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Division of Separate Real Property in Divorce Action: Eggemeyer v. Eggemeyer

Virginia Eggemeyer filed for divorce from Homer Eggemeyer, seeking custody of the children, a decree of child support payments, and a division of the property. The district court granted the divorce, named plaintiff managing conservator of the children, and, pursuant to the Texas Family Code,¹ decreed a property division which in part divested the defendant of his title to separate real property.² The court of civil appeals reversed the district court's judgment insofar as it divested defendant of his title to separate real property, holding that section 3.63 of the Family Code did not authorize the trial court to divest a party of separate real property in a divorce action.³ On defendant's appeal the case came before the Texas Supreme Court. *Held, affirmed*: A court cannot divest a person of title to his separate real property in a divorce action under section 3.63 of the Texas Family Code. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977).

I. THE LEGAL FRAMEWORK

The predecessor statute to the current Family Code section 3.63 on division of marital property was article 4638 of the Texas Civil Statutes.⁴ This statute provided for the division of the estate of the parties in a divorce action in a manner which the court considered just and right, and provided additionally that the statute not be construed to compel the divestiture of title to real estate on the part of either party.⁵ The majority of cases decided under this statute held that separate personal property of one spouse could be set aside to the other spouse where the court deemed it necessary for a just division of the marital property.⁶ The courts did acknowledge, however, that the purpose of the statute was to restore separate property to its respective owners and divide the community property as the court deemed just and right.⁷ As noted by the court of civil appeals in *Fuhrman v.*

1. TEX. FAM. CODE ANN. § 3.63 (Vernon 1975). The section pertaining to division of property in a divorce action reads: "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."

2. Defendant owned an undivided one-third interest in the family farm held as separate property, the remaining two-thirds interest being community property. The trial court divested defendant of his title to the separate property interest.

3. *Eggemeyer v. Eggemeyer*, 535 S.W.2d 425 (Tex. Civ. App.—Austin 1976).

4. Tex. Laws 1841, An Act Concerning Divorce and Alimony, §§ 1-14, at 19-22, 2 H. GAMMEL, LAWS OF TEXAS 483-86 (1898).

5. *Id.* Article 4638 read: "The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. *Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.*" TEX. REV. CIV. STAT. ANN. art. 4638 (Vernon 1960) (emphasis added).

6. *Keene v. Keene*, 445 S.W.2d 624 (Tex. Civ. App.—Dallas 1969, writ *dism'd*); *Goldberg v. Goldberg*, 392 S.W.2d 168 (Tex. Civ. App.—Fort Worth 1965, no writ); *Grant v. Grant*, 351 S.W.2d 897 (Tex. Civ. App.—Waco 1961, writ *dism'd*); *Piro v. Piro*, 349 S.W.2d 626 (Tex. Civ. App.—Houston 1961, no writ); *Fuhrman v. Fuhrman*, 302 S.W.2d 205 (Tex. Civ. App.—El Paso 1957, writ *dism'd*).

7. *See, e.g., Fuhrman v. Fuhrman*, 302 S.W.2d 205 (Tex. Civ. App.—El Paso 1957, writ *dism'd*). The court stated:

Fuhrman,⁸ divestiture of separate personal property was ordered when one spouse was without means of support or had children to support. In the absence of such an inequity, courts rarely ordered the divestiture of separate personal property.⁹ Although separate personal property was often divested pursuant to the court's discretion, most courts refused to divest separate real property under article 4638.¹⁰ Nevertheless, some courts which did not allow divestiture of separate real property did set aside such property for the support of the other spouse or the children.¹¹ Indeed, not all courts interpreted article 4638 as prohibiting the divestiture of separate realty.¹²

The provision on nondivestiture of real property had caused confusion over whether the restriction applied only to separate real property or also to community real property. This question was resolved in 1960, however, when the Texas Supreme Court held in *Hailey v. Hailey*¹³ that the nondivestiture provision of article 4638 applied only to separate property, and not to community property.¹⁴ The repeal of article 4638 and the enactment of section 3.63 of the Family Code in 1970, which removed the divestiture provision, revived the dispute as to whether a court may divest title to separate real property.

Since the enactment of the marital property provisions of the Family Code the courts have recited their broad discretion in dividing the estate of parties to a divorce, and have asserted this power to set aside separate personal property of either spouse in a property division decree.¹⁵ Although claiming the right and the power, some courts have refused to divest separate personal property based upon the facts of the particular case.¹⁶ Nevertheless, a few

In construing this statute [article 4638] it has been held that the most obvious construction of the statute is that the separate property should be restored to its owners, respectively, and that such division of the community be made as may seem just and right Of course, it has been many times held that when circumstances require it, the trial court may set aside separate property of one party to the divorce, to the other, especially where one party is without means of support or has children to support

Id. at 213.

8. 302 S.W.2d 205 (Tex. Civ. App.—El Paso 1957, writ *dism'd*).

9. *Caldwell v. Caldwell*, 423 S.W.2d 140 (Tex. Civ. App.—Waco 1967, no writ); *Beeler v. Beeler*, 363 S.W.2d 305 (Tex. Civ. App.—Beaumont 1962, writ *dism'd*).

10. *See, e.g., Bohn v. Bohn*, 420 S.W.2d 165 (Tex. Civ. App.—Houston [1st Dist.] 1967), *rev'd on other grounds*, 455 S.W.2d 401 (Tex. Civ. App.—Houston [1st Dist.] 1970); *Pevehouse v. Pevehouse*, 304 S.W.2d 770 (Tex. Civ. App.—Amarillo 1957, writ *dism'd*).

11. *Scott v. Scott*, 133 Tex. 1, 123 S.W.2d 306 (1939) (trust decreed upon the separate estate of husband for benefit of wife); *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W. 21 (1923) (homestead interest in land, which was the separate property of husband, awarded to wife and children for their support during wife's life). Provision for the support of children was codified by Tex. FAM. CODE ANN. § 14.05 (Vernon 1975).

12. *Farrell v. Farrell*, 407 S.W.2d 847 (Tex. Civ. App.—Austin 1966, writ *ref'd n.r.e.*). The court of civil appeals affirmed the trial court's award to the husband of title to the wife's separate real property, asserting that the district court had jurisdiction and a duty to adjudicate title to property in such a manner. *Id.* at 849.

13. 160 Tex. 372, 331 S.W.2d 299 (1960).

14. *Id.* at 376, 331 S.W.2d at 303. *See also Reardon v. Reardon*, 163 Tex. 605, 359 S.W.2d 329 (1962); *Hearn v. Hearn*, 449 S.W.2d 141 (Tex. Civ. App.—Tyler 1969, no writ); *Harrison v. Harrison*, 365 S.W.2d 698 (Tex. Civ. App.—San Antonio 1963, writ *dism'd*).

15. *See, e.g., In re Butler*, 543 S.W.2d 147 (Tex. Civ. App.—Texarkana 1976, writ *dism'd*); *Burns v. Burns*, 541 S.W.2d 280 (Tex. Civ. App.—San Antonio 1976, writ *dism'd*); *Dietz v. Dietz*, 540 S.W.2d 418 (Tex. Civ. App.—El Paso 1976, no writ).

16. *See, e.g., Dietz v. Dietz*, 540 S.W.2d 418 (Tex. Civ. App.—El Paso 1976, no writ). The court in *Dietz* refused to award benefits from the separate estate of the husband to the wife, even though the property division was vastly disparate in value. The court supported its refusal

recent decisions under section 3.63 have purported to grant divestiture of separate real property;¹⁷ two additional cases, although not speaking directly to the issue of separate real property, have indicated the wide extent of the court's power to invade the separate property of one spouse for the benefit of the other spouse when justice dictates.¹⁸ This inconsistency of decision and interpretation among the several Texas courts of civil appeals prompted the Texas Supreme Court to hear the case of *Eggemeyer v. Eggemeyer*.

II. EGGEMEYER V. EGGEMEYER

The issue before the Supreme Court in *Eggemeyer* was whether section 3.63 of the Texas Family Code permits the court to divest one spouse of his or her title to separate real property in a divorce property division decree. In a five-to-four decision, the court held that section 3.63 of the Code did not authorize such divestiture and supported its decision with five basic arguments. In affirming the decision of the court of civil appeals, however, the Supreme Court misquoted the holding of that court as stating, "section 3.63 of the Family Code does not authorize such a divestiture of one's title to separate property."¹⁹ The appeals court had limited its holding to nondivestiture of separate *real* property, and this misquotation has added to the confusion in interpreting the decision.

The court first explored the intention of the legislature in enacting section 3.63, and concluded that the legislature intended to codify then-existing law.²⁰ Because the law at that time specifically included a provision prohibiting divestiture of title to realty on the part of either spouse,²¹ the court argued that this provision of article 4638 was intended by the legislature to be utilized in the interpretation of section 3.63 of the Code.

Secondly, the court looked to section 14.05 of the Code,²² which authorizes the court to "set aside" property of a parent to be administered for the support of a child under eighteen years of age.²³ The court emphasized

on the grounds that the marriage was of short duration, each party was capable of providing his or her own support, and there were no minor children. *Id.* at 420.

17. See, e.g., *Baxla v. Baxla*, 522 S.W.2d 736 (Tex. Civ. App.—Dallas 1975, no writ) (court awarded real property claimed by husband as his separate property to wife in property division decree, holding that it need not decide the separate property issue since the court was given wide latitude in dividing separate as well as community property); *Wilkerson v. Wilkerson*, 515 S.W.2d 52 (Tex. Civ. App.—Tyler 1974, no writ) (court divested wife of her equitable title to real estate purchased partly with her separate funds).

18. *Looney v. Looney*, 541 S.W.2d 877 (Tex. Civ. App.—Beaumont 1976, no writ) (court cited its power to invade separate property of one spouse for benefit of other spouse where necessary to do justice, but did not divest title to separate real property in view of items awarded wife and fact that husband was ordered to pay all debts); *Merrell v. Merrell*, 527 S.W.2d 255 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (court claimed right to divide separate property as it deemed right and just, but did not confront issue in fact, since it claimed evidence did not conclusively establish that duplexes in question were separate property of husband).

19. 554 S.W.2d at 138.

20. The court cited as support for this conclusion McKnight, *Commentary on Title I Texas Family Code*, 5 TEX. TECH L. REV. 281, 337-42 (1974).

21. See note 5 *supra* and accompanying text.

22. TEX. FAM. CODE ANN. § 14.05 (Vernon 1975).

23. *Id.* On support of children the Code states:

The court may order either or both parents to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age in the manner and to the person specified by the court in the decree. *In*

that the property was "to be administered," rather than divested, and was to be "for the support of the child," rather than the support of a spouse.²⁴ Since section 3.63 does not expressly authorize the divestiture of separate realty, and since section 14.05 does not provide for divestiture but only for administration of a spouse's property for child support, the court concluded that the legislature in enacting section 14.05 was codifying existing law.

In the third argument the language of section 3.63 was examined. That section provides that a divorce decree shall contain "a division of the estate of the parties in a manner that the court deems just and right."²⁵ The court construed the singular tense of "estate" of the parties as applying only to community property.²⁶ Thus, the separate real property could not be reached by a divorce property division decree.

The court's fourth argument involved the constitutional definition of separate property. In Texas separate property is constitutionally defined for a wife and legislatively defined for a husband. The Texas Constitution defines separate property of the wife as all property owned before marriage and acquired afterward by gift, devise, or descent.²⁷ The Code gives a like definition applicable to the separate property of husband and wife.²⁸ The court reasoned that if one spouse's separate property could be taken under a divorce decree and vested as separate property in the other spouse, a type of separate property would result which is not embraced within the constitutional definition. This is at variance with the court's previous finding that the legislature cannot transform one type of constitutionally defined property into another type of property.²⁹ A construction of section 3.63 which authorizes divestiture of separate property would, therefore, be inconsistent with the constitutional definition of separate property under article XVI.

The fifth and most important reason for the court's decision was the constitutional requirement that a taking of private property be for a public purpose. The Texas Constitution prohibits the taking of private property except by due course of the law of the land.³⁰ Interpretation of this constitutional provision by the Texas Supreme Court reveals that private property cannot be taken for the benefit of another private person without a justifying public purpose even though compensation is paid.³¹ The taking of a husband's separate property for the benefit of his wife cannot be said to have been for a justifiable public purpose.

addition, the court may order a parent obligated to support a child to set aside property to be administered for the support of the child in the manner and by the persons specified by the court in the decree.

Id. (emphasis added).

24. 554 S.W.2d at 139.

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

26. 554 S.W.2d at 139.

27. TEX. CONST. art. XVI, § 15.

28. TEX. FAM. CODE ANN. § 5.01 (Vernon 1975).

29. *Williams v. McKnight*, 402 S.W.2d 505 (Tex. 1966). The court held that § 46 of the Texas Probate Code as amended in 1961 was unconstitutional. That section provided that a husband and wife could by written agreement create a joint estate out of their community property, with rights of survivorship. Section 46 was held unconstitutional since statutory partition with resulting separate property was the necessary prerequisite to a written agreement between husband and wife to create a joint estate with rights of survivorship. *Id.* at 508.

30. TEX. CONST. art. I, § 19.

31. *Marrs v. Railroad Comm'n*, 142 Tex. 293, 305, 177 S.W.2d 941, 949 (1944).

Although not addressed in the court's opinion, there is a further constitutional issue under the due process clause of the fourteenth amendment to the United States Constitution.³² A statute which authorizes the taking of a person's property for the benefit of another private person without a justifying public purpose may be invalid under the United States Constitution.³³

The revised dissent by Justice Steakley raised two basic objections to the majority's interpretation of section 3.63. First, the dissent did not agree with the majority's statutory construction of section 3.63. Following established principles of statutory construction, the dissent asserted that the purposeful elimination of the prohibition against divestiture of title to realty from section 3.63 was designed to allow such divestiture, and that the plain meaning of the statute mandated such a result.³⁴

Further, the dissent disagreed with the majority's interpretation of "estate of the parties," claiming their conclusion to be clearly against existing case law which by implication was ratified by the legislature in its reenactment of the statute without change in this language. The dissent pointed out that article 4638 prohibited only divestiture of title to realty, not personalty, and that there is no difference in the constitutional classification of separate real and separate personal property. Since there is no longer a statutory prohibition against divestiture of title to realty, realty should receive the same treatment as personalty. Therefore, the dissent concluded, an award of separate real property to the other spouse is permissible.³⁵

Secondly, the dissent did not agree that divesting separate property of one spouse and vesting such property in the other spouse would be unconstitutional.³⁶ The dissent saw article XVI, section 15 as applying only to the initial characterization of property, not to property characterization *after* the divorce of the parties. Additionally, the dissent asserted that the constitutional definition of separate property is not exclusive, citing post-marriage increases in the value of separately held land³⁷ and personalty,³⁸ and personal injury awards³⁹ as examples.⁴⁰ Personal injury awards are specifically included as separate property under section 5.01 of the Code⁴¹ and the constitutionality of this statute was upheld in *Graham v. Franco*.⁴² The dissent further argued that due process is not violated by divestiture of title to separate realty. A public purpose is served by such a taking: to redress the imbalance should one spouse artfully accumulate a separate estate at the expense of the community estate, thus leaving the other spouse a depleted community estate upon divorce.⁴³

32. U.S. CONST. amend. XIV, § 1.

33. See *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896).

34. 554 S.W.2d at 143.

35. *Id.* at 149.

36. *Id.* at 145-49; see notes 27-29 *supra* and accompanying text.

37. *Evans v. Purinton*, 34 S.W. 350 (Tex. Civ. App. 1896, writ ref'd).

38. *Stringfellow v. Sorrells*, 82 Tex. 277, 18 S.W. 689 (1891); *Love v. Robertson*, 7 Tex. 6 (1851); *Lessing v. Russek*, 234 S.W.2d 891 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.).

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

40. 554 S.W.2d at 148-49.

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

42. 488 S.W.2d 390 (Tex. 1972). The result of this decision was to give a liberal interpretation to TEX. CONST. art XVI, § 15.

43. 554 S.W.2d at 148.

The constitutional arguments presented by the majority opinion as to the taking of private property, plus the possible fourteenth⁴⁴ amendment, present a rational framework for the basis of this decision. Divestiture of one's separate property does raise constitutional issues which until this time had been largely ignored.

Although the court addressed with specificity only the question of divestiture of separate real property, the decision could by analogy extend to the divestiture of separate personal property. Neither the Texas Constitution nor the United States Constitution distinguishes between personal and real property; each speaks only to the general term "property." *Womack v. Womack*⁴⁵ defined "property" as a word of comprehensive meaning, extending to every species of valuable right and interest and including both real and personal property. The constitutional analysis used by the court could, therefore, equally be applied to the issue of separate *personal* property. This same reasoning might be further extended to prohibit an unequal distribution of community property, since community property is by definition an equal and vested joint ownership by husband and wife.⁴⁶ An unequal division might be construed as a taking of private property without a corresponding public purpose.

III. CONCLUSION

Section 3.63 of the Texas Family Code has caused much difference of opinion among the several state courts of civil appeals on the question of whether this statute authorizes the divestiture of separate real property in a divorce decree. The Texas Supreme Court has finally settled this issue by declaring that section 3.63 does *not* authorize such divestiture of separate realty. Although the future of the division of separate personal property is not clear at this time, it can be strongly argued that, in light of *Eggemeyer's* reasoning section 3.63 prohibits the divestiture of separate personal property or a spouse's fifty percent interest in the community property. In spite of the hope that the *Eggemeyer* decision would definitively set forth the types of marital property which are susceptible of division under section 3.63 upon a decree of divorce, this decision has raised additional issues. By not limiting its own arguments, the majority has presented new areas of contention for future litigation.

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44. See notes 32-33 *supra* and accompanying text.

45. 141 Tex. 299, 172 S.W.2d 307 (1943).

46. *Rompel v. United States*, 59 F. Supp. 483, 486-87 (W.D. Tex.), *rev'd on other grounds*, 326 U.S. 367 (1945). This case held that the wife is an equal owner, along with her husband, in all community property, that their interests thereof are of equal dignity, and that each interest in community property is absolute and a vested property right to which each spouse is entitled upon divorce. *Id.* at 486-87. See *Magnolia Petroleum Co. v. Still*, 163 S.W.2d 268 (Tex. Civ. App.—Texarkana 1942, writ ref'd); *Lusk v. Parmer*, 114 S.W.2d 677 (Tex. Civ. App.—Amarillo 1938, writ dismiss'd).