacted in 1840¹⁴ have long provided that marriages entered into in other states are subject to the law of Texas. The provision was initially designed to insure the applicability of the Texas matrimonial property requirement implied as a term of the marriage from the *lex loci contractus*.¹⁵

8. A confusion of these two situations is indicated in the court's opinion in *Reilly v. Jacobs*, 536 S.W.2d 406 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

9. 537 S.W.2d 323 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

10. TEX. FAM. CODE ANN. § 2.22 (Vernon 1975):

Marriage During Existence of Prior Marriage. A marriage is void if either party was previously married and the prior marriage is not dissolved. However, the marriage becomes valid when the prior marriage is dissolved if since that time the parties have lived together as husband and wife and represented themselves to others as being married.

11. Since there was no proof of foreign law, it was presumed to be the same as Texas law. The appellate court properly refused to remand for proof of foreign law. Under the more prosaic intrastate facts of *Talbert v. Talbert*, 1 Tex. Ct. Rep. 151 (Tex. Civ. App.—San Antonio 1976), the court also considered the effects of removal of an impediment to an informal marriage.

For a situation involving a property dispute growing out of a meretricious relationship see *Simon v. Watson*, 539 S.W.2d 951 (Tex. Civ. App.—Waco 1976, no writ). See also *Marvin v. Marvin*, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Clark, *The New Marriage*, 12 WILLAMETTE L.J. 441 (1976); Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453 (1976).

12. *Hopkins v. Hopkins*, 540 S.W.2d 783 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Smitheal v. Smitheal*, 518 S.W.2d 842 (Tex. Civ. App.—Fort Worth 1975, writ dismissed).

13. TEX. FAM. CODE ANN. § 4.01 (Vernon 1975).

14. Tex. Laws 1840, An Act to adopt the Common Law of England,—to repeal certain Mexican Laws, and to regulate the Marital Rights of parties § 13, at 6, 2 H. GAMMEL, LAWS OF TEXAS 180 (1898).

15. See Thomas & Thomas, *Community Property and the Conflict of Laws: A Recapitulation*, 4 Sw. L.J. 46, 52-57 (1950).

As recently as two years ago¹⁶ it could not be said with any certainty what rights a husband has to interfere with his wife's medical treatment for termination of pregnancy. Now the Supreme Court of the United States has determined that imposition of a prerequisite of spousal consent to abortion in the first twelve weeks of pregnancy is unconstitutional.¹⁷ The states cannot prescribe the husband's consent to a matter in which the state itself cannot interfere. Nor is it permissible for the state to prescribe that such abortions be performed in a hospital or licensed health facility.¹⁸

Several non-Texas cases further explained and developed the law with respect to interspousal interception of communications during marriage and in anticipation of divorce. In 1975 in *Simpson v. Simpson*¹⁹ the Fifth Circuit Court of Appeals denied damages for the gathering and use in a divorce proceeding of evidence procured by the husband by means of a telephone tap of his wife's conversation. In the Eighth Circuit court,²⁰ however, recovery was allowed against third persons in a spouse's employ for procuring information by the use of listening devices. The North Carolina Supreme Court²¹ suppressed interspousal wiretapped evidence in a divorce proceeding on the basis of the federal statutory prohibitions. The Court of Appeals for the Sixth Circuit²² nonetheless refused to dismiss an indictment of a husband for intercepting telephone conversations of his estranged wife, while the Federal District Court for the Northern District of Texas²³ declined to elevate the evidentiary marital privilege to a constitutional right in a situation where both spouses were charged with a criminal offense.

For the purpose of satisfying the requirement of ninety days' residence in a county for the bringing of a suit for divorce there,²⁴ it has long been disputed how much evidence is needed to show an actual move to establish a new residence.²⁵ In *Beavers v. Beavers*²⁶ the wife sought to show establishment of a new residence in a different county by paying part of the rent for a friend's apartment there, but she did so without advising anyone of her "move" except some of her creditors, one of whom sent bills to the new address. She returned to her original residence every evening and spent nights there until she separated from her husband. At that time she moved her effects to the second county but to a place other than her friend's apartment. The appellate court was not convinced that a change of residence had been accomplished.²⁷

16. McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 69 (1975).

17. *Planned Parenthood v. Danforth*, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).

18. *Arnold v. Sendak*, 416 F. Supp. 22 (S.D. Ind.), *aff'd without opinion*, 97 S. Ct. 476, (1976).

19. 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

20. *White v. Weiss*, 535 F.2d 1067 (8th Cir. 1976). *See also Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975).

21. *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 226 S.E.2d 347 (1976).

22. *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976).

23. *United States v. Hicks*, 420 F. Supp. 533 (N.D. Tex. 1976).

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

25. *Wilson v. Wilson*, 494 S.W.2d 609 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ *dism'd*); *Meyer v. Meyer*, 361 S.W.2d 935 (Tex. Civ. App.—Austin 1962, writ *dism'd*); *Therwanger v. Therwanger*, 175 S.W.2d 704 (Tex. Civ. App.—Eastland 1943, no writ).

26. 543 S.W.2d 720 (Tex. Civ. App.—Waco 1976, no writ).

27. *Garza v. Trevino*, 541 S.W.2d 524 (Tex. Civ. App.—San Antonio 1976, no writ), involved satisfaction of residence requirements for purposes of TEX. ELEC. CODE ANN. art. 5.08(g) (Vernon Supp. 1976-77). An opponent alleged that a husband-candidate had not been a

The appellate courts have twice stated²⁸ that the proper means of challenging residence requirements for divorce is by a plea in abatement, not by a plea of privilege.

*In re Parr*²⁹ involved two suits for divorce brought in quick succession by the spouses in different counties. The wife filed for divorce in county *A*, and the husband filed thereafter in county *B* where the wife filed her plea in abatement alleging the prior suit in county *A*. The wife's plea in abatement was denied in county *B*, and, as a result, the court in county *A* refused to proceed. This conclusion of the court of county *A* was sustained by the Corpus Christi court of civil appeals on the ground that dominant jurisdiction had been acquired in the matter by the court in county *B*. In *Raney v. Raney*³⁰ it was argued that a pending suit for divorce and child support required dismissal of a subsequent Uniform Reciprocal Enforcement of Support Act (URESA) proceeding (involving the same parties) commenced in another state and transferred to this state.³¹ It was concluded that URESA creates an exception to the rule of dominant jurisdiction as enunciated in *Curtis v. Gibbs*.³²

To obtain a continuance for his missing client an attorney must show why his client will be prejudiced by nonappearance, give a reasonable explanation for his absence, show that he has not been delinquent in locating his client, and demonstrate why the client has not been deposed if his testimony is essential.³³ Unless an abuse of discretion on the part of the trial judge is shown, an appellate court will not disturb the ruling below in refusing a continuance.³⁴ In *Bond v. Bond*³⁵ two weeks' continuance was sought under the Soldiers' and Sailors' Relief Act within twenty days of the client's military retirement.³⁶ In this instance the burden was upon the other party to show that the soldier was not imposed upon by defending the suit, and the court therefore abused its discretion in the absence of such a showing.

A divorce court is loath to employ receivership as a means of collecting or protecting assets.³⁷ In *Couch Mortgage Co. v. Hughes*³⁸ the court enunciated the further proposition that a divorce court cannot appoint a receiver of corporate property in the absence of a showing that the corporation is the alter

resident of the county for six months as the statute required because his wife lived in another county. The husband was employed in the county of election but spent days-off and vacations with his wife who often spent weekends with her husband in the county of election. The court held that the husband's residence requirements were satisfied.

28. *Harrison v. Harrison*, 543 S.W.2d 176 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ); *Lutes v. Lutes*, 538 S.W.2d 256 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

29. 543 S.W.2d 433 (Tex. Civ. App.—Corpus Christi 1976, no writ).

30. 536 S.W.2d 617 (Tex. Civ. App.—Tyler 1976, no writ).

31. TEX. FAM. CODE ANN. §§ 21.01-.66 (Vernon 1975).

32. 511 S.W.2d 263 (Tex. 1974).

33. *Ray v. Ray*, 542 S.W.2d 209 (Tex. Civ. App.—Tyler 1976, no writ).

34. *Chandler v. Chandler*, 536 S.W.2d 260 (Tex. Civ. App.—Corpus Christi 1976, writ dismissed). In this instance a second continuance had been sought under circumstances evidently causing the trial court to feel that enough delay had been allowed and the movant had had sufficient notice of the second setting.

35. 2 Tex. Ct. Rep. 151 (Tex. Civ. App.—Eastland 1976, no writ).

36. 50 U.S.C. § 521 (1970).

37. In *H & R Oils, Inc. v. Pioneer Am. Ins. Co.*, 541 S.W.2d 665 (Tex. Civ. App.—Fort Worth 1976, no writ), the court in a non-divorce case said that an applicant for receivership must have an interest in property the receiver is to take.

38. 536 S.W.2d 70 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

ego of a party. In *First Southern Properties, Inc. v. Vallone*³⁹ a receiver had been appointed in a divorce proceeding and had taken charge of real property held in the husband's name but subject to a deed of trust with a power of sale in the trustee in case of the husband's default. The receiver did not record lis pendens. The trustee's lien was foreclosed, and the purchaser at the sale bought without notice of the receivership. The receiver then moved to set aside the sale. The Supreme Court of Texas held that the property was *in custodia legis*, and the lis pendens statute was, therefore, inapplicable. The court nonetheless recommended that the legislature require lis pendens filing in this instance to protect purchasers.⁴⁰ In its effort to protect the careless receiver the court reached a conclusion that seems dubious at best. The principal authority relied upon was a case decided in 1891, long before the passage of the lis pendens statute in 1905.

Putting aside judicial interpretations, the legislature is now faced with finding a proper solution of the problem. A simple solution would be enactment of an amendment to article 6640⁴¹ by which receivers are specifically required to file lis pendens in these instances in order to be protected against bona fide purchasers. The Bankruptcy Act⁴² already requires bankruptcy trustees to record the bankrupt's interest in property subject to foreclosure so that purchasers are protected.

In *First Southern Properties, Inc. v. Gregory*⁴³ it was argued that mere pendency of a divorce proceeding requires a purchaser of property subject to court order, but not *in custodia legis*, to apprise himself of any restraints or conditions imposed by the divorce court with respect to the disposition of property at his peril and regardless of silence of the lis pendens record. In *Fannin Bank v. Blystone*⁴⁴ the Waco court of civil appeals left the misleading impression, which remained uncorrected by the supreme court in finding other grounds for supporting the result reached, that compliance with the lis pendens statute⁴⁵ is not required with respect to community property subject to an order restraining its disposition pending divorce under section 3.58⁴⁶ of the Family Code. In effect the Waco court, relying on authorities prior to the passage of the lis pendens statute in 1905, held that a divorce proceeding involving disposition of particular realty is notice to anyone dealing with the spouse who holds record title to the property. Such a rule would put an intolerable burden on prospective purchasers who are not put on notice by the lis pendens record. This conclusion was, therefore, rejected by the Houston (First District) court in *First Southern Properties, Inc. v. Gregory* in its

39. 533 S.W.2d 339 (Tex. 1976).

40. Since the court said the purchaser was entitled to get his money back, the principle of caveat emptor would evidently be inapplicable to a situation in which the purchaser refused to pay the trustee on realizing that the trustee could not give good title.

41. TEX. REV. CIV. STAT. ANN. art. 6640 (Vernon 1969).

42. Bankruptcy Act § 21(g), 11 U.S.C. § 44 (1970).

43. 538 S.W.2d 454 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

44. 417 S.W.2d 502 (Tex. Civ. App.—Waco 1967), writ *ref'd n.r.e.*, 424 S.W.2d 626 (Tex. 1968), discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 138-39 (1968), relied on by the court in *First S. Properties, Inc. v. Gregory*, 538 S.W.2d 454, 458 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

45. TEX. REV. CIV. STAT. ANN. art. 6640 (Vernon 1969).

46. TEX. FAM. CODE ANN. § 3.58 (Vernon 1975). See also *id.* § 3.57.

application to *separate property* which the owner-spouse had been enjoined from selling pending his divorce.⁴⁷

The legislature has provided⁴⁸ for the use of special masters in Dallas County, but elsewhere they may be properly employed in extraordinary circumstances only.⁴⁹ In spite of persistent reminders from the appellate courts⁵⁰ attorneys continue to overlook the requirement of a bond⁵¹ with respect to enjoining third parties in divorce proceedings. All too frequently divorce cases reach the appellate level without any findings or statements of fact so that the appellate court has, in effect, nothing to review with respect to the facts found.⁵² In 1975 article 2324⁵³ was amended to provide that court reporters would be available "on request." Hence, if no reporter is requested, the right to the question-and-answer record which might have been made is waived.⁵⁴ But a defaulting party without fault in not obtaining a record is still entitled to a statement of facts.⁵⁵

The Beaumont court has ruled⁵⁶ that a judgment fixing permanent child support and terminating temporary alimony and child support is *final* when rendered even though the court's order may be entered at a much later date. This conclusion is consistent with that of the supreme court⁵⁷ with respect to the finality of judgments for divorce when, after rendition of divorce but before entry of the order, a party to the proceeding dies. If a party dies prior to judgment, however, the proceeding must be terminated.⁵⁸

47. In *Neel v. Fuller*, 20 Tex. Sup. Ct. J. 120 (Dec. 12, 1976), the Texas Supreme Court held that an interest in property held in receivership may not be disposed of by the owner without prior approval by the court. The propriety of a receiver's management of property is not subject to a jury's fact-finding since receivership is wholly within the court's discretionary powers. *Moody v. State*, 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, no writ).

48. TEX. REV. CIV. STAT. ANN. art. 2338-9b.2 (Vernon Supp. 1976-77).

49. *Tex. R. Civ. P. 171*; *Bell v. Bell*, 540 S.W.2d 432 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); TEX. ATT'Y GEN. OP. NO. H-609 (1975).

50. *See, e.g., Hopkins v. Hopkins*, 539 S.W.2d 242, 246-47 (Tex. Civ. App.—Fort Worth 1976, no writ).

51. *TEX. R. CIV. P. 693a*.

52. *See Scoggins v. Scoggins*, 531 S.W.2d 245 (Tex. Civ. App.—Tyler 1975, no writ). With respect to various procedural factors in the fact-finding process in jury trials in particular see *Boriack v. Boriack*, 541 S.W.2d 237 (Tex. Civ. App.—Corpus Christi 1976, writ *dism'd*); *Williams v. Williams*, 537 S.W.2d 107 (Tex. Civ. App.—Tyler, no writ); *Spiller v. Spiller*, 535 S.W.2d 683 (Tex. Civ. App.—Tyler 1976, writ *dism'd*); *Goetz v. Goetz*, 534 S.W.2d 716 (Tex. Civ. App.—Dallas 1976, no writ).

53. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon 1971).

54. *See Bledsoe v. Black*, 535 S.W.2d 795 (Tex. Civ. App.—Eastland 1976, no writ).

55. *Smith v. Smith*, 544 S.W.2d 121 (Tex. 1976); *Brown v. Brown*, 520 S.W.2d 571 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); *Dugie v. Dugie*, 511 S.W.2d 623 (Tex. Civ. App.—San Antonio 1974, no writ).

56. *Leone v. Leone*, 543 S.W.2d 681 (Tex. Civ. App.—Beaumont 1976, no writ). The court was at pains to distinguish *Ex parte Gnesoulis*, 525 S.W.2d 205 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ), though as indicated in McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 74 (1976), the cases are similar since in each instance there was reliance on a letter from the court which recorded the court's oral judgment. The earlier case is different in that it is a contempt proceeding turning on the lack of a written order to support that stern consequence of disobedience. Though the opinion in *Leone, supra*, at 681, is somewhat garbled, the record in that case appears to have been somewhat fuller than that in *Gnesoulis*.

Ex parte Wagley, 530 S.W.2d 609 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ), illustrates the point that a motion for contempt cannot be grounded on disobedience of provisions of a judgment which constitutes a material alteration added more than 30 days after entry of the final order.

57. *Dunn v. Dunn*, 439 S.W.2d 830 (Tex. 1969). For another situation involving death of a party see *Deen v. Deen*, 530 S.W.2d 913 (Tex. Civ. App.—Fort Worth 1975, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 72-73 (1976).

58. *Parr v. White*, 543 S.W.2d 445 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Parr v.*

By way of obiter dictum in *McCartney v. Mead*⁵⁹ the court said that pledging an interest awarded by the divorce court as collateral for a loan to bear the cost of appeal does not bar an appeal under the rule that voluntary acceptance of a benefit of judgment precludes appeal⁶⁰ with respect to division of property. After entry of the divorce decree the wife moved for waiver of costs for appeal supported by her affidavit stating her inability to pay. The trial court refused to waive costs and the wife sought a writ of mandamus to force the court to do so.⁶¹ The appellate court held that to be entitled to a writ of mandamus in such an instance the record must show that the petitioner made an unsuccessful attempt to borrow the funds necessary to pay for the appeal bond since the trial court had found that the estate of the parties was substantial enough to pay any costs which might be adjudged against the petitioner.⁶²

II. CHARACTERIZATION

*Frey v. Estate of Sargent*⁶³ involved a contract between proposed spouses entered into prior to the amendment of article 4610⁶⁴ (now section 5.41⁶⁵) in 1967. The agreement was executed in Oklahoma but was intended to be performed in Texas, and, hence, Texas law was treated as governing its operation. The prospective spouses agreed that the husband would bequeath \$30,000 to the wife, who would, in turn, minister to the needs of the husband.⁶⁶ The husband executed a will providing for the contracted bequest but revoked it after his wife predeceased him. The wife's heirs asserted their entitlement to the benefits of the contract. The court rejected this contention on the ground that the contract was one of "a personal nature" which did not evidence an intention of the contracting parties that the agreed bequest should benefit the wife's heirs under the circumstances which occurred. In the opening paragraph of its opinion the court commented, almost as an aside, that the contract expressed "an order of descent of Texas property contrary to the existing provisions of . . . art. 4610."⁶⁷ The court's allusion was to the

White, 543 S.W.2d 440 (Tex. Civ. App.—Corpus Christi 1976, no writ); Pritchard v. Estate of Tuttle, 534 S.W.2d 946 (Tex. Civ. App.—Amarillo 1976, no writ).

59. 541 S.W.2d 202 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

60. Roye v. Roye, 531 S.W.2d 242 (Tex. Civ. App.—Tyler 1975, no writ); Trader v. Trader, 531 S.W.2d 189 (Tex. Civ. App.—San Antonio 1975, no writ).

61. In the meantime the wife was able to procure some funds to file an appeal bond. The appellate court held that her doing so in this instance did not moot the question of her right to litigate the question of waiver of costs of appeal.

In *Harrison v. Harrison*, 543 S.W.2d 176 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ), the court held that the appellant's failure to give notice of appeal under TEX. R. CIV. P. 354(b) is not jurisdictional as to the appeal, but in some circumstances failure to give notice may cause an appellate court to deny an appeal.

62. A non-injunctive temporary order is, of course, not appealable. *Wells v. Wells*, 539 S.W.2d 220 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dismissed). The court also pointed out that TEX. R. CIV. P. 683 had been sufficiently complied with by a general recital of need for preservation of the parties' rights.

63. 533 S.W.2d 142 (Tex. Civ. App.—Amarillo 1976, writ refused n.r.e.).

64. TEX. REV. CIV. STAT. ANN. art. 4610 (Vernon 1925) as originally enacted in Tex. Laws 1840, An Act to adopt the Common Law of England,—to repeal certain Mexican Laws, and to regulate the Marital Rights of parties § 5, at 5, 2 H. GAMMEL, LAWS OF TEXAS 179 (1898).

65. TEX. FAM. CODE ANN. § 5.41 (Vernon 1975).

66. If the proposed wife's promise was merely to do that which a faithful wife is bound to do anyway, the contract is still supportable as made in consideration of marriage.

67. 533 S.W.2d at 143.

now-repealed, and often misconstrued, provision of the statute that marriage contracts should not "alter the order of descent." The origin and meaning of this phrase were long unappreciated and the phrase was, therefore, misinterpreted⁶⁸ as a condemnation of any term of such a contract which would cause property to devolve otherwise than as provided by the statute of descent and distribution.

Modern research demonstrates that the statute was adapted from the Louisiana Code of 1825⁶⁹ which used almost identical phraseology and referred to compliance with the principle of forced heirship, then applicable in both Louisiana⁷⁰ and Texas.⁷¹ The Texas forced heirship rule was repealed in 1856, but this vestige of the rule lingered on as a kind of disembodied spirit until the amendment of article 4610 in 1967.⁷² The Amarillo court of civil appeals wisely avoided further comment on old article 4610 in arriving at its decision. As the Supreme Court of Texas pointed out in *Valmont Plantations v. Texas*,⁷³ subsequent historical research may be used to correct prior misconceptions.

The subject matter of a gift in trust has long perplexed the courts. For example, if a spouse is the beneficiary of a trust, is the subject of the gift merely the equitable estate held in trust or does it also include the income by which that beneficial interest is valued? There is no other means of measuring the beneficiary's interest in corpus than by its production of income. Hence, it is asserted that the right to receive income is really the subject matter of the gift. On three occasions the Supreme Court of Texas has stated that the settlor of a trust or the donor of other inter vivos gifts may provide that income from the property shall be the separate property of the donee.⁷⁴ Several old federal court tax cases have reached the conclusion that in the absence of such directions trust income is community property.⁷⁵ But the courts have consis-

68. See, e.g., *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964).

69. 1825 La. Acts art. 2306 (current version at LA. CIV. CODE ANN. art. 2326 (West 1973)).

70. 1825 La. Acts arts. 1480, 1482 (current version at LA. CIV. CODE ANN. arts 1493, 1495 (West 1973)).

71. See Tex. Laws 1840, An Act Concerning Wills §§ 13, 15, at 170, 2 H. GAMMEL, LAWS OF TEXAS 344 (1898), repealed, Tex. Laws 1856, ch. 85, § 1, at 5, 4 H. GAMMEL, LAWS OF TEXAS 423 (1898). See also Tex. Laws 1837, An Act Authorizing persons to dispose of property by Will § 1, at 106, 1 H. GAMMEL, LAWS OF TEXAS 1448 (1898).

72. Another remnant of the same idea lingers on in TEX. FAM. CODE ANN. § 3.63 (Vernon 1975): "In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." This language had its origins in the Divorce Act of 1841. Tex. Laws 1841, An Act Concerning Divorce and Alimony § 13, at 22, 2 H. GAMMEL, LAWS OF TEXAS 486 (1898). In spite of its lack of meaning in the law's historical context, its seeming relevance to the process of division of marital property on divorce was employed in *McKnight v. McKnight*, 535 S.W.2d 658 (Tex. Civ. App.—El Paso), *rev'd on other grounds*, 543 S.W.2d 863 (Tex. 1976).

73. 163 Tex. 381, 383, 355 S.W.2d 502, 503 (1962), *relying on* *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 196-97 (1844).

74. *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); *Hutchison v. Mitchell*, 39 Tex. 488 (1873) (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*, 32 S.W. 559 (Tex. Civ. App. 1895, no writ); *Shepflin v. Small*, 23 S.W. 432 (Tex. Civ. App. 1893, no writ).

75. See, e.g., *Commissioner v. Porter*, 148 F.2d 566 (5th Cir. 1945); *Commissioner v. Terry*, 69 F.2d 969 (5th Cir. 1934).

tently held that income of a discretionary trust which is not paid the beneficiary is not community property.⁷⁶ Hence, if the settlor directs that such income be added to the trust corpus, it follows, as the Texarkana court held in *In re Marriage of Long*,⁷⁷ that such additions constitute separate property of the beneficiary who, as a distinct and separate right, may also be the donee of the corpus.

On dissolution of a marriage a claimant who asserts that particular property is separate property rather than community property may trace its acquisition to a mutation of a demonstrably separate asset. When tracing or other means of proving separate character of the property fails,⁷⁸ the presumption of community character prevails.⁷⁹ If separate funds in a definite amount are deposited in a bank account containing community funds and the specific amount of the separate deposit is withdrawn to discharge a premarital debt, the requirements of tracing are satisfied to refute a claim for reimbursement of community funds used to discharge a "separate debt."⁸⁰ On the other hand, if a bank account is made up of separate funds to which a particular amount of community funds is added and apparently expended in the course of doing business, the withdrawal and expenditure of funds in the appropriate amount of net profits of the business does not demonstrate that all the remainder must be separate property.⁸¹

Most problems of distinction between separate and community character of property arise out of transactions of spouses with third persons, by contract or otherwise. The most common types of contracts in this regard are those of purchase or employment. Whereas property purchased during marriage is presumed to be community, income from employment is community by definition. Since community character of the former depends on *acquisition during marriage*, the courts have applied the doctrine of inception of title and the concept of vesting to make this determination. If a contract is entered into prior to marriage, its incidents are then fixed and the proceeds of that contract are characterized as separate property. For example, a single man contracts to perform certain services for his mother and she contracts to convey certain realty to him in payment for these services. The man marries before all the services are performed and completes his part of the bargain while he is married, at which time the promised conveyance is made to him. It has been said that the conveyance is an integral part of the premarital contract

76. *Currie v. Currie*, 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ dismissed); *Buckler v. Buckler*, 424 S.W.2d 514 (Tex. Civ. App.—Fort Worth 1967, writ dismissed), discussed in McKnight, *Matrimonial Property*, *Annual Survey of Texas Law*, 23 Sw. L.J. 44, 47 (1969).

77. 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1976, no writ). The case follows *Currie v. Currie*, 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ dismissed), discussed in McKnight, *Family Law*, *Annual Survey of Texas Law*, 29 Sw. L.J. 67, 76 (1975).

78. See, e.g., *Means v. Means*, 535 S.W.2d 911 (Tex. Civ. App.—Amarillo 1976, no writ).

79. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975). But if community property is left undivided on dissolution of marriage by death of one of the spouses and is left in the charge of the survivor, there is no presumption that acquisitions made during the second marriage of the survivor belong to the community of the first marriage. *Cook v. Cook*, 538 S.W.2d 218 (Tex. Civ. App.—Tyler 1976, no writ). See also *McKinley v. McKinley*, 496 S.W.2d 541 (Tex. 1973).

80. *In re Tandy*, 532 S.W.2d 714, 717 (Tex. Civ. App.—Amarillo 1976, no writ). The court also discusses lack of proof of source of alleged separate property. *Id.* at 718-19.

81. *Meshwert v. Meshwert*, 543 S.W.2d 877 (Tex. Civ. App.—Beaumont 1976, writ granted on other grounds).

and the property is, therefore, the man's separate property.⁸² Similarly, if a single man enters into a contract of insurance on his life and after the marriage he keeps his part of the bargain by paying premiums, the proceeds payable on his death *while married* are separate property since the performance of the contract relates back to its inception.⁸³ Again, if realty is conveyed to a single man who asserts a claim of right and if title is acquired by running of adverse possession during marriage, the title relates back to its acquisition by conveyance.⁸⁴ It has been said, however, that if a single man goes into possession of land as a naked trespasser and acquires title by adverse possession while married, the title does not relate back to the time the period of possession began but its character is fixed when title *vests*.⁸⁵ In 1970 the Supreme Court of Texas decided *Busby v. Busby*,⁸⁶ a case concerned with the partition of benefits of an ex-husband under his military retirement scheme. The man had entered the military service as a single man. He married several years later. During marriage he served the requisite number of years to entitle him to retirement pay although no benefits were then received. He was ordered retired on account of disability on the very day of his divorce although actual retirement occurred about a month later. The divorce court did not make any disposition of subsequent benefits. After the divorce the ex-wife sought partition of the benefits as community property undivided on divorce which by operation of law constitute a tenancy in common.⁸⁷ Without commenting on the inception of the husband's right to receive retirement benefits, the court concluded that his right had vested when he had served the required time to receive benefits. Since that time had run during the marriage, the benefits were community property, transformed into a tenancy in common on divorce without division. Following what they perceived as the rule laid down in *Busby*, appellate courts⁸⁸ applied the *vesting* rule in divorce cases in order to determine whether an interest in a retirement or pension fund had achieved community character for purposes of division. In reaching this conclusion the appellate courts rejected "if and when" orders made by divorce courts for the division of benefits if and when received. The Dallas court of civil appeals has wrestled with a diversity of problems in applying the rule in *Busby* and has contributed significantly to the solution. It first sustained an "if and when" order in *Miser v. Miser*,⁸⁹ a divorce case where the serviceman had reenlisted

82. *Bishop v. Williams*, 223 S.W. 512 (Tex. Civ. App.—Austin 1920, writ ref'd).

83. *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Civ. App.—Waco 1963, writ ref'd); *Estate of Wildenthal*, 29 CCH Tax Ct. Mem. 519 (1970), discussed in *McKnight & Raggio, Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 51 (1971).

84. *Strong v. Garrett*, 148 Tex. 265, 224 S.W.2d 471 (1949).

85. *Id.* As to whether a claim to a faulty title under a warranty deed can constitute a claim of right compare *Scott v. Washburn*, 324 S.W.2d 957 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.), with *Brown v. Foster Lumber Co.*, 178 S.W. 787 (Tex. Civ. App. 1915, writ ref'd).

86. 457 S.W.2d 551 (Tex. 1970).

87. The term "tenancy in common" is applied to interests in personalty as well as realty in this situation although it would be more precise to refer to the ex-spouses as co-owners of personalty.

88. *Cearley v. Cearley*, 536 S.W.2d 96 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 544 S.W.2d 661 (Tex. 1976); *Bright v. Bright*, 531 S.W.2d 440 (Tex. Civ. App.—San Antonio 1976, no writ); *Lumpkins v. Lumpkins*, 519 S.W.2d 491 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *Davis v. Davis*, 495 S.W.2d 614 (Tex. Civ. App.—Dallas 1973, writ disp'd).

89. 475 S.W.2d 597 (Tex. Civ. App.—Dallas 1971, writ disp'd). Though it is not clear whether similar facts were before the court, a similar result may have been reached in *In re*

prior to divorce and the requisite time for vesting of pension rights would be complete within the enlistment period about eighteen months after the decree of divorce. In *Davis v. Davis*,⁹⁰ however, where the officer-husband would have had to complete twelve additional years of military service before his right to benefits would vest, the court distinguished *Miser* as dealing with an enlisted man whose benefits would vest during the enlistment period and rejected the trial court's "if and when" order with respect to the officer-husband's benefits.⁹¹ In all these cases, including *Busby*, where pension rights were held to be vested by time in service only, it was evident that vesting in the sense of absolute entitlement to benefits could be thwarted by termination of employment prior to receipt of benefits. Termination could occur as a result of death of the employee or his voluntarily quitting his position or by his dismissal. In the military service dismissal for dereliction of duty would, by the terms of employment, cause loss of all rights to future retirement benefits, even those vested by time in service. This concept of vested rights, therefore, had a contingent element.

In *Dessommes v. Dessommes*,⁹² a case like *Busby* in that it dealt with division after divorce, the ex-husband had commenced his employment prior to marriage. Though retirement rights seem to have vested during this marriage from the point of satisfying time requirements under the employment contract, the ex-husband continued to augment the fund after the divorce, and the retirement plan was superseded by a new one negotiated by the employer and the employee under which the ex-husband was entitled to an annuity when he subsequently retired. The trial court concluded that the ex-wife did not have any interest in the annuity subject to partition. The Dallas appellate court reversed and remanded with the instruction that the ex-husband should be allowed to prove how much of the fund was not attributable to acquisition during the marriage. The court was evidently concerned that application of the inception of title and vesting doctrines would not do substantial justice in this situation.

*Cearley v. Cearley*⁹³ was a divorce case involving retirement rights which had not vested in the sense that the employee had not served the requisite time for entitlement to benefits on retirement under the plan. The husband had been in the military service prior to marriage. He would not be entitled to retirement benefits until he served at least twenty years, an event that could occur after the divorce. The marriage lasted eighteen years. Computing the

McCurdy, 489 S.W.2d 12 (Tex. Civ. App.—Amarillo 1973, writ *dism'd*). The *Miser* and *Busby* decisions are noted in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 73 (1974), and McKnight, *Family Law, Annual Survey of Texas Law*, 27 Sw. L.J. 7, 30-31 (1973).

90. 495 S.W.2d 607 (Tex. Civ. App.—Dallas, 1973 writ *dism'd*), *noted in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 73 (1974).

91. The Austin court rejected that distinction in *Cearley v. Cearley*, 36 S.W.2d 96 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 544 S.W.2d 661 (Tex. 1976). The Waco court found no basis for distinguishing retirement benefits of a regular officer from those of a reserve officer. *Ables v. Ables*, 540 S.W.2d 769 (Tex. Civ. App.—Waco 76, no writ). In applying the vesting doctrine the Corpus Christi court concluded that Naval Fleet Reserve pay is not a vested retirement benefit, but the vesting test is no longer applicable to this situation. *Taggart v. Taggart*, 540 S.W.2d 823 (Tex. Civ. App.—Corpus Christi 1976, writ granted).

92. 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ *ref'd n.r.e.*), *noted in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 72-73 (1974).

93. 544 S.W.2d 661 (Tex. 1976).

community share in the ratio of eighteen to the number of years served before retirement, the trial court awarded the wife one half of that amount⁹⁴ if and when received. The Supreme Court of Texas sustained this award and in so doing characterized prospective retirement rights as *contingent* community property assets for purposes of division on divorce.⁹⁵ The court noted that this approach would make unnecessary a further suit by which the wife might seek partition of her share "after the date that the retirement benefits mature."⁹⁶ Beyond this the court did not indicate how a post-divorce partition of overlooked community assets should be handled.⁹⁷ But treatment of interests having their origin prior to marriage as community assets both in *Cearley* and *Busby* indicates a departure from strict application of the inception of title rule for the purpose of dealing with interests that accrue over a period of time.

In *Busby* the husband's retirement had resulted from disability suffered by a serviceman, and the supreme court pointedly noted that the occasion for retirement did not affect the character of the right as community property.⁹⁸ In *Ramsey v. Ramsey*⁹⁹ the Eastland court nevertheless concluded that payments received from the Veterans' Administration on account of disabilities apparently incurred during marriage are separate property. This conclusion has subsequently been distinguished by the El Paso¹⁰⁰ and Amarillo¹⁰¹ courts when considering benefits received on military or other retirement occasioned by disability. But the Texarkana court¹⁰² has recently concluded that disability payments from the Veterans' Administration constitute separate property while those received from the civil service following disability are community. This conclusion based on section 5.02¹⁰³ is erroneous, however, in the absence of proof to rebut the presumption of community laid down in section 5.01.¹⁰⁴

Purchases of property involving third persons present more difficult problems of analysis and proof. In *Bradley v. Bradley*¹⁰⁵ the husband and wife had agreed with the husband's parents that the husband would arrange for the purchase of a farm. The parents agreed to make the down-payment and to discharge future payments toward the purchase price as they came due. It was further agreed that the parents would occupy the farm during their lifetimes

94. The trial court's formulation of the amount as quoted at *id.* at 662 is scarcely a model to be followed, but this seems to be what the court ordered, however ill-expressed.

95. The El Paso court of civil appeals had reached a similar conclusion a week earlier in *Schappell v. Schappell*, 544 S.W.2d 807 (Tex. Civ. App.—El Paso 1976, no writ).

96. 544 S.W.2d at 666.

97. Nor does the court indicate whether its characterization of assets for purposes of division on divorce is applicable to division of property at death. For example, on the death of a non-employee-spouse is there any interest includable in his or her estate with respect to "unvested" retirement rights of the surviving spouse? A *probate* court will doubtless soon have to consider that issue. See *Cowgill v. White*, 543 S.W.2d 437 (Tex. Civ. App.—Corpus Christi 1976, no writ).

98. 457 S.W.2d at 553-54.

99. 474 S.W.2d 939 (Tex. Civ. App.—Eastland 1972, writ *dism'd*), *criticized in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 31 (1973).

100. *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. Civ. App.—El Paso 1972, no writ), *noted in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 31 (1973).

101. *Copeland v. Copeland*, 544 S.W.2d 183 (Tex. Civ. App.—Amarillo 1976, no writ).

102. *In re Butler*, 543 S.W.2d 147 (Tex. Civ. App.—Texarkana 1976, no writ).

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

104. *Id.* § 5.01.

105. 540 S.W.2d 504 (Tex. Civ. App.—Fort Worth 1976, no writ).

and on their death the husband would get possession of the farm. The conveyance was to the husband. After the husband's and wife's divorce, in which there was no disposition of the farm, the wife sought an adjudication of her community interest in it. There was a finding of fact that the parents had no intention of making a gift to their son. The court construed the whole transaction as a contract of acquisition, with the consequence that the property acquired was presumed to be community property.¹⁰⁶ If a contract with a third party involves a purchase on credit¹⁰⁷ or is for the loan of money,¹⁰⁸ and if the seller or lender agrees to look solely to the purchasing or borrowing spouse's separate property for payment, the property bought or money borrowed is the separate property of that spouse. But apart from the contractual aspects of such transactions, the fact that property is acquired in the name of a spouse during marriage does not affect the presumption as between the spouses that the property is community.¹⁰⁹ If title is taken in the name of a third person, it is incumbent upon one who urges its community character to prove it.¹¹⁰ If the third person is a child of the purchasers, a presumption of gift¹¹¹ must be rebutted as well.¹¹² Rebuttal of gift and a showing of payment of the purchase price with community funds produce a resulting trust in the third person on behalf of the community.¹¹³ The unilateral act of a spouse in secreting funds in the name of a child and later withdrawing them does not cause them to lose their community character.¹¹⁴

106. In analyzing the incidents of a policy of life insurance in *First Nat'l Bank v. United States*, 418 F. Supp. 955 (N.D. Tex. 1976), with all relevant facts occurring before the amendment of TEX. REV. CIV. STAT. ANN. art. 23 in 1957, a federal court looked at the situation as it perceived a court would have done prior to 1957. For subsequent analyses of interests in life insurance policies see McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 133 (1968); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 48-49 (1969); McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 52-53 (1971); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 31-33 (1973); McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 80-81 (1974).

107. *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881 (1937).

108. *Ray v. United States*, 538 F.2d 1228 (5th Cir. 1976).

109. *McGee v. McGee*, 537 S.W.2d 94 (Tex. Civ. App.—Amarillo 1976, no writ). If title is taken in the names of both spouses, the spouse who asserts that the property is wholly of a separate character may introduce evidence to that effect in the absence of recitals of separate property ownership of the other spouse, *Galvan v. Galvan*, 534 S.W.2d 398 (Tex. Civ. App.—Austin 1976, no writ); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 130-31 (1968); McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 38-39 (1971). See *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 77-78 (1976).

110. *Harris v. Harris*, 174 S.W.2d 996, 999 (Tex. Civ. App.—Fort Worth 1943, no writ).

111. *Smith v. Strahan*, 16 Tex. 314 (1856) (dictum).

112. *Bell v. Smith*, 532 S.W.2d 680 (Tex. Civ. App.—Fort Worth 1976, no writ). The husband in the presence of his second wife negotiated to buy a house. He told his attorney to put title in the name of his son by a prior marriage and explained to his wife when she questioned that decision that title would later be put in the names of husband and wife. After the transaction was completed according to the husband's instructions and payment of the purchase price was made with community funds, the formal state of the title was not altered. In their subsequent divorce, which occurred after the son's death, the couple's interest in the property was awarded to the wife, and the husband complied with the court's order to convey his interest in the property to her. In this instance it seems to have been proved that the couple intended that the son hold the title beneficially for them and a resulting trust was therefore constituted. Hence, the property maintained its community character and the wife acquired all of it as a result of the divorce decree.

113. *Id.* at 684; cf. *DeGrassi v. DeGrassi*, 533 S.W.2d 81 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.) (a conveyance was made by the husband and wife to the husband's son; no undue influence on the wife was shown; in the absence of proof of other facts by the wife, title in the son was confirmed).

114. *Anderson v. Anderson*, 535 S.W.2d 943, 946-47 (Tex. Civ. App.—Waco 1976, no writ). See also *Carnes v. Meador*, 533 S.W.2d 365, 369 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

III. DIVISION ON DIVORCE

The divorce court may not sever the property division from other elements of a case although difficulty in dividing specific property may result in a postponement of final disposition of the case.¹¹⁵ The appellate courts will not disturb a trial court's exercise of its equitable judgment¹¹⁶ unless a clear abuse of discretion can be shown.¹¹⁷ Such an abuse is difficult to show in view of the often sparse record on appeal.¹¹⁸ Although an occasional award seems so extreme as to warrant reversal,¹¹⁹ even if the appellate court discerns error in the conduct of the trial with respect to division, if the division seems fair under the circumstances, the trial court's conclusion will usually be sustained.¹²⁰

In *Eggemeyer v. Eggemeyer*¹²¹ the Supreme Court of Texas should finally resolve the longstanding dispute concerning construction of section 3.63¹²² with respect to the trial court's power to divide separate real property on

115. *Reed v. Williams*, 545 S.W.2d 33 (Tex. Civ. App.—San Antonio 1976, no writ). In *Burleson v. Burleson*, 419 S.W.2d 412 (Tex. Civ. App.—Houston [14th Dist.] 1967), *on remand sub nom. Carter v. Burleson*, 439 S.W.2d 381 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ), in which a decree of divorce was granted in another jurisdiction while the proceeding was pending, the court then proceeded to partition (rather than divide) the community property. *See also Mitchim v. Mitchim*, 509 S.W.2d 720 (Tex. Civ. App.—Austin 1974), *rev'd on other grounds*, 518 S.W.2d 362 (Tex. 1975).

116. In some cases the court may appoint a master in the division process. *See* TEX. REV. CIV. STAT. ANN. art. 2338—9b.2 (Vernon Supp. 1976-77), making such provision for Dallas County. Otherwise, the use of a master is permissible only in exceptional cases. TEX. R. CIV. P. 171; *Bell v. Bell*, 540 S.W.2d 432 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); TEX. ATT'Y GEN. OP. NO. H-609 (1975). *See also Roberson v. Roberson*, 420 S.W.2d 495 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.). In *Bell*, where the use of a master was not warranted by the circumstances, the appellate court nonetheless held that the master's making findings of fact which were later employed by the court in making its division did not constitute reversible error since the complaining spouse could have had a jury trial on all matters of fact if he had requested it. The court did, however, treat the assessment of the master's fee as erroneous, since no master should have been appointed.

117. In *Hopkins v. Hopkins*, 540 S.W.2d 783 (Tex. Civ. App.—Corpus Christi 1976, no writ), it was indicated that the court might consider the innocent spouse's loss of medical benefits in making a division of property. In *Roberts v. Roberts*, 535 S.W.2d 373, 374 (Tex. Civ. App.—Tyler 1976, no writ), it was suggested that the wife's being 20 years older than her husband might support a division in her favor.

118. When there is no statement or findings of fact, the appellate court must resolve all disputes in favor of the trial court's conclusions. *See, e.g., Fuqua v. Fuqua*, 541 S.W.2d 228, 229-30 (Tex. Civ. App.—Tyler 1976, no writ); *Collins v. Collins*, 540 S.W.2d 497, 498 (Tex. Civ. App.—Tyler 1976, no writ); *Williams v. Williams*, 537 S.W.2d 107, 111 (Tex. Civ. App.—Tyler 1976, no writ). *But see* note 55 and accompanying text.

119. In *Dietz v. Dietz*, 540 S.W.2d 418 (Tex. Civ. App.—El Paso 1976, no writ), the wife was awarded less than one percent of the community estate without any reasonable basis and an abuse of discretion was found. *See also Mial v. Mial*, 543 S.W.2d 736 (Tex. Civ. App.—El Paso 1976, no writ); *Boriack v. Boriack*, 541 S.W.2d 237, 242-43 (Tex. Civ. App.—Corpus Christi 1976, writ *dism'd*).

120. In *Bell v. Bell*, 540 S.W.2d 432 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ), it was erroneous for the trial court to strike the husband's allegation of the wife's adultery, but under the circumstances the error was treated as harmless. *See also McGee v. McGee*, 537 S.W.2d 94 (Tex. Civ. App.—Amarillo 1976, no writ) (harmless error, if any, in finding the value of particular property). A possibly incorrect finding as to value or characterization of property will not necessarily cause reversal. *Fuqua v. Fuqua*, 541 S.W.2d 228, 299-30 (Tex. Civ. App.—Tyler 1976, no writ). *See also McKnight, Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 79 n.94 (1975). But a substantial error will not be allowed to stand. *Freeman v. Freeman*, 497 S.W.2d 97 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ). It was said in *Spiller v. Spiller*, 535 S.W.2d 683 (Tex. Civ. App.—Tyler 1976, no writ), that the wife had no ground to complain that property was awarded to her as her separate property rather than community.

121. 535 S.W.2d 425 (Tex. Civ. App.—Austin 1976, writ granted).

122. TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).

divorce. The majority of courts of appeals which have addressed the question have tended to the conclusion that title to separate realty may be divested in favor of the other spouse,¹²³ but prior to the supreme court's reaching a decision it had been recommended to the Texas House of Representatives that legislation be adopted to bar division of all separate property on divorce.¹²⁴

Pension and Retirement Benefits. The courts of appeals had been sharply divided on the issue of whether pension and retirement rights that had neither accrued nor matured were subject to division on divorce.¹²⁵ In *Cearley v. Cearley*¹²⁶ the supreme court held that these interests should be treated as contingent community property for property division purposes. In doing so, the court intimated a clear preference for the "if and when" type of decree when division is sought of rights that have not accrued because of insufficient time of employment. The court did not absolutely reject a division of property based on the present value of future rights and liabilities,¹²⁷ but when pension rights are a significant asset of the marriage the "if and when" decree seems to be the better approach since the risk that an interest may not mature is divided equally between the parties. The same reasoning indicates that the latter approach is to be preferred over the use of a conjectural present value of an interest as a factor in overall division of assets.¹²⁸

Cearley disposed of some problems, but it raises others concerning the amount of benefits and whether the principle of the case is applicable to other

123. *Baxla v. Baxla*, 522 S.W.2d 736, 739-40 (Tex. Civ. App.—Dallas 1975, no writ); *Wilkerson v. Wilkerson*, 515 S.W.2d 52, 56-57 (Tex. Civ. App.—Tyler 1974, no writ). See also *In re Butler*, 543 S.W.2d 147 (Tex. Civ. App.—Texarkana 1976, no writ) (dictum); *Looney v. Looney*, 541 S.W.2d 877 (Tex. Civ. App.—Beaumont 1976, no writ) (dictum); *Burns v. Burns*, 541 S.W.2d 280, 282 (Tex. Civ. App.—San Antonio 1976, no writ) (dictum); *Dietz v. Dietz*, 540 S.W.2d 418, 420 (Tex. Civ. App.—El Paso 1976, no writ) (dictum). *Contra*, *Eggemeyer v. Eggemeyer*, 535 S.W.2d 425 (Tex. Civ. App.—Austin 1976, writ granted); *Ramirez v. Ramirez*, 524 S.W.2d 767 (Tex. Civ. App.—Corpus Christi 1975, no writ). See also McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 82 (1976). By confining its comments to separate personalty in *Spiller v. Spiller*, 535 S.W.2d 683 (Tex. Civ. App.—Tyler 1976, no writ), there was some indication that the Tyler court had changed its position. Cf. *Merrell v. Merrell*, 527 S.W.2d 250 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (dictum as to separate realty).

124. 4 HOUSE COMM. ON JUDICIARY, 65TH LEGISLATURE OF TEXAS, INTERIM REPORT 3 (1976). This is a stronger stand than that taken in the 64th and 63d sessions merely to restore the language of art. 4638 repealed in 1971. See McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 75 n.64 (1974).

125. For holdings allowing division see *Schappell v. Schappell*, 544 S.W.2d 807 (Tex. Civ. App.—El Paso 1976, no writ); *In re McCurdy*, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973, writ dism'd); *Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App.—Dallas 1971, writ dism'd). *Contra* *Cearley v. Cearley*, 536 S.W.2d 96 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 544 S.W.2d 661 (Tex. 1976); *Bright v. Bright*, 531 S.W.2d 440 (Tex. Civ. App.—San Antonio 1975, no writ); *Lumpkins v. Lumpkins*, 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 dism'd).

126. 544 S.W.2d 661 (Tex. 1976).

127. The present value of contingent liabilities was considered in *Means v. Means*, 535 S.W.2d 911 (Tex. Civ. App.—Amarillo 1976, no writ). Potential liability may in some circumstances, however, be too speculative for consideration in making a property division. See *Fonstein v. Fonstein*, 17 Cal. 3d 783, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976), *discussed in* 3 COMM. PROP. J. 251 (1976).

128. The use of the "if and when" order also discourages giving effect to the kind of rigid reasoning that produces hardship results as in *In re Marriage of Smith*, 56 Cal. App. 3d 247, 128 Cal. Rptr. 410 (1976), where the California court said that the ex-wife was entitled to immediate monthly payments although the husband, who had not yet retired, was not receiving benefits. In the use of the "if and when" order, it must be realized that some reasonable self-interested choices of the pensioner may be made within the limits of the retirement plan. See editorial comments on *In re Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), in 3 COMM. PROP. J. 125-26 (1976).

types of "unvested interests." The established rule in division of property prevents a divorce court from considering an anticipated increase in amount of pension benefits due to an employee's continued employment after divorce.¹²⁹ Consistent with this rule, the El Paso court of civil appeals recently held that division must be based on the pensioner's pay-status at the time of the divorce and not at some future date.¹³⁰ But can the principle of *Cearley* be confined to unaccrued pension and retirement rights? Prevailing Texas authority treats a husband's future right to receive renewal commissions on life insurance policies sold by him as an insurance agent as "unvested" prior to divorce and, hence, not subject to division on divorce.¹³¹ A California court reached the same conclusion,¹³² but there was a strong dissent resting on *In re Brown*,¹³³ on which the Supreme Court of Texas relied so heavily in *Cearley*. Whereas for practical purposes contingent interests in certain pension plans are virtually certain to accrue, the accrual of other types of potential interests is far less certain. These interests, although analogous to prospective pension benefits in theory, may, therefore, be looked upon as mere expectancies for purposes of division on divorce. A right in real property founded on color of title that will ripen by adverse possession in the remote future is probably such an interest. A likelihood of inheritance is certainly one. Whatever the facts involving one of these situations, divorce courts must make allowance for the contingent nature of the interest, and, in the case of pension rights particularly, the divorce court must bear in mind that the principal object of providing them is future support of the pensioner.

Reimbursement for Benefits to One Marital Estate Made by Another. The accepted general rules for reimbursement for improvements and other benefits of one marital estate made by another were reiterated by the Beaumont court,¹³⁴ and the Texarkana court¹³⁵ reapplied the rule that living expenses defrayed as a separate expense are not reimbursable.¹³⁶ Although it has long

129. *In re Rister*, 512 S.W.2d 72 (Tex. Civ. App.—Amarillo 1974, no writ). See also *Dessommes v. Dessommes*, 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

130. *Schappell v. Schappell*, 544 S.W.2d 807 (Tex. Civ. App.—El Paso 1976, no writ). Cf. *In re Freiberg*, 57 Cal. App. 3d 304, 127 Cal. Rptr. 792 (1976), which evidences a tendency on the part of California courts to think in terms of alimony and property division simultaneously. Increase in earning power is, of course, relevant to fixing child support, but that is a very different process from the division of property. See *Goren v. Goren*, 531 S.W.2d 897, 900 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

131. *Cunningham v. Cunningham*, 183 S.W.2d 985 (Tex. Civ. App.—Dallas 1944, no writ).

132. *In re Skaden*, 132 Cal. Rptr. 524 (Ct. App. 1976).

133. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

134. *Looney v. Looney*, 541 S.W.2d 877 (Tex. Civ. App.—Beaumont 1976, no writ). In *Collins v. Collins*, 540 S.W.2d 497 (Tex. Civ. App.—Tyler 1976, no writ), the application of the rule with respect to improvements was apparently based on a finding that cost and enhancement were the same or the latter exceeded the former.

135. *In re Long*, 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1976, no writ).

136. In *Dickson v. Dickson*, 544 S.W.2d 200 (Tex. Civ. App.—Austin 1976, no writ), the court alludes to the fact that family support had depended largely on the separate wealth of the wife and its income as a ground for supporting an award to the wife of separate shares of the husband. Those shares had been acquired by him as mutations of a gift from his wife under circumstances which smacked of undue influence. Reliance on the support argument is ill-founded, however. The facts of *Dickson* respecting the gift are reminiscent of those in *Bohn v. Bohn*, 420 S.W.2d 165 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ dismissed), *on remand*, 455 S.W.2d 401 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ). See McKnight, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 39-40 (1971); McKnight, *Family Law, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 131 (1968). However, the disposition of separate property as a consequence of interspousal gift in *Dickson* conjures up the spirit of *Fitts v. Fitts*, 14 Tex. 443 (1855).

been established that a claim for reimbursement is waived if its elements are not proved,¹³⁷ some appellate courts have continued to approve a trial court's consideration of unproved amounts expended by one marital estate for the benefit of another in balancing the equities of property division.¹³⁸

Attorney's Fees. In *Carle v. Carle*¹³⁹ the supreme court clearly enunciated the rule that an award for attorney's fees is merely an element in equitable division of property on divorce. There are numerous recent examples of the point's application.¹⁴⁰ The award must, however, be based on competent evidence as to amount,¹⁴¹ and no abuse of discretion on the part of the trial court is shown by its refusal to award attorney's fees to either party.¹⁴² It is also within the court's discretion to allow fees for appeal;¹⁴³ therefore, care should be taken in the drafting of pleadings to provide for this eventuality.¹⁴⁴ Once the wife's attorney's fees are awarded by the divorce court, the issue is res judicata as to any subsequent suit which the wife's attorney may bring against the husband.¹⁴⁵ Attorney's fees may also be awarded in a divorce proceeding that fails to go to judgment, as when one of the parties dies. In that instance, however, such an award is not an incident of property division.¹⁴⁶

Division of Nonpartitionable Property and the Alimony Problem. In 1971 the Beaumont court of civil appeals held that an appropriate means of dividing property not susceptible to partition was to award a money judgment in lieu of partition.¹⁴⁷ The practice had by then become so widespread and generally accepted that the opinion seemed scarcely worthy of note. Use of this device to achieve equalization of shares is still very common.¹⁴⁸ An extension of this device is that of ordering one spouse to pay the other a fixed sum over a period of time. In some quarters this practice is also regarded as unexceptionable.¹⁴⁹

137. *Williams v. Williams*, 537 S.W.2d 107, 110 (Tex. Civ. App.—Tyler 1976, no writ). Waiver by application of the doctrine of election is exemplified by *Stutts v. Stovall*, 531 S.W.2d 690 (Tex. Civ. App.—San Antonio 1976, no writ).

138. *Burns v. Burns*, 541 S.W.2d 280, 281 (Tex. Civ. App.—San Antonio 1976, no writ); *Means v. Means*, 535 S.W.2d 911 (Tex. Civ. App.—Amarillo 1976, no writ).

139. 149 Tex. 469, 234 S.W.2d 1002 (1951).

140. *See, e.g.*, *Williams v. Williams*, 537 S.W.2d 107, 111 (Tex. Civ. App.—Tyler 1976, no writ); *Cearley v. Cearley*, 536 S.W.2d 96 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 544 S.W.2d 661 (Tex. 1976).

141. *Meshwert v. Meshwert*, 543 S.W.2d 877 (Tex. Civ. App.—Beaumont 1976, writ granted on other grounds). In *Hopkins v. Hopkins*, 539 S.W.2d 242 (Tex. Civ. App.—Fort Worth 1976, writ *dism'd*), the court pointed out that the amount of attorney's fees could be proved on remand.

142. *Boriack v. Boriack*, 541 S.W.2d 237, 243 (Tex. Civ. App.—Corpus Christi 1976, no writ).

143. *Dickson v. McWilliams*, 543 S.W.2d 868 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). In *Dietz v. Dietz*, 540 S.W.2d 418 (Tex. Civ. App.—El Paso 1976, no writ), the appellate court affirmed the award of attorney's fees without prejudice to the wife's seeking further attorney's fees on remand.

144. *See Carson v. Carson*, 528 S.W.2d 308 (Tex. Civ. App.—Waco 1975, no writ), where the court held that a prayer for a sum certain for attorney's fees precluded a larger award.

145. *Dickson v. McWilliams*, 543 S.W.2d 868 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). In *Pearson v. Pearson*, 356 N.E.2d 993 (Ill. App. 1976), an Illinois court held that if a property settlement without provision for attorney's fees is incorporated in the decree, a court is precluded from subsequent consideration of the matter.

146. *See In re Parr*, 543 S.W.2d 433 (Tex. Civ. App.—Corpus Christi 1976, no writ).

147. *Weeks v. Weeks*, 471 S.W.2d 454 (Tex. Civ. App.—Beaumont 1971, writ *dism'd*). *See also Kirkham v. Kirkham*, 335 S.W.2d 393 (Tex. Civ. App.—San Antonio 1960, no writ).

148. *See, e.g.*, *In re Jackson*, 506 S.W.2d 261 (Tex. Civ. App.—Amarillo 1974, writ *dism'd*).

149. *See, e.g.*, *Garrett v. Garrett*, 534 S.W.2d 381 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

Other courts are of the opinion that ordering periodic payments of a fixed sum is an award of permanent alimony,¹⁵⁰ an award which is forbidden in Texas.¹⁵¹

Notwithstanding the condemnation of awards of permanent alimony, division of property on divorce in Texas has always been affected by the reasoning underlying alimony awards. Because *equitable* division of property on divorce has, since the Divorce Act of 1841,¹⁵² rested almost entirely on the concept of *fault* as the ground for divorce, Texas courts have always regarded the future needs of the innocent spouse as a significant consideration in making a division. As long as the grounds for divorce were at least nominally based on fault,¹⁵³ it was not often apparent that divorce courts thought in terms of alimony in making a division. When attorneys began to shift their reliance from fault to no-fault grounds of insupportability, however, the motivation of the courts became more obvious.¹⁵⁴ The influence of the alimony principle becomes even more obvious when a court makes an award for periodic payments that will cease on remarriage of the recipient.¹⁵⁵

The Fort Worth court of civil appeals found an award of alimony in an order to make periodic payments that were not specifically connected with existing property.¹⁵⁶ Thus, it appears that the trial court must identify the existing property from which the payments are to be made to avoid a later argument that the court made an award of permanent alimony to be paid out of future earnings.¹⁵⁷ Yet, despite the court's concern for avoiding an award of alimony, its further discussion betrays a marked degree of alimony-based thinking. First, the court felt that future earning power was relevant to a determination of the amount to be paid, and, second, the court remedied the trial court's error by reforming the decree so that the sum would be paid from a trust estate held beneficially for the payor or from the future *income* of the

150. *In re Long*, 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1976, no writ).

151. See McKnight, Book Review, 11 Sw. L.J. 272, 274 (1957).

152. Tex. Laws 1841, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898).

153. Until Jan. 1, 1972, the ground for divorce alleged in the vast preponderance of cases was cruelty, though professional experience showed that this was merely a euphemism for marital breakdown to bring the cause for divorce within statutory grounds. See McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH. L. REV. 281, 320-21 (1974).

154. TEX. FAM. CODE ANN. § 3.01 (Vernon 1975).

155. See, e.g., *Benedict v. Benedict*, 542 S.W.2d 692 (Tex. Civ. App.—Fort Worth 1976, writ *dism'd*). If the obligation to make further payments is to cease on the occurrence of an event seemingly unrelated to the cause for divorce or the extent of the property to be divided, it is hard to believe that the trial court was thinking in terms of anything other than an award of alimony. In *Goren v. Goren*, 531 S.W.2d 897 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ *dism'd*), the wife was awarded \$15,000 to be paid in five annual installments in an instance when community indebtedness exceeded the aggregate of tangible assets of the marriage. Unnecessarily troubled by the net condition of the community, the appellate court said that the divorce court was entitled to consider other factors in awarding what it thought might smack of alimony. The other factors, which the court identifies as the husband's earning power and the wife's future needs, themselves smack of alimony. But the net approach to property interest is clearly unsound. See *Meshwert v. Meshwert*, 543 S.W.2d 877, 879 (Tex. Civ. App.—Beaumont 1976, writ granted) (*dictum*); *In re Greer*, 483 S.W.2d 490, 493-94 (Tex. Civ. App.—Amarillo 1972, writ *dism'd*). See also *Uranga v. Uranga*, 527 S.W.2d 761 (Tex. Civ. App.—San Antonio 1975, writ *dism'd*).

156. *Benedict v. Benedict*, 542 S.W.2d 692 (Tex. Civ. App.—Fort Worth 1976, writ *dism'd*). In *In re Long*, 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1976, no writ), the court found alimony in an order merely to pay a fixed sum in monthly installments. See also *Ex parte Neff*, 542 S.W.2d 268 (Tex. Civ. App.—Fort Worth 1976, no writ).

157. The Texas Supreme Court's finding of an award of alimony in *Ex parte Yates*, 387 S.W.2d 377 (Tex. 1965), is clearly based on the assumption that the ordered payment would be made from future earnings.

trust.¹⁵⁸ Such reformation, however, does not seem to run afoul of the strictures of *McKnight v. McKnight*,¹⁵⁹ where the Supreme Court of Texas made it clear that an appellate court may not reform an order in such a way that it purports to exercise the discretionary powers of the trial court.

Enforcement. Contempt of a court's order as evidenced by an ex-spouse's failure to comply with the order may cause the other ex-spouse to seek coercion by means of a civil contempt citation.¹⁶⁰ In *Ex parte Sutherland*¹⁶¹ the Supreme Court of Texas held in 1975 that if an ex-spouse is ordered to pay money, as received, into the registry of the court for the benefit of the other spouse, the contempt powers of the ordering court are available to enforce compliance. In *Ex parte Anderson*¹⁶² the San Antonio court of civil appeals extended the principle to include orders made to pay the ex-spouse directly. In so doing the court distinguished the earlier supreme court decision in *Ex parte Yates*,¹⁶³ a seemingly related but quite different case involving a rather peculiar order. In *Yates* the husband held a promissory note which evidenced a substantial debt from a third person. The divorce court awarded the wife half of the amount owed, ordered the husband to deliver the note to the wife as security for his payment to her, and further ordered the husband to pay her \$500 a month to redeem the note. The Texas Supreme Court held that since the wife was in effect awarded a money judgment which the husband was to pay from his future earnings, the order could not be enforced by contempt. In *Anderson* the San Antonio court held that this conclusion was substantially different from that in *Sutherland* where the husband was deemed a trustee of the periodic future pension benefits and ordered to pay the wife's share into

158. 542 S.W.2d at 697, 700. Whether the husband or a third party was the settlor of the trust is not indicated in the opinion.

159. 543 S.W.2d 863 (Tex. 1976). The same may be said of *Collins v. Collins*, 540 S.W.2d 497 (Tex. Civ. App.—Tyler 1976, no writ), and *Hopkins v. Hopkins*, 539 S.W.2d 242 (Tex. Civ. App.—Fort Worth 1976, writ dismissed), although in each case reformation involved matters of law, not merely correction of clerical errors. In *Collins* the appellate court reformed the application of principles of reimbursement so that reimbursement in favor of the husband was taken from the wife's share of the community rather than the entire community. In *Hopkins* reformation amounted to striking part of the trial court's order that gave affirmative relief against a third party as the husband's agent. In *Dessommes v. Dessommes*, 543 S.W.2d 165 (Tex. Civ. App.—Texarkana 1976, writ refused n.r.e.), the matter had been remanded for a new trial with instructions and indications of how the property should be divided if those instructions could not be complied with. *Dessommes v. Dessommes*, 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ refused n.r.e.). On further appeal after a trial that did not comply with the instructions the order of the earlier trial was reformed along the lines indicated in the earlier appeal. In *McKnight v. McKnight* the Supreme Court of Texas was cautious to indicate that its opinion did not cover matters of remittitur as in *Dietz v. Dietz*, 540 S.W.2d 418 (Tex. Civ. App.—El Paso 1976, no writ).

For some recent authorities dealing with the tax consequences of various types of property arrangements in connection with divorce see *Esther Walker*, 35 T.C.M. (CCH) 239 (1976) (voluntary alimony payments, not a part of property settlement, defined as alimony for income tax purposes); *Elizabeth L. Deyoe*, 66 T.C. 904 (1976) (gain on sale between spouses pending divorce treated as ordinary income); *Rev. Rul. 76-83*, 1976-10 I.R.B. 14 (approximately equal division of community property resulting in no gain or loss and assets' retaining community property basis).

160. As a general rule a court cannot adjudge a person in contempt of an order of another court that made the order. *Ex parte Alvarado*, 543 S.W.2d 144 (Tex. Civ. App.—El Paso 1976, no writ). If one is adjudged in contempt of an order embodying invalid as well as valid elements, detention under such an adjudication is invalid. *Ex parte Harwell*, 538 S.W.2d 667 (Tex. Civ. App.—Waco 1976, no writ).

161. 526 S.W.2d 536 (Tex. 1975).

162. 541 S.W.2d 286 (Tex. Civ. App.—San Antonio 1976, no writ).

163. 387 S.W.2d 377 (Tex. 1965).

the registry of the court. In *Anderson* the court concluded that the order should be enforced by contempt if the husband was ordered to pay the wife directly in a like situation. This conclusion cannot be seriously disputed. The order in *Yates* was very peculiar and ambiguous. The supreme court's response to it should not be generalized to mean that an order to make period payments of money rendered in the course of dividing marital property is unenforceable by contempt. If it were, such a conclusion would conflict with *Sutherland* unless that later case is confined to its subject matter of pension and retirement benefits and like interests. In *Ex parte Preston*,¹⁶⁴ which antedates *Yates* by four years, the supreme court held that an order to make a lump sum payment of money from a specific source was enforceable by contempt. The courts must clarify this confusing situation with some definite general rules.

Relying on *Yates* and *Preston*,¹⁶⁵ the Fort Worth court of civil appeals held in *Ex parte Neff*¹⁶⁶ that an order to pay money from unspecified funds was not enforceable by contempt. Although *Neff* involved an agreed order, no particular point was made of that fact¹⁶⁷ nor of how the situation might have been affected if the decree had incorporated a property settlement agreement to the same effect.¹⁶⁸

The cases discussed do not deal with the problem of recurrent contempt which may arise in connection with an order to make successive payments. This sort of problem arises most frequently in relation to child-support orders, but the principle is equally applicable to a continuing duty to pay money in circumstances in which non-compliance would allow resort to a contempt citation. In *Garrison v. Garrison*¹⁶⁹ there is discussion of a court's power to cite for contempt in order to guard against future contemptuous acts.

Although an order to deliver or convey property may be coerced through the use of the contempt power, there is little authority with respect to the use of a writ of possession. If realty is awarded to a spouse on divorce, the writ of

164. 162 Tex. 379, 347 S.W.2d 938 (1961).

165. The court also relied on *Ex parte Jones*, 163 Tex. 513, 358 S.W.2d 370 (1962), and *Ex parte Duncan*, 462 S.W.2d 336 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

166. 542 S.W.2d 268 (Tex. Civ. App.—Fort Worth 1976, no writ).

167. An agreed order concerning property in dispute in a divorce proceeding was said to amount to a contract between the parties in *Spiller v. Sherrill*, 518 S.W.2d 268 (Tex. Civ. App.—San Antonio 1974, no writ). *Supersedeas* was filed. The trial court then purported to dissolve the agreed order. That action was stayed by writ of prohibition from the San Antonio court of civil appeals because of the quality of the agreement as a contract. On appeal (to a different appellate court) the court held that the agreed order was final. *Spiller v. Spiller*, 535 S.W.2d 683 (Tex. Civ. App.—Tyler 1976, no writ).

168. An agreement to make periodic monetary payments under a separation contract is enforceable as a term of that contract. Mere incorporation of the terms of the agreement in a decree of divorce is harmless and does not render it subject to an attack as an award of permanent alimony. *Griffin v. Griffin*, 535 S.W.2d 42 (Tex. Civ. App.—Austin 1976, no writ). See McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 77 (1975). As a contractual obligation the terms of the agreement may be enforced in domestic relations courts with jurisdiction to adjudicate issues concerning contracts arising from divorce decrees and contractual settlements included therein. *Black v. Wilemon*, 539 S.W.2d 203, 205 (Tex. Civ. App.—Dallas 1976, no writ). But a suit for contractual child support payments under a settlement agreement that specifically provides for contractual enforcement under TEX. FAM. CODE ANN. § 14.06(d) (Vernon 1975) is not "a suit affecting the parent-child relationship" and is, therefore, not subject to the continuing jurisdiction of the divorce court. *Adwan v. Adwan*, 538 S.W.2d 192, 195 (Tex. Civ. App.—Dallas 1976, no writ).

169. 544 S.W.2d 797 (Tex. Civ. App.—Austin 1976, no writ).

possession can be used to put the spouse in possession. Rule 310¹⁷⁰ merely provides for the writ's use in connection with real property in other instances, but rules 632 and 633¹⁷¹ clearly imply its use with respect to personal property as well as realty. The availability of enforcement by contempt of a properly drawn decree ordering delivery or conveyance or granting possession should obviate recourse to the writ of possession with the possible exception of a grant of possession to realty.

Division After Divorce. Recourse to the federal courts for the enforcement of division of property on divorce has met with little success. In *Morrison v. Morrison*¹⁷² a federal district court denied itself the power to enforce the state court decree, and in *Kerbow v. Kerbow*¹⁷³ another federal court disclaimed the power to enforce a decree in favor of wives against husbands' employers for pension benefits. A similar conclusion¹⁷⁴ was reached elsewhere in an effort to reach the pay account of a serviceman, a fractional part of which had been awarded to the wife. After careful consideration of the legislative history of the Social Services Amendment Act of 1974,¹⁷⁵ the court concluded that the federal court lacked the judicial power to enforce the decree.

In a federal case in Oklahoma¹⁷⁶ an unsuccessful attempt was made to garnish the pension funds of a retired serviceman to satisfy a decree of child-support. The court held that relief was precluded by Oklahoma law forbidding garnishment of wages.¹⁷⁷ In Texas efforts to avoid liability under a divorce decree by means of a voluntary petition in bankruptcy have been almost as unsuccessful¹⁷⁸ as attempts to enforce divorce decrees in the federal court. The Seventh Circuit Court of Appeals,¹⁷⁹ however, drew a distinction between an obligation arising out of a division of property (a dischargeable liability) and alimony to be paid out of future earnings (an undischageable debt).¹⁸⁰ The distinction rests on the same arguments as those relied on by the Fort Worth court of civil appeals in *Benedict* in distinguishing between a property division and a forbidden award of permanent alimony by a Texas court.

170. TEX. R. CIV. P. 310.

171. TEX. R. CIV. P. 632, 633.

172. 408 F. Supp. 315 (N.D. Tex. 1976).

173. 3 FAM. L. REP. (BNA) 2020 (N.D. Tex. Oct. 9, 1976).

174. *Wilhelm v. United States Dep't of the Air Force*, 418 F. Supp. 162 (S.D. Tex. 1976).

175. 42 U.S.C. § 659 (1970).

176. *Crane v. United States*, 417 F. Supp. 38 (E.D. Okla. 1976).

177. Other jurisdictions prohibiting garnishment of wages are Florida, Pennsylvania, and South Carolina.

178. See McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 88-89 (1976); McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 92 (1975); McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 77-78 (1974); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 42 (1973). In *In re Nunnally*, 506 F.2d 1024 (5th Cir. 1975), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 92 (1975), no point was made of the "secured" status of the wife's interest, and that factor opens up other interesting problems.

179. *Nichols v. Hensler*, 528 F.2d 304 (7th Cir. 1976).

180. Elsewhere, federal courts were not so careful in analyzing these matters. See, e.g., *In re Knuppenburg*, 422 F. Supp. 274 (E.D. Mich. 1976) (construing attorney's fees as "alimony" without any allusion to whether the attorney's fees were attributable to an award of alimony or property division); *In re Golden*, 411 F. Supp. 1076 (S.D.N.Y. 1976) (in effect construing as "alimony" for purposes of the Bankruptcy Act anything the divorce court calls "alimony" even though it may include contractual penalties agreed by the parties and approved by the court).

In several instances collateral attacks were mounted against foreign alimony decrees when suits were brought in Texas to enforce arrears. The most meritorious attack¹⁸¹ involved a question of constitutionality of the foreign statute under which the award was made. The Kentucky statute, since repealed, provided for alimony for women but not for men. Without alluding to *Lipshy v. Lipshy*,¹⁸² but relying on Georgia authority,¹⁸³ the court concluded that the statute was constitutional.¹⁸⁴

In another case¹⁸⁵ a Texas divorce was granted the husband without exertion of personal jurisdiction over the wife but after she had commenced a proceeding for judicial separation in Maryland. After the Texas judgment became final the wife amended her Maryland complaint to seek alimony. Personal jurisdiction over the husband was achieved and judgment was rendered against him for permanent alimony. In a later Maryland proceeding a money judgment was rendered against the husband for arrears. The wife brought suit in Texas on her Maryland money judgment.¹⁸⁶ In this *Vanderbilt*-type¹⁸⁷ case, the Texas court held that the Maryland judgment was subject to full faith and credit.¹⁸⁸

In the situation when a foreign divorce has been granted without division of property held by a spouse residing in Texas,¹⁸⁹ a Texas court faced with the problem of making a division would seem to be limited to partition rather than

181. *Hendricks v. Hendricks*, 535 S.W.2d 668 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

182. 525 S.W.2d 222 (Tex. Civ. App.—Dallas 1975, writ dismissed). There the court rejected the argument that the Texas Constitution (TEX. CONST. art. I, § 3a) precludes an award of attorney's fees to a wife as constituting sex discrimination. The court pointed out that either spouse may be entitled to attorney's fees under Texas law. The implication of the court's remark is that such limited relief to a spouse of one sex but not to the other would be inadmissibly discriminatory and unconstitutional. See also *Felsenthal v. McMillan*, 493 S.W.2d 729, 729-30 (Tex. 1973); Comment, *The ERA and Texas Marital Law*, 54 TEXAS L. REV. 590 (1976). In *Craig v. Boren*, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), the Supreme Court held that the Oklahoma statute prohibiting sales of beer to males under 21 and females under 18 was gender-based discrimination without reasonable factual support and therefore unconstitutional. In *Mathews v. de Castro*, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976), different treatment of divorced wives of Social Security beneficiaries and wives of Social Security beneficiaries is reasonable and, therefore, not discriminatory.

183. *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974).

184. The court, however, ignored Pennsylvania authorities construing a constitutional provision similar to that in the Texas Constitution. See *Wiegrand v. Wiegrand*, 226 Pa. Super. Ct. 278, 310 A.2d 426 (1973); *DeRosa v. DeRosa*, 60 Pa. D. & C.2d 71 (C.P. Delaware Co. 1972); *Kehl v. Kehl*, 57 Pa. D. & C.2d 164 (C.P. Allegheny Co. 1972).

185. *Layton v. Layton*, 538 S.W.2d 642 (Tex. Civ. App.—San Antonio 1976, no writ). Though the Texas divorce court overruled the wife's special appearance to contest jurisdiction, what that meant in terms of adversely affecting the wife's rights is not clear. It appears that the Maryland court assumed that the Texas court had not exerted personal jurisdiction over the wife. For another view of *Layton*, see 55 TEXAS L. REV. 127 (1976).

186. It is not necessary to reduce foreign arrears of alimony to a money judgment before bringing suit in Texas. *Wilder v. Wilder*, 543 S.W.2d 689 (Tex. Civ. App.—El Paso 1976, no writ).

187. See *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

188. Other full faith and credit situations involved a variety of points of pleading and practice: *Cutler v. Cutler*, 543 S.W.2d 201 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.) (timely motion under TEX. R. CIV. P. 184a to take judicial notice of foreign law to show that foreign alimony decree is final); *Hatfield v. Christoph*, 539 S.W.2d 396 (Tex. Civ. App.—Waco 1976, no writ) (presumed validity of nunc pro tunc correction of order by foreign court). See also *Vandervoort v. Vandervoort*, 529 F.2d 424 (5th Cir. 1976) (foreign judgment not subject to collateral attack in federal diversity suit on the grounds of fraud in the foreign proceeding).

189. In a dictum in *Bradley v. Bradley*, 540 S.W.2d 504, 512 (Tex. Civ. App.—Fort Worth 1976, no writ), the court states that a foreign divorce court lacks power to make a division of Texas realty. But such divisions have been approved by Texas appellate courts on numerous occasions.

an equitable division.¹⁹⁰ A proportional partition based on time and place acquired in the case of incremental acquisitions seems authorized by *Cearley*, but the language of *Cearley* implies that division cannot be had until the interest is vested in the traditional sense.¹⁹¹ If this is not so, however, and an undivided, unaccrued, and unmaturing interest is partitionable after divorce, the passage of time that will bar a claim would seem to begin to run at the date of divorce or as soon thereafter as sufficient claims are asserted by the possessor to start the running of time in his favor.¹⁹²

In *Constance v. Constance*¹⁹³ the Supreme Court of Texas indicated a more liberal approach to the construction of divorce decrees dealing with property division than previously adopted by the courts of civil appeals.¹⁹⁴ There, retirement benefits of the husband were referred to in recitals of the decree as being set aside to the husband but no specific disposition was made of them in the decretal part of the decree. The supreme court held that the benefits had been adequately adverted to in order to achieve their division.¹⁹⁵

In *Starkey v. Holoye*¹⁹⁶ a different kind of construction question was examined. The decree awarded the husband occupancy of the community home with "all future payments and equity created in such property . . . by payments made [by him to be his] . . . separate property."¹⁹⁷ In a later dispute with respect to the interests of the former spouses in the property, the court held that the house, with its incremental increase in value, was a tenancy in common between the ex-spouses with a right of the husband to be compensated for payments he had made toward discharge of the purchase money lien.

In *Smith v. Smith*¹⁹⁸ the Dallas court of civil appeals concluded that a will in favor of a spouse who was later divorced but subsequently remarried to the testator was valid with respect to the beneficiary-spouse's interest in spite of

190. In Note, *Foreign Divorce and Texas Community Property*, 28 BAYLOR L. REV 425 (1976), reprinted in 3 COMM. PROP. J. 236 (1976), the author suggests an equitable division, but his argument is unconvincing.

191. *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976).

192. The Austin court of civil appeals had said in *Cearley* by way of obiter dictum that no right arises which can be barred by passage of time or adverse claim until the benefit is matured. In *Dessommes v. Dessommes*, 543 S.W.2d 165 (Tex. Civ. App.—Texarkana 1976, no writ), the court had said that time did not run until the right had accrued. But the supreme court's *approach* (apart from its language at 544 S.W.2d at 666) suggests that rights are sufficiently held in the case of incremental acquisitions to allow an adverse right to be asserted earlier. In *Taggart v. Taggart*, 540 S.W.2d 823 (Tex. Civ. App.—Corpus Christi 1976, writ granted), laches or estoppel was seemingly argued and rejected by the court as inapplicable to the "unvested" interest.

193. 544 S.W.2d 659 (Tex. 1976), *rev'g* 537 S.W.2d 488 (Tex. Civ. App.—Austin 1976).

194. See *Dessommes v. Dessommes*, 461 S.W.2d 525 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.). In *Taggart v. Taggart*, 540 S.W.2d 823 (Tex. Civ. App.—Corpus Christi 1976, writ granted), the property settlement referred to the husband's retirement benefits, but the decree was silent with respect to them.

195. In the very different situation of *Adwan v. Adwan*, 538 S.W.2d 192 (Tex. Civ. App.—Dallas 1976, no writ), where community property overlooked in drafting the property settlement agreement as well as the decree was sold prior to divorce by the husband who later used the proceeds to pay debts assumed by him under the agreement, the husband was made to account to the wife for these funds as held in common after the divorce. With respect to a tax refund received after divorce and also unprovided for by the parties' agreement and the decree, the court held that there was nothing to divide because it had been applied to an outstanding tax deficiency. See also *Busse v. United States*, 542 F.2d 421 (7th Cir. 1976).

196. 536 S.W.2d 438 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

197. *Id.* at 440.

198. 519 S.W.2d 152 (Tex. Civ. App.—Dallas 1974, writ ref'd).

section 69 of the Probate Code¹⁹⁹ which provides that divorce terminates an ex-spouse's interest in a former spouse's will. In *McFarlen v. McFarlen*²⁰⁰ the Eastland court of civil appeals examined a further variation of this situation. The husband and wife were divorced in 1968. In 1972 the husband made a will in favor of his ex-wife whom he remarried later that year. But the spouses were again divorced in 1974. The ex-wife was held to lose her interest under the will as a result of the divorce.

IV. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

In the management of separate or community property, the fact that one spouse holds property in the name of a third person or in the joint names of that spouse and a third person does not, without more, imply a gift to that third person. In *Anderson v. Anderson*²⁰¹ a wife secreted community property in a savings account in her son's name, but subject to withdrawal by her, so that she might appear to qualify for old-age assistance benefits. The community character of the property was held not to have been affected.²⁰² Reference to rights of survivorship in the third person, however, implies an intention to create a contractual benefit in favor of the third person.²⁰³ When that third person participates in the handling of a joint account the transaction is completed in his favor.²⁰⁴ The gratuitous transfer of community property by one spouse to a third person works a constructive fraud upon the other spouse. This *marital constructive fraud*, however, is not void as a fraudulent transfer under section 24.02 of the Business and Commerce Code²⁰⁵ without a further showing of an intent to defraud.²⁰⁶ As a constructive fraud it is voidable at the instance of the other spouse, but only to the extent that the spouse's community interest in the property cannot be reimbursed out of other property of the donor-spouse.²⁰⁷

In *Pope Photo Records v. Malone*²⁰⁸ a creditor asserted that when a husband-debtor named his wife as the beneficiary of a life insurance policy the proceeds were subject to the husband's debts because he died insolvent. Relying on a similar conclusion in *Parker Square State Bank v. Huttash*,²⁰⁹ the court in *Pope Photo* found that the gift was complete before insolvency at the time the policy was taken out and that, therefore, the transaction was not a fraudulent transfer within section 24.03 of the Business and Commerce Code.²¹⁰ If the husband had retained the right to change the beneficiary, the

199. TEX. PROB. CODE ANN. § 69 (Vernon 1956).

200. 536 S.W.2d 590 (Tex. Civ. App.—Eastland 1976, no writ).

201. 535 S.W.2d 943 (Tex. Civ. App.—Waco 1976, no writ). See also *Bell v. Smith*, 532 S.W.2d 680 (Tex. Civ. App.—Fort Worth 1976, no writ) (husband's taking title to realty in name of son).

202. Dealing with separate property in the same manner would not constitute a gift. *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

203. *Id.*

204. *Anderson v. Anderson*, 535 S.W.2d 943 (Tex. Civ. App.—Waco 1976, no writ).

205. TEX. BUS. & COMM. CODE ANN. § 24.02 (Vernon 1968).

206. *Carnes v. Meador*, 533 S.W.2d 365, 372 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

207. *Id.*

208. 539 S.W.2d 224 (Tex. Civ. App.—Amarillo 1976, no writ).

209. 484 S.W.2d 429 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.), discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 43 (1973).

210. TEX. BUS. & COMM. CODE ANN. § 24.03 (Vernon 1968).

court overlooked the clear language of *Volunteer State Life Insurance Co. v. Hardin*²¹¹ that a reservation by the insured of the right to change the policy beneficiary deprives a named beneficiary of any vested interest in the insurance proceeds prior to the death of the insured. Only a transfer by the husband of ownership of the policy and all its incidents to his wife before his death would constitute a valid inter vivos gift. On the other hand, article 3836(a)(6)²¹² makes the cash surrender value of a life insurance policy exempt from claims of the general creditors of the insured. Even though section 21.22²¹³ of the Insurance Code exempts only periodically paid insurance benefits from the process of debt collection and does not exempt proceeds paid in a lump sum²¹⁴ when creditors of a *beneficiary* seek to reach them, creditors of the transferor should be precluded from asserting that proceeds represent the fruits of a fraudulent transfer when the subject matter of the inter vivos transfer, *i.e.*, the cash surrender value, was exempt when the transfer was made. Exempt property may be the subject matter of a gift by a debtor—even an insolvent one—because his creditors might not have had resort to such property anyway.²¹⁵

Unable to reach all the proceeds of an insurance policy, the creditor in *Pope Photo* nevertheless argued that he should be able to reach that part of the proceeds proportionate to premiums paid during insolvency. Although allowed in some jurisdictions,²¹⁶ this approach was rejected in *San Jacinto Building, Inc. v. Brown*²¹⁷ absent an allegation that the beneficiary spouse was a party to the fraud. The creditor in *Pope Photo* failed to argue, as allowed in some jurisdictions, that the premiums themselves paid during insolvency were fraudulently transferred.²¹⁸

The creditors of the husband also argued and speculated that the purchase of the policy in favor of the wife somehow supplied an association between the spouses to which the principles of vicarious liability could be applied as in *Cockerham v. Cockerham*.²¹⁹ But even with that exaggerated example before it, the court was unable to construe these facts as a situation of joint liability for the husband's indebtedness. The Judiciary Committee of the Texas House of Representatives has responded to *Cockerham* in this survey period by recommending²²⁰ a clarification of section 5.22²²¹ of the Family Code, so that

211. 145 Tex. 245, 249-50, 197 S.W.2d 105, 107 (1946), *discussed in* First Nat'l Bank v. United States, 418 F. Supp. 955, 960 (N.D. Tex. 1976). *See also* Howard v. Howard, 158 S.W.2d 591 (Tex. Civ. App.—Texarkana 1942, writ ref'd).

212. TEX. REV. CIV. STAT. ANN. art. 3836(a), (b) (Vernon Supp. 1976-77).

213. TEX. INS. CODE ANN. art. 21.22 (Vernon 1963).

214. *Preston v. Martin*, 69 S.W.2d 472 (Tex. Civ. App.—Beaumont 1943, no writ); *Union Sav. Bldg. & Loan Ass'n v. Smith*, 62 S.W.2d 175 (Tex. Civ. App.—Texarkana 1933, writ ref'd).

215. *See* *Morris v. Morris*, 482 S.W.2d 400 (Tex. Civ. App.—Waco 1972, no writ).

216. *See* Annot., 106 A.L.R. 596, (1937), *supplementing* 6 A.L.R. 1173 (1920); 23 COLUM. L. REV. 771 (1923); 26 HARV. L. REV. 362 (1912).

217. 79 S.W.2d 164 (Tex. Civ. App.—Beaumont 1935, no writ).

218. *See* 23 COLUM. L. REV. 771 (1923). The cumulative amount of premiums paid while insolvent was presumably of too small an amount to make recourse to this argument worthwhile.

219. 527 S.W.2d 162 (Tex. 1975), *analyzed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 90-91 (1976).

220. 4 HOUSE COMM. ON JUDICIARY, 65TH LEGISLATURE OF TEXAS, INTERIM REPORT 3 (1976). The committee's report quoted at length from the analysis of *Cockerham* in McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 90-91 (1976).

221. TEX. FAM. CODE ANN. § 5.22 (Vernon 1975). No specific language for revision of § 5.22 was proposed, however. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 78 (1974).

sole management of community property would not give way to an interpretation of joint management by too much judicial reliance on subsection (c) rather than subsection (a).

In the course of a divorce proceeding the wife filed a voluntary petition in bankruptcy.²²² The bankruptcy receiver took possession of property which the husband claimed in another suit as community property subject to his sole management. Since the wife died in the meantime, the administrator of her estate also sought the property, and a judgment creditor of the wife intervened to foreclose a lien on property in the receiver's possession. It was concluded that all these matters were exclusively within the jurisdiction of the probate court.²²³

In *O'Neill v. Mack Trucks, Inc.*²²⁴ a husband executed a note to a lender and as security conveyed four acres of land by deed of trust. When the lender sought to foreclose the deed of trust lien the grantor of the property asserted his ownership of it as a business homestead. The four acres were within the town in which the debtor lived. The creditor argued that because the debtor had designated his residence as a homestead for purposes of receiving a tax exemption, but had not so designated his business property, the debtor's past acts indicated that he did not regard this property as a business homestead. The court rejected this argument as irrelevant because designation for a tax exemption applies only to residential homesteads.²²⁵ The court went on to point out that if the creditor seeks to reach a part of the debtor's interest in homestead property because its value exceeded the allowable exemption at the time of designation, the creditor must put the value of the property in issue.²²⁶

A 1976 bankruptcy case²²⁷ applied the rule in *Hoffman v. Love*²²⁸ that when a homestead is established on land worth more than the maximum exemption allowable and the value of that land continues to increase, then the exempt portion of the homestead remains the same fraction of the total value as the exemption was at the time of designation, increased proportionately with the total increase in value. The bankrupts purchased their home in 1969 when the value of the lot, exclusive of \$120,000 in improvements, was valued at \$20,000, and the homestead exemption was \$5,000. The value of the lot had grown to \$25,000 by 1976. Hence, the homestead exemption was in the ratio

222. *Parr v. White*, 543 S.W.2d 440 (Tex. Civ. App.—Corpus Christi 1976, no writ).

223. *Id.* at 444.

224. 542 S.W.2d 112 (Tex. 1976).

225. The Texas attorney general expressed the opinions that TEX. REV. CIV. STAT. ANN. art. 7150h (Vernon Supp. 1976-77) constitutes a constitutional grant of property tax exemption to disabled veterans and their survivors, TEX. ATT'Y GEN. OP. NO. H-857 (1976), and applies to the survivors of veterans who died before the passage of the act as well as those who died thereafter. *Id.* H-894. See McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 86 (1974), for comments on earlier legislation in this field.

226. The court also notes Dean McSwain's suggestion that in disputes such as these the value limitation be applied first to the residential homestead. McSwain, *The Texas Business Homestead*, 15 BAYLOR L. REV. 39, 53 (1963). It is submitted, however, that unless the creditor seeks to reach the residential homestead as well as the business homestead, the debtor may assert the whole of exempt value as that of the business homestead just as a debtor may assert the full exempt value of personalty in favor of any particular piece of personalty a creditor may attempt to seize. TEX. REV. CIV. STAT. ANN. art. 3836(a) (Vernon Supp. 1976-77).

227. *In re Bobbitt*, No. BK-3-74-373-F (N.D. Tex. Mar. 29, 1976).

228. 494 S.W.2d 591 (Tex. Civ. App.—Dallas, writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973)).

of five to twenty,²²⁹ leaving \$18,750 of the present value non-exempt, and a purchase money lien on the property in excess of that amount. The court held the non-exempt portion was covered by the mortgage lien and, hence, no part of the property was available to satisfy the obligations owing the unsecured creditors.²³⁰

A subcontractor who seeks to establish a homeowner's liability for his expenditures of labor and materials must be cautious to comply with the statutory requirements for fixing liability in those regards. In *Donahue v. Rattikin Title Co.*²³¹ the husband and wife contracted with a builder to construct a home for them. The full contract price was placed in escrow and the couple failed to retain ten percent, as required by article 5469,²³² to protect the builder's subcontractors who might have acquired lien status even against homestead property by compliance with the provisions for notice and filing under article 5453.²³³ The couple had agreed with the escrow agent that the agent should pay lien creditors for amounts owed. Although these subcontractors had not acquired liens, the escrow agent paid them from the couple's funds. In an action against the agent for misapplication of funds, the husband and wife were successful because the agent could not establish that the indebtedness at issue was an obligation enforceable against the couple.²³⁴

229. It was concluded in *Valley Bank v. Skeen*, 401 F. Supp. 139 (N.D. Tex. 1975), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 94-95 (1976), that this ratio is unaffected by the subsequent increase of the homestead exemption from \$5,000 to \$10,000 in late 1970.

230. *Kerens Nat'l Bank v. Stockton*, 127 Tex. 326, 94 S.W.2d 161 (1936).

231. 534 S.W.2d 156 (Tex. Civ. App.—Fort Worth 1976, no writ).

232. TEX. REV. CIV. STAT. ANN. art. 5469 (Vernon Supp. 1976-77).

233. *Id.* art. 5453.

234. *Donahue v. Rattikin Title Co.*, 534 S.W.2d 156 (Tex. Civ. App.—Fort Worth 1976, no writ).

