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FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight*

I. STATUS

In the eight years that have elapsed since title 1 of the Texas Family Code¹ became effective, most of the questions of spousal status posed by the Code have been tentatively resolved.² Developments elsewhere, however, may rekindle a past dispute. In August 1977 the Vatican enunciated the policy that a male incapable of procreation because of undergoing vasectomy surgery might still enter into an ecclesiastically valid marriage. This policy tends to undermine the contention that procreation is one of the principal objectives of the marital union. That argument has also been advanced as a policy bar to allowing "marriage" between persons of the same sex.³ At the same time, state constitutional law against sex discrimination continues to be urged⁴ as a ground for nullifying prohibitions against unisexual unions akin to marriage since such prohibitions may deprive such persons of the benefits the law confers on married couples.⁵ While the validity of such unisexual unions were not discussed by Texas appellate judges in the past year, other issues concerning spousal status were decisively dealt with.

Wife's Name. A Houston court of civil appeals⁶ dealt with the appropriate name to be used by a married woman. A wife sought judicial approval to use her maiden surname during marriage.⁷ Reversing the trial court's denial of her petition, the court of appeals concluded that an application for change of

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1. 1969 Tex. Gen. Laws ch. 888 (effective Jan. 1, 1970).

2. For a brief popular treatment of the status of married women in Texas see S. WEDDINGTON, *THE LEGAL STATUS OF HOMEMAKERS IN TEXAS* (1977). In spite of some historical inaccuracies (*id.* at 4, particularly) the work is generally accurate and informative for the lay audience for which it was prepared. One wonders, however, why the author chose to rely (*id.* at 13, n.32) on Nebraska authority for the duty of spousal support rather than upon TEX. FAM. CODE ANN. § 4.02 (1975) or even upon *Gonzales v. Gonzales*, 117 Tex. 183, 300 S.W. 20 (Tex. Comm'n App. 1927, opinion adopted). See also Hughes, *Status of Women in Texas*, in 3 HANDBOOK OF TEXAS 1125 (1976), which presents a historical and reflective treatment of the subject.

3. See Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 FAM. L.Q. 101, 120 (1977). Nonetheless, marriage of an elderly person incapable of procreation is generally sanctioned everywhere.

4. *Id.* at 115-23. See TEX. CONST. art. I, § 3(a).

5. *E.g.*, the right to claim a rural family homestead of 200 acres as opposed to one of merely 100 acres allowed to a single adult. Note prior TEX. ATT'Y GEN. OP. Nos. M-1277, M-1216 (1972) and TEX. FAM. CODE ANN. §§ 1.01, .91(a) (Vernon 1975). McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH. L. REV. 281, 282 (1974).

6. 547 S.W.2d 357 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

7. In TEX. ATT'Y GEN. OP. No. H-432 (1974) the attorney general stated that at marriage a woman may choose to take her husband's name or continue to use her existing name. See McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 68-69 (1975).

name should be granted unless sought for a wrongful or capricious purpose. The court noted that section 32.21 of the Family Code does not require that the other spouse be made a party to the proceeding.⁸ Because the wife's motives were legitimate⁹ and because she believed use of her maiden name would be in her interest, the court held that to deny her the use of that name would be contrary to the principle of equal protection of the law. Even without judicial authorization, however, a married woman may, if she wishes,¹⁰ deal with third persons in a name other than that of her husband,¹¹ especially when she does not purport to act as his agent. While it is conventional for a former wife, particularly one who has custody of any children of the marriage, to use the former husband's surname, a court may allow an ex-husband of a childless marriage to restrain the ex-wife's use of his surname, especially if the divorce was not grounded on his fault.¹²

Interspousal Torts. The Texas Supreme Court abolished the interspousal tort immunity doctrine as applied to intentional torts in *Bounds v. Caudle*.¹³ That doctrine had been enunciated in *Nickerson & Matson v. Nickerson*¹⁴ and was reiterated by the same court as recently as 1964.¹⁵ In *Bounds* the children brought suit against their stepfather for the wrongful death of their mother. Under the interspousal immunity doctrine the children could not have recovered if the doctrine would have precluded their mother from recovering for a willful tort had she survived. The supreme court held that the plaintiffs had stated a cause of action since statutory changes in Texas law have given each spouse sole management of recoveries for personal injury¹⁶ and, as a practical matter, family harmony is not disrupted by such suits. The doctrine had, therefore, lost its validity for the purpose of recovery for intentional torts.¹⁷

Divorce Procedure. Satisfaction of domiciliary requirements, normally on the part of the petitioner, is an aspect of the jurisdictional power of the divorce court. Nevertheless, the residence requirement prescribed by sec-

8. 547 S.W.2d at 359.

9. *Id.* at 359-60.

10. Any person may use the name of his choice except for the purpose of misleading or harming others.

11. The board of directors of the State Bar of Texas has recommended that a provision be added to the Rules Governing the State Bar of Texas, art. XII, § 8, Disciplinary Rule 2-102(B), that there is no prohibition to a married woman's practicing law "under her maiden name."

12. See also *Welcker v. Welcker*, 342 So. 2d 251 (La. Ct. App. 1977). The court denied ex-husband's petition to restrain his ex-wife of a childless marriage from using his surname on grounds of "established custom and equity."

13. 560 S.W.2d 925 (Tex. 1977). The holding applies only to cases in which a tort was committed on or after March 1, 1971. For a general discussion of the case see Reynolds, *Changing Times: A look at the interspousal tort immunity doctrine in Texas after Bounds v. Caudle*, 41 Tex. B.J. 153 (1978).

14. 65 Tex. 281 (1886).

15. *Turner v. Turner*, 385 S.W.2d 230 (Tex. 1964).

16. TEX. FAM. CODE ANN. §§ 4.04, 5.01(a)(3) (Vernon 1975).

17. Without characterizing the policy as either separate or community property, the court in *Bounds* held that the convicted killer-beneficiary lost the proceeds of an insurance policy on the life of the victim through imposition of a constructive trust in favor of the insured's nearest relatives. See also TEX. PROB. CODE ANN. § 41(d) (Vernon 1956); TEX. INS. CODE ANN. art. 21.23 (Vernon 1963).

tion 3.21 of the Family Code is not jurisdictional but is merely a prerequisite to suit which the respondent must assert. Disputed with respect to personal jurisdiction over the respondent, however, often focus on deprivation of personal and property rights of the respondent rather than on the court's power to dissolve the marriage.¹⁸ If the court purports to sever the cause of action for divorce from the division of property and matters affecting the custody and support of children because the respondent cannot be found, the respondent cannot perfect an appeal since the judgment of divorce is interlocutory.¹⁹ The issues of divorce on the one hand and division of property and provision for the children on the other cannot be severed.²⁰

Interlocutory orders *may* not survive entry of a judgment for divorce.²¹ Although some doubts have been entertained in this regard,²² the trial court may order spouse-support pending appeal.²³ With proper supportive pleadings the court may grant attorney's fees for appeal as well.²⁴

A number of appeals were taken from default judgments for divorce. One reversal²⁵ was based on the requirements of rules 107 and 239²⁶ that a return of citation must be on file ten days before a default judgment is taken. Another reversal²⁷ was based on an award of attorney's fees sought by way of a trial amendment made without notice. A respondent's right to a record of the divorce proceedings was in issue in two appeals from default judgments. In *Shepard v. Shepard*²⁸ the court indicated that the 1975 amendment to article 2324²⁹, making a reporter available "upon request," in effect absolves the appellee of the need to provide any kind of factual record for purposes of appeal.³⁰ In *Rogers v. Rogers*,³¹ however, the Supreme Court of

18. See *Scott v. Scott*, 554 S.W.2d 274 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Layton v. Layton*, 538 S.W.2d 642 (Tex. Civ. App.—San Antonio 1976, no writ), discussed in Note, *Full Faith and Credit Versus State Interest: The Last-in-Time Rule in Texas*, 55 TEXAS L. REV. 127 (1976). See also notes 109-16 *infra* and accompanying text.

19. *Campbell v. Campbell*, 550 S.W.2d 164 (Tex. Civ. App.—Austin 1977, no writ).

20. See, e.g., *Garrison v. Texas Commerce Bank*, 560 S.W.2d 451 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ), a sequel to *Garrison v. Mead*, 553 S.W.2d 25 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Austin v. Austin*, 553 S.W.2d 9 (Tex. Civ. App.—Eastland 1977, writ dismissed); *Adam v. Stewart*, 552 S.W.2d 536 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); *Campbell v. Campbell*, 550 S.W.2d 164 (Tex. Civ. App.—Austin 1977, no writ); *Reed v. Williams*, 545 S.W.2d 33 (Tex. Civ. App.—San Antonio 1976, no writ).

21. See, e.g., *Beavers v. Beavers*, 545 S.W.2d 29 (Tex. Civ. App.—Waco 1976, no writ). See *McKnight, Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 465 (1976).

22. See *Ex parte Hodges*, 130 Tex. 280, 109 S.W.2d 964 (1937).

23. See, e.g., *Ex parte Kollenborn*, 153 Tex. 350, 269 S.W.2d 339 (1954); *Ex parte Lohmuller*, 103 Tex. 474, 129 S.W. 834 (1910); *Trevino v. Trevino*, 555 S.W.2d 792 (Tex. Civ. App.—Corpus Christi 1977, no writ); *Clay v. Clay*, 550 S.W.2d 730 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); cf. *McCartney v. McCartney*, 548 S.W.2d 435 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (alleging abuse of discretion for failure to so award).

24. *Dickson v. McWilliams*, 543 S.W.2d 868 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); *Carson v. Carson*, 528 S.W.2d 308 (Tex. Civ. App.—Waco 1975, no writ).

25. *Gentry v. Gentry*, 550 S.W.2d 167 (Tex. Civ. App.—Austin 1977, no writ).

26. TEX. R. CIV. P. 107, 239. See also *Ramirez v. Ramirez*, 554 S.W.2d 253 (Tex. Civ. App.—El Paso 1977, writ dismissed).

27. *Shepard v. Shepard*, 546 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1977, no writ).

28. *Id.*

29. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1978). See also TEX. FAM. CODE ANN. § 11.14(d) (Vernon 1975). See generally *Baen-Bec, Inc. v. Tenhoopen*, 548 S.W.2d 799 (Tex. Civ. App.—Eastland 1977, no writ); *Muldoon v. Musgrave*, 545 S.W.2d 539 (Tex. Civ. App.—Fort Worth 1976, no writ).

30. 546 S.W.2d at 889.

31. 21 Tex. Sup. Ct. J. 131 (Jan. 7, 1978).

Texas relied upon its earlier opinion in *Smith v. Smith*,³² and on the opinion of the Dallas court of civil appeals in *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*,³³ to conclude that the absent respondent is entitled to a statement of facts even though the verbatim transcript has been waived by his failure to request a reporter at the trial. If there is no statement of facts, the respondent is entitled to a new trial.³⁴ An intermediate appellate court, however, had held, in *Glass v. O'Hearn*,³⁵ that if a statement of facts is supplied in the record, the appellant must accept it.

In *Boswell, O'Toole, Davis & Pickering v. Townsend*³⁶ a discharged firm of attorneys, originally representing the wife, intervened in a divorce proceeding to recover its fees against both spouses. The trial court dismissed the intervention against the husband and severed the suit against the wife. When the firm appealed the dismissal, the appellate court held that because the intervenor had taken a non-suit prior to the judgment, the intervenor could not complain that the dismissal of the suit against the husband was erroneous. Another procedural point was settled in *Meshwert v. Meshwert*.³⁷ In that case the appellant questioned whether an appellate court might receive a transcript and statement of facts inadvertently filed after sixty days of judgment within rule 21c.³⁸ The Supreme Court of Texas held that the appellate court may receive the proffered matter within fifteen days following the last date for timely filing if it is accompanied by reasonable explanation of inadvertence, mistake, or mischance.³⁹

II. CHARACTERIZATION OF MARITAL PROPERTY

Although all property acquired during marriage is presumed to be community, this presumption may be rebutted by a showing that the property was acquired by gift,⁴⁰ inheritance, partition of a separate interest in an undi-

32. 554 S.W.2d 121 (Tex. 1976).

33. 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd).

34. *But see* Clayton v. Clayton, 547 S.W.2d 719 (Tex. Civ. App.—El Paso 1977, writ dism'd). The petitioner, questioning the validity of two prior divorces, did not satisfy the prerequisites to a successful bill of review in spite of a lack of transcripts and statements of fact.

35. 553 S.W.2d 15 (Tex. Civ. App.—Fort Worth 1977, no writ).

36. 546 S.W.2d 380 (Tex. Civ. App.—Beaumont 1977, no writ).

37. 549 S.W.2d 383 (Tex. 1977).

38. TEX. R. CIV. P. 21(c).

39. 549 S.W.2d at 384. The court construed "reasonably explaining" as used in rule 21c to mean "any plausible statement of circumstances indicating that failure to file within the sixty-day period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance." *Id.* Moreover, the court declared that the motion must be filed within 15 days of the last date for timely filing or it would not grant leave to file the instrument. *Id.*

40. The implication or presumption of gift between spouses is a weak one and is easily rebutted in practice. *Cockerham v. Cockerham*, 527 S.W.2d 162, 175 (Tex. 1976) (Reavley, J., dissenting). In *Glover v. Martin*, 544 S.W.2d 777 (Tex. Civ. App.—Eastland 1976, no writ), the wife withdrew funds from a separate bank account in the form of a cashier's check payable to husband or wife. Following her death, the husband claimed that she had intended to make an inter vivos gift to him. The fact that she retained control of the check by making it payable to herself and her husband and the fact that she never delivered it indicated that she did not intend a gift of half of it to her husband. In *Southwestern Bell Tel. Co. v. Gravitt*, 551 S.W.2d 421 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.), it was reiterated that pension benefits, even under a non-contributing plan, are not gifts by an employer to an employee; rather, the plans are a form of employee compensation. *Id.* at 423.

vided property,⁴¹ or as a mutation of separate property.⁴² The problem is commonly one of tracing separate property into a fund where it may have been so commingled with community property as to lose its identity.⁴³ If separate property is brought into a marriage and is invested and reinvested thereafter in conjunction with community property, its identity must be traced in order to demonstrate its continued separate character.⁴⁴ In *Hicks v. Hicks* the Dallas court of civil appeals dealt with an alleged commingled fund. An ex-wife sought a partition of a workmen's compensation award, made after a divorce with respect to an injury suffered by the husband during marriage.⁴⁵ The prospective recovery was not dealt with in the divorce decree. The award therefore might have covered compensation for some lost earning capacity during marriage in addition to that after its dissolution. On the other hand, since weekly compensation payments had been received and apparently had been consumed during marriage, these payments might have fully compensated earning capacity lost during marriage. The court seemingly relied on this conjecture to shift the burden of proof to the wife to show that a community interest was comprehended within the award. This burden she failed to discharge.⁴⁶

41. *Westhoff v. Reitz*, 554 S.W.2d 1 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

42. *McDade v. Sams*, 545 S.W.2d 205 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

43. See generally Comment, *Community Property: The Concept of Tracing Ownership*, 8 TEX. TECH L. REV. 637 (1977). After the death of a spouse, tracing presents somewhat greater difficulties of proof than it does if both spouses are living. The probate court is now an appropriate forum for such an adjudication. See *Potter v. Potter*, 545 S.W.2d 43 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); TEX. PROB. CODE ANN. §§ 5(c), (d) (Vernon Supp. 1978). See also *Parr v. White*, 543 S.W.2d 440 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.), discussed in *McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 130 (1977). The dead man's statute poses particular evidentiary problems. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926). The surviving spouse may, however, testify to facts of her own knowledge with respect to tracing a separate property interest. See *Whitis v. Whitis*, 549 S.W.2d 54 (Tex. Civ. App.—Waco 1977, no writ).

44. See *Bilek v. Tupa*, 549 S.W.2d 217 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

45. 546 S.W.2d 71 (Tex. Civ. App.—Dallas 1977, no writ). The ex-husband had received an award for each of two injuries. The discussion here is only with respect to the second injury. The court found that there was no commingling of the award for the first injury with that for the second; therefore, the award for the second injury could not presumptively constitute community property. One should compare the outcome with that in *Latham v. Allison*, 560 S.W.2d 481 (Tex. Civ. App.—Fort Worth 1977, no writ). See also *Postelnek v. Postelnek*, No. 6,609 (Tex. Civ. App.—El Paso, Sept. 21, 1977, no writ).

46. In *Hicks* the court cited, but did not really rely on, two earlier cases dealing with future workmen's compensation awards dealt with by a divorce court. 546 S.W.2d at 74. In *Mabry v. Aetna Cas. & Sur. Co.*, 230 S.W.2d 572 (Tex. Civ. App.—Galveston 1950, no writ), the wife was granted one half of a future award to be made to the husband. The insurance company paid the husband in full and the wife sought her share from the insurance company. The court held that the decree in favor of the wife was an invalid judicial assignment of workmen's compensation under TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967). This anti-assignment statute is clearly provided as a protection against creditors' claims, and this case is, therefore, analogous to a divorce court's handling of railway retirement benefits in *Allen v. Allen*, 363 S.W.2d 312 (Tex. Civ. App.—Houston 1962, no writ). But see *Berg v. Berg*, 115 S.W.2d 1171 (Tex. Civ. App.—Fort Worth 1938, writ dism'd). *Allen*, however, has been superseded by *Eickelberger v. Eickelberger*, 557 S.W.2d 587 (Tex. Civ. App.—Waco 1977, no writ), and *Mabry* must give way to *Hicks*. The California Supreme Court has reached the same conclusion with respect to railroad retirement benefits as did the Texas court in *Eickelberger*. In *re Hisquierdo*, 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 590 (1977), noted in 4 COMMUNITY PROP. J. 172 (1977).

In *Piro v. Piro*, 327 S.W.2d 335 (Tex. Civ. App.—Fort Worth 1959, writ dism'd), a division of workmen's compensation benefits was again considered. Although the court cited *Mabry*, the thrust of the decision was much more refined. The wife was given 1/5 of a future award which the husband might receive for workmen's compensation. When the husband appealed from this decree, the appellate court struck it down as, in effect, an indefinite or conjectural award

Apportionment of Interests. It is perhaps inappropriate to use the phrase "contingent community property," as employed in *Cearley v. Cearley*,⁴⁷ to describe a *type* of property. It is rather a technique for dealing with an accruing interest in the context of division on divorce. In *Cearley* the supreme court provided for division of pension benefits which might be received in the future.⁴⁸ Arguably, the principle of contingent community property may also be applicable to division on death.⁴⁹ While the apportionment of separate and community property interests is clearly applicable to the division of retirement benefits on divorce, the extent to which it may be applied to other interests has yet to be examined.⁵⁰ In *Taggart v. Taggart*,⁵¹ for example, the supreme court applied the *Cearley* principle to a pension interest which had not accrued at the time of the divorce. In *Vibroch v. Vibrock*⁵², however, the principle's application to an insurance agent's anticipated right to commissions which had not accrued on divorce was posed but not resolved. The ex-wife sought a partition of her former husband's commissions allegedly earned, in part at least, during their marriage but not disposed of on divorce. The trial court entered summary judgment for the husband. The intermediate appellate court, however, reversed and remanded for a determination of whether there was an interest to divide since it was possible that the interest might never accrue. The court indicated its reluctance to determine whether there could be a community interest in the renewal commissions. The court noted that such an extension of the *Cearley* principle should be made only by the supreme court. In refusing a writ of

possibly inclusive of separate personalty. The court did not conclude that the decree was in violation of art. 8306, § 3, but instead held that judicial authority was improperly exercised in awarding the wife what might be the husband's separate property rather than a portion of the community. The court reasoned that if the future compensation award were made only for those earning lost after divorce, the portion decreed to the wife would be from the husband's separate property. The award was speculative and therefore improper under the circumstances.

In TEX. ATT'Y GEN. OP. NO. H-862 (1976) the opinion was expressed that a lump sum payment to a widow or a widower for workmen's compensation on behalf of a deceased spouse is not subject to the 4% per annum statutory interest provided for under TEX. REV. CIV. STAT. ANN. art. 8306a (Vernon 1967). That article provides that:

[W]here suits are legally brought by any claimant or beneficiary under any of the provisions of this Act and recovery is had for past due weekly installments, such claimant or beneficiary shall be entitled to recover interest on such past due installments at the rate of four (4%) percent, compounded annually.

47. 544 S.W.2d 661 (Tex. 1976), discussed in McKnight, *supra* note 21, at 426-30; Note, *Military Retirement Benefits: Community Property as Earned During Marriage*, 14 HOUS. L. REV. 925 (1977).

48. 544 S.W.2d at 666.

49. See Valdez v. Ramirez, 558 S.W.2d 88 (Tex. Civ. App.—San Antonio 1977, no writ), a case of accrued and matured pension retirement benefits. If the non-beneficiary spouse dies while the retirement benefits of the other spouse are still contingent, it may be argued that a community interest of the spouses may yet accrue or mature. An accrued interest is equivalent to a vested one; the term "matured" is used to refer to an interest that is payable. See McKnight, *supra* note 21, at 426-30, 440-42. See also Massman, *Proposed Legislation to Exempt from Inheritance Taxation the Non-Employee Spouse's Interest*, 40 TEX. B.J. 38 (1977). For a comment on proposals at the national level see Foster, *Pensions and Marital Property*, 17 FAM. L. NEWSLETTER, No. 4, Summer 1977, at 6.

50. Some further conjectures are examined in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 120 (1977).

51. 552 S.W.2d 422 (Tex. 1977).

52. 549 S.W.2d 775 (Tex. Civ. App.—Fort Worth 1977), writ *ref'd n.r.e. per curiam*, 20 Tex. Sup. Ct. J. 499 (July 27, 1977).

error the Supreme Court of Texas specifically reserved its opinion on the community property issue.⁵³ The California Supreme Court has concluded that termination rights with respect to renewal commissions do have a community element in such a case.⁵⁴

*Cearley*⁵⁵ and its progeny,⁵⁶ foreshadowed by the line of cases following *Busby v. Busby*,⁵⁷ point the way to a reappraisal of characterizing incremental acquisitions of property interests which arise over an extended period of time during which the acquirer is alternately married and single. In numerous cases in which the character of retirement benefits has been considered, little thought has been given to applying the inception of title doctrine to this sort of property interest. Instead the courts initially characterized benefits on the basis of *vesting* without focusing on the argument that characterization relates back to the inception of the contract right. The vesting doctrine of *Busby*, however, had already been seriously undermined by the lower appellate courts⁵⁸ before the supreme court enunciated the contingent community property doctrine in *Cearley*. The ways were, therefore, laid for the application of an apportionment principle to characterize property acquired incrementally over an extended period of time. For example, if a person employed for three years while single is thereafter married for six years, and then is divorced and remains single for a year prior to the division of pension benefits, the apportionment principle results in characterizing the benefits as six-tenths community and four-tenths separate. This approach may be logically applied to ordinary life insurance policies as has been done in some other community property jurisdictions,⁵⁹ although term life insurance may be interpreted as a new policy each time a premium is paid to renew the term.⁶⁰ The apportionment principle could also apply to the division of proceeds of contracts of service extending over periods of different marital status,⁶¹ as well as to acquisitions by adverse possession in the same situation.⁶² Thus the relation-back principle of the inception of title doctrine could be swept away.⁶³

53. 20 Tex. Sup. Ct. J. 499 (July 27, 1977); cf. *Echols v. Austron, Inc.*, 529 S.W.2d 840 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). The court held that a bonus paid after divorce to ex-spouse president by his corporate employer was not community property.

54. *In re Skaden*, 19 Cal. 3d 679, 566 P.2d 249, 139 Cal. Rptr. 615 (1976), *rev'd*, 61 Cal. App. 3d 682, 132 Cal. Rptr. 524, *noted in* 4 COMMUNITY PROP. J. 171, 173-74 (1977).

55. 544 S.W.2d 661 (Tex. 1976). See also Comment, *Apportionment of Community Property Interests in Prospective Military Retirement Benefits Upon Divorce*, 9 ST. MARY'S L.J. 72 (1977); Note, *Community Property—Cearley v. Cearley*, 9 ST. MARY'S L.J. 135 (1977); Note, *Marital Property—Cearley v. Cearley*, 8 TEX. TECH L. REV. 834 (1977).

56. *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977); *In re Gongwer*, 554 S.W.2d 49 (Tex. Civ. App.—Amarillo 1977, no writ).

57. 457 S.W.2d 551 (Tex. 1970). See also Note, *Military Retirement Benefits as Community Property—Busby v. Busby*, 25 SW. L.J. 340 (1971).

58. See, e.g., *Dessommes v. Dessommes*, 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 72-73 (1974).

59. See W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 190-91 (2d ed. 1971). See generally S. SCOVILL, *COMMUNITY PROPERTY AND LIFE INSURANCE* (1969).

60. *But see* *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Civ. App.—Waco 1963, writ ref'd).

61. See, e.g., *Gulf Oil Corp. v. Shell Oil Co.*, 410 S.W.2d 260 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.); *Bishop v. Williams*, 223 S.W. 512 (Tex. Civ. App.—Austin 1920, writ ref'd).

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

63. The all-or-nothing approach would, therefore, give way to one of sharing. When the inception of title principle was first authoritatively applied in cases of conditional colonization

Conflicts of Interest. A recent attorney general's opinion⁶⁴ conjures up memories of Ma Ferguson and *Dickson v. Strickland*.⁶⁵ In *Dickson* the supreme court enunciated the unconventional view that Mrs. Ferguson's salary as governor would be her separate property because her husband had forfeited his right to share it by his own malfeasance in the same office.⁶⁶ The attorney general's opinion employed a more conventional analysis. The opinion dealt with article 2340, which provides that a county commissioner must not be directly or indirectly interested in any contract or claim against the county. Hence if the wife of a commissioner is appointed deputy tax-assessor-collector, she must serve without pay, since her husband would otherwise take a community interest in any salary she should receive.

Transactions Between Couples. Transactions between couples intending a meretricious relationship, those between couples anticipating marriage, and those between spouses continue to present difficult and interesting problems. The highest courts of California,⁶⁷ Minnesota,⁶⁸ and Georgia⁶⁹ have recently examined express and implied contracts concerning the mutual gains of unmarried persons living and working together. In *Marvin v. Marvin*⁷⁰ the California court considered the enforceability of a contract between a man, then married, and a single woman to live together and share assets acquired by their individual and mutual efforts. During the course of their cohabitation the man was divorced. Without recourse to the concept of informal marriage, which is not recognized in California, the court concluded that a contract between an unmarried, cohabiting couple to define the status of property acquisitions is valid provided it is not based explicitly

grants, no thought was apparently given to an apportionment approach. *Webb v. Webb*, 15 Tex. 275 (1855); *Mechaca v. Field*, 62 Tex. 135 (1884); *Mills v. Brown*, 69 Tex. 244, 6 S.W. 612 (1887); *Welder v. Lambert*, 91 Tex. 510, 44 S.W. 281 (1898); *Creamer v. Briscoe*, 101 Tex. 490, 109 S.W. 911 (1908). Although little remarked upon at the time, an impetus toward apportionment came from the federal court in *Wrightsmen v. Commissioner*, 111 F.2d 227 (5th Cir. 1940), where a migrant executive's annual earnings were treated as community property to the extent of the proportionate part of the year he lived in Texas. As yet, however, no judicial hints of application of the apportionment approach beyond the subject matter of pension and retirement benefits have appeared.

In a different sort of dispute as to characterization of realty acquired by deed dated prior to the spouse's marriage but acknowledged during marriage, the Amarillo court of civil appeals held that it was presumed to have been delivered at the time the deed was dated; hence the property was separate estate. *Rogers v. Gunn*, 545 S.W.2d 861 (Tex. Civ. App.—Amarillo 1976, no writ).

64. TEX. ATT'Y. GEN. OP. NO. H-993 (1977).

65. 114 Tex. 176, 265 S.W. 1012 (1923).

66. This approach is similar to that of the South African Court in *Potgeiter v. Potgeiter and another*, [1959] 1 S.A. 194, where the husband's recovery for alienation of affection was said to be his separate property because of his wife's own involvement with the marital poacher. That decision can be defended on other grounds, such as those underlying *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972).

67. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). See also *Kay & Amyx, Marvin v. Marvin: Preserving the Options*, 65 CALIF. L. REV. 937 (1977); Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708 (1977); Foster & Freed, *Non-Marital Partners*, 17 FAM. L. NEWSLETTER No. 3, Spring 1977, at 6.

68. *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977).

69. *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977).

70. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

and primarily on the sexual relationship.⁷¹ Although the spouse might complain, the fact that a party to the contract was actually married at the time the contract was entered into did not render property dealings between the parties void *ab initio*. By way of obiter dictum the court further noted that a court might inquire into the conduct of a cohabiting couple to determine the existence of an *implied* undertaking, a joint venture, or a partnership.⁷² The Minnesota court also considered the propriety of implying contractual undertakings in such circumstances.⁷³ The Georgia court rejected property consequences of a meretricious relationship out of hand.⁷⁴ One commentator has speculated⁷⁵ that these decisions may have some impact on the future course of Texas law in dealing with such arrangements.

A recent Texas case dealt with a meretricious relationship, although the issues raised were not similar to those of *Marvin*. In that case⁷⁶ the facts did not show a contract between the unmarried couple who had lived together for several years.⁷⁷ But whether or not there is a contractual arrangement, if such a relationship ends as a result of the death of one of the parties, a will in favor of a second mate would preclude some dispute in those circumstances.⁷⁸

In disputes between two persons who claim property rights by virtue of asserted marriages to the same individual, the actual spouse, or the children of the valid marriage, have prevailed *except* against a putative spouse who entered into the relationship in good faith; even then, however, they have prevailed only with respect to property acquired while the putative spouse remained married in good faith.⁷⁹ The measure of the putative spouse's property interest, however, has been much disputed. Several questions are posed by the Texas authorities. (1) Is the putative spouse to be treated as an actual spouse with respect to property acquisitions of the union as long as it subsists in good faith on the part of the claimant? That is, with respect to gains of the putative union, are the putative spouse's property rights to be exactly the same as those of an actual spouse? (2) Or, are the rights of the

71. *Id.* at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

72. *Id.* at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.

73. *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977).

74. *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977).

75. Dougherty, *Dissolution of Non-marital Cohabitation and Common Law Marriage*, in MARRIAGE DISSOLUTION IN TEXAS J-1, J-8 (1977).

76. *Simon v. Watson*, 539 S.W.2d 951 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

77. *But cf. Jernigan v. Scott*, 518 S.W.2d 278 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (in dispute between wife who had entered into separation agreement with deceased husband and woman who asserted that she had later married him believing that he was single, court sustained validity of separation agreement and therefore did not reach any issue of alleged putative marital status or claims that might have been contractually based).

78. In a case of a New York second marriage—though perhaps putative by Texas standards—the bigamous husband's bequest of all his property to the second "wife" was not entitled to a marital deduction for estate tax purposes under I.R.C. § 2056. *Estate of Goldwater v. Commissioner*, 539 F.2d 878 (2d Cir. 1976); *cf. Lee v. Commissioner*, 550 F.2d 1201 (9th Cir. 1977) (husband and purported second wife not allowed to file a joint federal income tax return after state law consulted as to whether marriage absolutely void; implication that if state law viewed marital status as valid, joint filing might be allowed).

79. *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975). Once entered into, a putative marriage exists as a matter of law until the person asserting it has real knowledge of an impediment to it under the circumstances of the case. *Id.* at 606. For further authorities see McKnight, *supra* note 5, at 310, 340; Williams, *Property Rights of Putative Spouses*, 4 COMMUNITY PROP. J. 131, 137, 142-44 (1977).

putative spouse limited to that property the acquisition of which the putative spouse contributed and to the extent of participation in acquisition? (3) Further, does merely acting as a spouse constitute contribution to acquisition? If so, there is really no difference between approaches (1) and (2). If, however, the putative spouse's claim is limited to that property which was acquired by his overt effort, at least in part, a factual determination must be made if the second alternative approach is adopted. On the basis of all the authorities the better view is that a putative spouse's interest is that which would be community property in the case of an actual marriage.

Nevertheless, even when that issue is resolved, the problem of apportionment of interests between three potential claimants remains.⁸⁰ If the bad-faith bigamist and those claiming from him are excluded, an equal division can be made of the acquisitions of the putative marriage between the actual spouse and the putative spouse. The Texas courts, however, have not approached the problem in this way and a clear resolution of this question remains to be made. Nor have the appellate courts distinguished between the situation involving a bad-faith bigamist and a three-way dispute in which all claimants, or those from whom their claims derive, were in good faith during all times relevant to the controversy.⁸¹ In a legal environment such as our own where divorce is easily available, moreover, there are perhaps almost as many good faith bigamists as there are those in bad faith. At any rate, the good-faith bigamist is not infrequently encountered in practice.⁸²

A different sort of situation is presented when a claimant was not in good faith in entering into the relationship, and, therefore, was never more than a pretended spouse from the start, or later learned the truth and *then* became a mere pretended spouse. From that time forward, the claimant of the wholly or partly meretricious relationship has been excluded, in Texas, from asserting a right to any property acquired while the relationship subsisted in bad faith on the claimant's part. The same result prevails when both parties to the liaison are single, unless an informal marriage can be established. In either case, any resort to a property claim based on contractual principles would previously have been rejected on the ground of public policy.⁸³ This

80. See McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 68 N.5 (1975). Williams, *supra* note 79, at 142-44, regards the question as settled in favor of the putative spouse's entitlement to one-half while the legal wife and husband take one-fourth each. See also Note, *Family Law and Community Property—Putative Marriage—Division of Property*, 11 Sw. L.J. 245 (1957).

81. Nor would one expect that the commentators on the Hispanic sources of our law would have devoted much attention to this situation; the likelihood that such a situation could be presented would have been slim due to the unavailability of divorce as we know it.

82. Such a situation often arises in this way. After a period of separation the wife informs her husband that she has filed a petition for divorce and requests that he execute a waiver of citation to save her additional expense. He executes the waiver and assumes that his wife will pursue her suit to judgment. In the course of time the husband remarries. Some years later he encounters his wife and discovers that she did not pursue her divorce proceeding—usually because she failed to pay her lawyer. As a result, all three persons have claims in the continuing assets of the one or two marriages, although the first wife is clearly at fault under these facts for misleading her husband. If she is to share in the gains of the husband, it is only proper that her gains should also be included in making a decision.

83. No Texas case has been found in which recovery has been sought for fraud by a person who entered into a good-faith marriage which is later discovered to be void.

policy was rooted in the criminal consequences of adultery and fornication⁸⁴ as well as in the sanctity of marriage. Since 1973, however, the criminal aspects of the policy no longer exist in Texas.⁸⁵ In *Marvin*, as a matter of general policy, the California Supreme Court could not accept a contract based merely on sexual grounds.⁸⁶ But a longstanding cohabital relationship based on sex alone would be hard to imagine.

While the California court did not formulate precise measures of recovery as between the parties to the contract, as to third persons the court indicated that ordinary rules of principal and agent, holding-out, and partnership liability would apply.⁸⁷ In Texas persons who hold themselves out as joint-venturers take the consequences of joint-venture liability.⁸⁸ On the other hand, those who merely hold themselves out as marital-joint venturers seemingly do not induce others to rely on the higher standard of partnership liability.⁸⁹ As between the couple an express undertaking to share liability may exist or such an agreement may be inferred from the circumstances of their association. An agreement to share the *net* gains of a non-marital relationship clearly presupposes some consideration of liability and loss.

If a marital relationship is not indicated by a couple's agreement or conduct, the consequences of their cohabital relationship are those of an imputed partnership⁹⁰ rather than a putative marriage. If, as the California court suggested, equity and fair dealing are to be the guides to property division when the relationship disintegrates, in such instances a closer study of the parties' conduct may be required than is needed in a divorce situation.⁹¹ The California court left open those matters analogous to spousal support obligations growing out of such a relationship.⁹² The Minnesota court⁹³ also confined its consideration to the property acquired during the relationship, resorting to a principle of implied gift on which to ground its opinion. The Georgia court,⁹⁴ on the other hand, wholly rejected recovery as based on an immoral consideration. A similar dispute has not been before a Texas appellate court in recent years.⁹⁵

84. See *Hayworth v. Williams*, 102 Tex. 308, 116 S.W. 43 (1909); *Meador v. Ivy*, 390 S.W.2d 391 (Tex. Civ. App.—San Antonio 1965, no writ).

85. TEX. PEN. CODE ANN. app. arts. 499-504 (Vernon 1974) (repealed 1973).

86. 18 Cal. App. 3d 660, 671, 557 P.2d 106, 113-14, 134 Cal. Rptr. 815, 822-23 (1976).

87. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

88. See, e.g., *Heinrich v. Wharton County Livestock, Inc.*, 557 S.W.2d 830 (Tex. Civ. App.—Corpus Christi 1977, no writ) (characteristics of joint ventures); *Yorfino v. Ferguson*, 552 S.W.2d 563 (Tex. Civ. App.—El Paso 1977, no writ) (partners are jointly and severally liable).

89. *But see Dougherty*, *supra* note 75, at J-4.

90. By the very nature of the arrangement, some sexual relationship seems to be presupposed, although only the bi-sexual relationship is here under consideration. This discussion does not consider uni-sexual relationships or those involving dependency without regard to sex (see, e.g., *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921)), or communal arrangements which may or may not involve sex.

91. *Dougherty*, *supra* note 75, at J-6.

92. For further discussion of *Marvin* see Kurtz, *supra* note 3, at 122-23; Foster, *Nonmarital Partners: Sex and Serendipity From Coast to Coast*, 18 FAM. L. NEWSLETTER No. 1, Fall 1977, at 5, 6. Pre-*Marvin* literature includes Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453 (1976).

93. *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977).

94. *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977).

95. The facts which produced *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124 (1913), however, might today produce a dispute somewhat similar to that in *Marvin*.

Two appellate courts have considered the consequences of marriage contracts between couples planning to marry.⁹⁶ In *Williams v. Williams*⁹⁷ the proposed wife had renounced by contract all interests in the proposed husband's separate property, including homestead rights, home furnishings, and the family car.⁹⁸ When the marriage was terminated by the husband's death, four months after its celebration, the surviving widow and the husband's children of his previous marriage disputed both the widow's right to occupy the homestead and to exercise her statutory rights with respect to all the husband's exempt personalty. The Austin court of civil appeals held that the contract was invalid as to all exempt property because a right to property not yet acquired cannot be renounced. This conclusion was clearly contrary to the long standing, albeit unconsidered, precedents sustaining contracts to assign a possibility of inheritance.⁹⁹

The argument applied in *Williams* to a future homestead, however, is equally applicable to future gains of the marriage. In *Huff v. Huff*¹⁰⁰ the Waco court of civil appeals sustained the constitutional validity of section 5.41 of the Family Code and its application to a marriage contract which provided for mutual renunciation of what would be community acquisitions. The contract was entered into in Louisiana by a Louisiana couple who were married in 1967¹⁰¹ and moved to Texas in 1968 after the effective date of the new provisions of article 4610, now codified as section 5.41.¹⁰² The court stated that the contract was valid in Louisiana and held that it was also valid under Texas law which was in effect when the couple moved to Texas.¹⁰³

96. On marriage contracts in general see Neely, *Marriage Contracts for Better or for Worse*, JURIS DOCTOR, Sept. 1977, at 38.

97. 548 S.W.2d 492 (Tex. Civ. App.—Austin 1977, writ granted).

98. The contract also provided for mutual renunciation of what would have been future community acquisitions, but this aspect of the contract did not provoke dispute because of the short duration of the marriage.

99. See, e.g., *Hale v. Hollon*, 90 Tex. 427, 39 S.W. 287 (1897); *Gottwald v. Warlick*, 125 S.W.2d 1060 (Tex. Civ. App.—San Antonio 1939, no writ).

100. 554 S.W.2d 841 (Tex. Civ. App.—Waco 1977, writ dismissed).

101. At that time there were two impediments to valid marriage contracts. The first one was constitutional. See, e.g., *Gorman v. Gause*, 56 S.W.2d 855 (Tex. Comm'n App. 1933, holding approved); *Castro v. Illies*, 22 Tex. 479 (1858) (*semble*). The proponent of the constitutional validity of § 5.41 must regard with some apprehension the supreme court's citation of *Gorman* in *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977), in its application of a strict construction of the constitutional definition of marital property to § 3.63 of the Texas Family Code.

The second impediment was the effect of the old provisions of art. 4610 which were in effect until Jan. 1, 1968. This statute of 1840 had caused many Texas marriage contracts to fail. See *McKnight*, *supra* note 43, at 111-12. See also *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964); *Watts v. Watts*, 390 S.W.2d 30 (Tex. Civ. App.—El Paso 1964, writ ref'd n.r.e.); *Hayes v. Hayes*, 378 S.W.2d 375 (Tex. Civ. App.—Corpus Christi 1964, writ dismissed); *Lieber v. Mercantile Nat'l Bank*, 331 S.W.2d 463 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.). The Texas provision was modelled on a section of the Louisiana Code under which marriage contracts have been consistently sustained.

In *Frederick v. Frederick*, 44 Ill. App. 3d 578, 358 N.E.2d 398 (1976), a marriage contract was attacked as invalid because it had as part of its purpose a tax evasion scheme. The contract provided, in part, that if the wife inherited her husband's lands over which she would have a testamentary power of appointment, she would convey those lands to the husband's children. Hence, if the term of the agreement were valid, she would have no general testamentary power entitling the property to a marital deduction. The court held that the contract which had as its purpose a fraud on the United States Treasury was unenforceable, and since this provision of the marriage contract was not severable, the whole contract failed.

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

103. 554 S.W.2d at 843-44.

*Castro v. Illies*¹⁰⁴ also involved a foreign premarital contract entered into by a couple who later moved to Texas. A distinction between *Huff* and *Castro* is that both Texas statutory and constitutional provisions have been radically changed during the eighty year interval between the two decisions. The marriage contract statute has been modernized by removal of the reference to the forced heirship statute which was repealed in 1856;¹⁰⁵ the Texas Constitution was significantly altered in 1948 to allow partitions of community property during marriage. Since the strictures of old article 4610 were considered equally applicable to both marital partitions and marriage contracts,¹⁰⁶ the liberalized constitutional provision dealing with partitions should lead the courts to construe the amended marriage contract statute as one allowing premarital contractual arrangements which are designed to avoid the need for partitioning community property.

In *Martin v. Flener*¹⁰⁷ a property settlement agreement made in anticipation of divorce recited that the property mentioned in the agreement was all of the community property which the spouses possessed. A post-divorce suit was brought twenty-one years later for a determination of the character of an unmentioned tract acquired during marriage and hence presumed to be community property. Despite the recital, the court held that the property was community.¹⁰⁸

III. DIVISION ON DIVORCE

Jurisdiction. Although rarely relevant to the validity of the divorce itself,¹⁰⁹ personal jurisdiction of the respondent in a divorce proceeding is very relevant to division of property,¹¹⁰ and to fixing parental rights and

104. 22 Tex. 479 (1858).

105. 1856 Tex. Gen. Laws, ch. 85, § 1, at 5, 4 H. GAMMEL, LAWS OF TEXAS 423 (1898). There is a surviving reference to the institution of forced heirship in TEX. FAM. CODE ANN. § 3.63 (Vernon 1975). The provisions of *id.* § 4.01, derived from old art. 4627 and its 1840 predecessor, were initially designed to insure the applicability of Texas matrimonial property law in spite of different rules applicable at the time and place of marriage. See Thomas & Thomas, *Community Property and the Conflict of Laws: A Recapitulation*, 4 Sw. L.J. 46, 52-57 (1950).

106. See Graser v. Graser, 147 Tex. 404, 215 S.W.2d 867 (1948); Weaver v. Citizens Nat'l Bank, 490 S.W.2d 887 (Tex. Civ. App.—Waco 1973, no writ).

107. 543 S.W.2d 756 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

108. *Id.* at 759. A recital in a divorce decree that there was no community property was similarly construed in Clendenin v. Krock, 527 S.W.2d 471 (Tex. Civ. App.—San Antonio 1975, no writ). In McDade v. Sams, 545 S.W.2d 205 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ), the recital in the divorce decree that there was no community property was not even considered in determining the character of property acquired during the marriage but not dealt with in the divorce decree.

109. Such a rare case is presented when the petitioner is a domiciliary of Texas only by virtue of the respondent's domicile there. See Shankles v. Shankles, 445 S.W.2d 803 (Tex. Civ. App.—Waco 1969, no writ). See also TEX. FAM. CODE ANN. § 3.21 (Vernon 1975), which was not in effect when *Shankles* was decided. *Id.* Section 3.24 was also subsequently enacted. Under § 3.24 it appears that a spouse of a nonresident but domiciliary Texas serviceman, or other absent Texan, may maintain a suit for divorce in Texas without showing any Texas residence on the part of the petitioner. Personal jurisdiction of the petitioner or the respondent is necessary in order to give the court in rem jurisdiction to dissolve the marriage. Such personal jurisdiction is normally based on domicile. Jurisdiction over a nondomiciliary, but resident, serviceman is based on legislative enactment. TEX. FAM. CODE ANN. § 3.23 (Vernon 1975). The constitutional validity of § 3.23 under federal standards was not in issue, but was assumed in Fox v. Fox, 559 S.W.2d 407 (Tex. Civ. App.—Austin 1977, no writ).

110. In Fox v. Fox, 559 S.W.2d 407 (Tex. Civ. App.—Austin 1977, no writ), the power of the court went unchallenged even though in personam jurisdiction had not been obtained. Although the court assumed that it had the power to deal with property within Texas, that power is very

responsibilities with respect to children.¹¹¹ The long-arm statutes¹¹² based on prior marital contact with Texas provide a means for obtaining jurisdiction over an out-of-state respondent, but their use may generate conflict of laws and concurrent jurisdiction questions if, at his current state of domicile, the respondent has already commenced, or later commences, a divorce proceeding.¹¹³ *Scott v. Scott*¹¹⁴ focused on the power of the divorce court to dissolve a marriage after similar proceedings had been initiated in California. A Houston court of civil appeals concluded that because the wife had not satisfactorily proved that she was not subject to long-arm jurisdiction under the Family Code¹¹⁵ and because the California court had not finally disposed of the issue of residence, the Texas trial court had properly denied her motion to stay the proceeding and had subsequently granted the divorce without offending notions of comity.¹¹⁶

Although a negotiated property settlement¹¹⁷ generally precludes the need for judicial scrutiny of a property division, the decision in *Eggemeyer v. Eggemeyer*¹¹⁸ may cause an increase in disputes regarding the characterization of marital property as well as increased reliance on tracing. It may also influence more frequent recourse to trial by jury for a determination of the property's character.

Although some trial courts have been inclined to grant a divorce and postpone consideration of property division, the appellate courts have unan-

seriously doubted. *Shaffer v. Heitner*, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). Without personal jurisdiction over the respondent, the court in *Fox* concluded that it lacked the power to deal with property located outside Texas. As to the power of a Texas court to deal with foreign realty by exercising its in personam power over a litigant within its jurisdiction who is in control of that property, see *Hedley v. duPont*, 558 S.W.2d 72, 75 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (a non-divorce case). See also *McKnight*, *supra* note 21, at 449, 483. On the basis of comity a sister state may enforce a Texas in personam order to convey realty located there just as a Texas court will enforce a similar foreign order. *McElreath v. McElreath*, 162 Tex. 190, 195, 345 S.W. 722, 725 (1961). For the effect given to a California in personam order in *Rozan v. Rozan*, 49 Cal. 2d 322, 317 P.2d 11 (1957), to achieve division of foreign realty purchased with community property, see *Rozan v. Rozan*, 150 Mont. 121, 431 P.2d 870 (1967), and *Rozan v. Rozan*, 129 N.W.2d 694 (N.D. 1964). See also Note, *Community Property in a Common Law Jurisdiction: A Seriously Neglected Area of the Law*, 16 WASHBURN L.J. 77 (1976).

111. In *Fox v. Fox*, 559 S.W.2d 408 (Tex. Civ. App.—Austin 1977, no writ), the appellate court acceded to the argument of the respondent not subject to in personam jurisdiction that the trial court lacked jurisdiction to affect the conservatorship of the children, who may never have been in Texas, but apparently rejected the argument that jurisdiction was lacking to order the petitioner to support the children.

112. TEX. FAM. CODE ANN. § 3.26(a)(1) (Vernon Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964). See Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process is Due*, 30 SW. L.J. 747 (1976). See also *Fox v. Fox*, 559 S.W.2d 408 (Tex. Civ. App.—Austin 1977, no writ); *Scott v. Scott*, 554 S.W.2d 274 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

113. See *Scott v. Scott*, 554 S.W.2d 274 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Layton v. Layton*, 538 S.W.2d 642 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.); Note, *supra* note 18.

114. 554 S.W.2d 274 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

115. TEX. FAM. CODE ANN. § 3.26(a)(1) (Vernon Supp. 1978).

116. 554 S.W.2d at 278. See also *Layton v. Layton*, 538 S.W.2d 642 (Tex. Civ. App.—San Antonio 1976, no writ), cited in Note, *supra* note 18.

117. Some of the tax pitfalls in such arrangements are indicated in du Canto, *Divorce Settlements*, 17 FAM. L. NEWSLETTER No. 4, Summer 1977, at 1. See *Deyoe v. Commissioner*, 66 T.C. 904 (1976); *Carriers v. Commissioner*, 64 T.C. 959 (1975); Rev. Rul. 76-146, 1976-1 C.B. 144; Rev. Rul. 76-83, 1976-1 C.B. 213.

118. 554 S.W.2d 137 (Tex. 1977); see text accompanying notes 128-40 *infra*.

imously rejected the idea of such severance.¹¹⁹ The *Garrison* cases¹²⁰ and *Austin v. Austin*¹²¹ were suits for divorce in which dismissal was requested because one of the spouses died during the proceedings. In the *Garrison* proceedings an order of divorce was entered, but division of property was postponed. The consequence was that no final judgment had been entered and the suit had abated due to the death of a party. In *Austin*, however, the court had made an oral adjudication of its decision regarding the manner of division, as well as a docket entry that the divorce was "granted as prayed for."¹²² The appellate court concluded that this constituted a final judgment for divorce and a division of property.¹²³ Thus, the crucial issue in determining whether a cause of action can be dismissed upon the death of a spouse is whether the court rendered a final judgment.¹²⁴

With respect to property division, the court must hear the evidence concerning the property before ordering its division. In *Rutherford v. Rutherford*,¹²⁵ for instance, one judge heard the evidence and another made the decision. Here a clear deprivation of property without due course of law occurred inasmuch as the appellant was denied the opportunity to be heard.¹²⁶ Somewhat startlingly, a due course of law argument was relied on in *Eggemeyer* where the majority of the Supreme Court of Texas held that divestiture of title to separate real property was an unconstitutional exercise of power on the part of a divorce court.¹²⁷ If the divestiture of title to separate property is unconstitutional as a deprivation of a vested right, it

119. *Garrison v. Texas Commerce Bank*, 560 S.W.2d 451 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ), a sequel to *Garrison v. Mead*, 553 S.W.2d 25 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Adam v. Stewart*, 552 S.W.2d 536 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); *Campbell v. Campbell*, 550 S.W.2d 164 (Tex. Civ. App.—Austin 1977, no writ); *Reed v. Williams*, 545 S.W.2d 33 (Tex. Civ. App.—San Antonio 1976, no writ). After judgment the issues are, in effect, severable if an appeal is taken only with respect to property division and not on the granting of the divorce itself. See, e.g., *Piro v. Piro*, 327 S.W.2d 335 (Tex. Civ. App.—Fort Worth 1959, writ dismissed). For a complete discussion of non-divestiture of separate property in a divorce action in Texas see Note, *Division of Separate Real Property in Divorce Action: Eggemeyer v. Eggemeyer*, 31 Sw. L.J. 934 (1977).

120. *Garrison v. Texas Commerce Bank*, 560 S.W.2d 451 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Garrison v. Mead*, 553 S.W.2d 25 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

121. 553 S.W.2d 9 (Tex. Civ. App.—Eastland 1977, writ dismissed).

122. *Id.* at 10.

123. *Id.* at 11.

124. See also *Dunn v. Dunn*, 439 S.W.2d 830 (Tex. 1969); *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).

125. 554 S.W.2d 829 (Tex. Civ. App.—Amarillo 1977, no writ). *But cf.* *Fortenberry v. Fortenberry*, 545 S.W.2d 40 (Tex. Civ. App.—Waco 1976, no writ) (no error found where due to death and subsequent appointments one district judge decided the case, another entered judgment and a third filed conclusions of law and findings of fact).

126. TEX. CONST. art. I, § 19. In some instances, however, it may be appropriate for an appellate court to remand a case for a new trial concerning disposition of a particular asset or liability in the light of prior disposition of other assets and liabilities. *McCartney v. McCartney*, 548 S.W.2d 435 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (remand limited to dealing only with federal tax liability). In *Quesada v. Quesada*, 547 S.W.2d 366 (Tex. Civ. App.—Eastland 1977, no writ), remand seemed limited merely to a more precise description, rather than a division, of realty.

127. 554 S.W.2d 137 (Tex. 1977). The response of the dissenting opinion to this argument of "unconstitutional taking of private property and the gift of it to another person without a justifying public purpose" is acerbic: "If this [constitutional] rule applies in the instant case to prohibit the divestiture of one spouse's title to separate property in order to equitably divide the property of the marriage, I suggest that the enforcement of a personal injury judgment is similarly prohibited." *Id.* at 148.

also follows that a divestiture of any part of a spouse's community property, which is similarly vested, is also unconstitutional. No member of the court, however, seemed willing to carry constitutional logic this far.

In *Eggemeyer*¹²⁸ the long wrangle over the proper construction of section 3.63 of the Texas Family Code was finally resolved. The court relied on the further constitutional argument that the definition of separate property in article XVI, section 15, is exclusive and hence an award of one spouse's separate property to the other is forbidden. This literal interpretation of the constitutional definition is, however, out of step with the court's approach when it last examined that provision.¹²⁹

Although these constitutional arguments were offered in support of the conclusion reached by the court, the decision of the court rests primarily on the legislative history and internal construction of the Family Code. First, the court pointed out that the legislature did not intend to change the prevailing law when section 3.63 was enacted.¹³⁰ Secondly, the provisions of section 14.05(a) complement those of section 3.63 in providing that a spouse's property may be administered, not divested, to discharge the duty of child support. Finally, the majority of the court relied on the statutory language that empowers the divorce court to divide "the estate of the parties."¹³¹ The court concluded that the reference to "estate" in the singular denotes only the community estate.¹³² The court thereby tacitly overruled the interpretation in *Hedtke v. Hedtke*¹³³ that "estate" means "property." One may infer from the court's language in *Eggemeyer*¹³⁴ that it limits the holding in *Hedtke*¹³⁵ to permit utilization of a separate homestead for the support of children during their minority.¹³⁶ The court, however, did not specifically overrule the award in *Hedtke* of the husband's separate homestead to the wife for life. But when the wife has no minor children in her custody, an award of the husband's separate homestead to her is clearly contrary to *Eggemeyer* and holdings to the contrary are inferentially overruled.¹³⁷ *Eggemeyer* need not be read so broadly as to preclude the fixing of a lien on separate realty to assure payment of a monetary award ancillary to property division. The validity of this practice has been defended on the ground that such a lien is no more than a *tentative divestiture* since ultimate

128. *Id.*; see Note, *supra* note 119; Note, *Community Property—Division of Property on Divorce—Spouse Cannot be Divested of Title to Separate Real Property Under Texas Family Code § 3.63*, 9 ST. MARY'S L.J. 331 (1977); Note, *Eggemeyer v. Eggemeyer: An Exercise in Judicial Legislation?*, 14 HOUS. L. REV. 1104 (1977).

129. *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972). The court's interpretation in *Eggemeyer* harks back to *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925). The dissenting justices in *Eggemeyer* pointed out that the catalogue of exceptions to the literal interpretation are now so numerous that reliance on a literal approach is untenable. See 554 S.W.2d at 147. See also *McKnight*, *supra* note 5, at 337.

130. 554 S.W.2d at 139; see *McKnight*, *supra* note 5, at 337.

131. 554 S.W.2d at 139.

132. *Id.*

133. 112 Tex. 404, 408, 248 S.W. 21, 22 (1923).

134. 554 S.W.2d at 141-42.

135. 112 Tex. at 411, 248 S.W. at 23.

136. Use of a separate homestead for children over 18 who are unable to support themselves may possibly come within the court's analysis.

137. See, e.g., *Bush v. Bush*, 237 S.W.2d 708 (Tex. Civ. App.—Amarillo 1950, no writ); *Clark v. Clark*, 35 S.W.2d 189 (Tex. Civ. App.—Waco 1930, writ dism'd).

divestiture by foreclosure is essentially voluntary in that it may be avoided by compliance with the court's order to pay.¹³⁸

With respect to the division of separate personalty, the last statutory argument (*community estate* of the parties) and the first constitutional one (due course of law) are equally applicable to both separate personalty and separate realty, but divestiture of the former was not before the court.¹³⁹ In spite of the broad language of *Eggemeyer* which may be interpreted to preclude divestiture of separate personalty, several intermediate appellate courts have approved division of separate personalty as though *Eggemeyer* had not been decided.¹⁴⁰

Reimbursement. Although separate realty, and seemingly separate personalty, is to be dealt with on divorce only as the needs of children may demand, (1) reimbursement of the separate estate may be awarded,¹⁴¹ (2) reimbursement of the community by a separate estate may be ordered,¹⁴² and (3) the extent of the separate estate belonging to each spouse is considered in dividing the community assets and liabilities.¹⁴³ In *Hale v. Hale*¹⁴⁴ the husband asserted a right to reimbursement for the labor, talent, and industry which he had used to enhance the value of his wife's separate property. Rejecting the husband's claim, the Texarkana court of civil appeals held that there is no right of reimbursement for labor; there is only a right of reimbursement for the expenditure of funds.¹⁴⁵ The court supported this conclusion by drawing a negative inference from three supreme court cases which had considered reimbursement for funds only.¹⁴⁶ Although ascertaining the value of uncompensated labor is difficult, the right to such reimbursement should not be excluded merely because it was not claimed in past cases. The Texarkana court also rejected the husband's reliance upon the ambiguous discussion of reimbursement for management of community property in the opinion on remand in *Norris v. Vaughn*.¹⁴⁷ The supreme

138. *Smith v. Smith*, 187 S.W.2d 116, 121 (Tex. Civ. App.—Fort Worth 1945, no writ).

139. The court in *Eggemeyer* criticized the overbreadth of the language in *Hedtke* that allows divestiture of separate personalty in favor of a spouse, although that issue was not before the court in *Hedtke* either. 554 S.W.2d at 141-42.

140. *Eichelberger v. Eichelberger*, 557 S.W.2d 587, 589 (Tex. Civ. App.—Waco 1977, no writ). The court interpreted *Eggemeyer* to mean that divestiture of separate personalty upon divorce is permissible. Cf. *Musslewhite v. Musslewhite*, 555 S.W.2d 894 (Tex. Civ. App.—Tyler 1977, writ dismissed) (reaching same result without discussion of *Eggemeyer*); *Campbell v. Campbell*, 554 S.W.2d 10 (Tex. Civ. App.—Fort Worth 1977, no writ) (no discussion of *Eggemeyer*). See also *Williams v. Williams*, 537 S.W.2d 107 (Tex. Civ. App.—Tyler 1976, no writ); *Roberts v. Roberts*, 535 S.W.2d 373 (Tex. Civ. App.—Tyler 1976, no writ). In order to counteract part of the effect of *Eggemeyer* the Council of the Family Law Section of the State Bar of Texas is recommending enactment of the California concept of quasi-community property for purposes of division on divorce. Apart from the inevitable impact of such a change on the law of decedents' estates, this seems something of an overreaction.

141. *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935).

142. *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328 (1943).

143. *Bell v. Bell*, 513 S.W.2d 20 (Tex. 1974) (court considered extent of spouses' separate property in ordering division of property upon divorce).

144. 557 S.W.2d 614 (Tex. Civ. App.—Texarkana 1977, no writ).

145. *Id.* at 615.

146. *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964); *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952); *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935).

147. 278 S.W.2d 582, 584 (Tex. Civ. App.—Amarillo 1955, no writ), discussed in *Hale v. Hale*, 557 S.W.2d 614, 615-16 (Tex. Civ. App.—Texarkana 1977, no writ).

court's prior opinion in *Norris*,¹⁴⁸ however, did not reject reimbursement for labor as a general proposition.

Norris involved a situation in which a partnership to which the husband belonged prior to marriage acquired property during marriage through the expenditure of partnership funds and the skill of the individual partners. Putting aside the use of funds, which were treated as reimbursable,¹⁴⁹ the court¹⁵⁰ imputed the efforts of a partner in acquiring property for their partnership to the husband. By so doing, the court attributed the partner's skill and talent to the husband and thus to the community.¹⁵¹ Therefore, in *Norris*, a dispute between the husband and the wife's heir with respect to property acquired by the partnership, there was nothing to reimburse on behalf of the community. Community efforts had contributed to community acquisition. To speak of reimbursement in that context was meaningless. But if the husband had used his community efforts to enhance the value of the wife's separate property, as the husband did in *Hale*, allowing reimbursement in favor of the community would be appropriate just as allowing reimbursement of separate funds expended for community property enhancement would be proper.¹⁵² In the earlier opinion in *Welder v. Lambert*¹⁵³ the supreme court specifically referred to reimbursement for "labor or funds" expended.¹⁵⁴ That was a case where a right of reimbursement was claimed for the efforts expended by a spouse for the benefit of his own separate estate.

Factors Affecting Division. Various factors¹⁵⁵ affect the division of prop-

148. 152 Tex. 491, 260 S.W.2d 676 (1953), *rev'g* 256 S.W.2d 156 (Tex. Civ. App.—Amarillo 1952).

149. It cannot be determined from the reports whether the right of reimbursement was being claimed by the partnership or by the husband directly. The end result was that the husband was asserting a right of set-off to the claim of the wife's heir to community property held by him.

150. 152 Tex. at 500, 260 S.W.2d at 682.

151. When *Norris* was decided Texas adhered to the aggregate, as opposed to the entity, theory of partnership. Nonetheless, the court at times alluded to the partnership, which was formed before the husband's marriage, as a separate property interest. At that time, however, only partnership property acquired before marriage would have had a separate character, and only to the extent of the husband's undivided interests therein. Property acquired by the partners during marriage would have been community property insofar as it represented the husband's share therein as a consequence of his efforts as a partner. Today Texas adheres to the entity partnership theory. Under this approach, if a partnership is formed prior to marriage, the husband's share in the partnership remains a separate property interest during the marriage. The community may, however, have a right of reimbursement for the value of the husband's community efforts used to enhance the value of his separate partnership interest. With respect to a partnership entered into during marriage today, the community has an interest in the partnership but not in specific partnership property. On dissolution of the partnership or sale of the partnership interest, the value of that interest can be realized.

152. It is readily apparent that reimbursement for separate labor does not exist in this context, because separate labor produces community gains.

153. 91 Tex. 510, 44 S.W. 281 (1898).

154. *Id.* at 526, 44 S.W. at 287.

155. For a discussion of Texas law on criteria, standards, and division of property see McKnight, *supra* note 21, at 433. See also Pena, *Outline brief: division of marital property*, 12 TRIAL LAW. F. No. 3, 1978, at 10, 12. For a more general treatment see Foster & Freed, *From a Survey of Matrimonial Law in the United States: Distribution of Property Upon Dissolution*, 3 COMMUNITY PROP. J. 231 (1976); Foster, *Pensions and Marital Property* 17 FAM. L. NEWSLETTER No. 4, Summer 1977, at 6.

erty: disparate earning capacity,¹⁵⁶ cash flow,¹⁵⁷ attorney's¹⁵⁸ and auditor's fees,¹⁵⁹ consequences of a marriage contract,¹⁶⁰ disposition of the homestead,¹⁶¹ and tax liability.¹⁶² Yet courts have not focused on the need for a rational approach to the property and claim disposition on marital dissolution.

Although Texas law has provided equitably, if not altogether rationally, for division of the community estate on divorce, it has failed to provide for the innocent spouse when there is little, if any, community property to divide upon dissolution. Although the Family Law Section of the State Bar of Texas has recommended legislation that provides a discretionary readjustment for up to five years, the legislature has not favored this suggestion.¹⁶³ Since the criteria for such an allowance have not been spelled out or explained, the legislature has hesitated to leave the matter to the discretion of the judiciary. Nevertheless, Texas law would be improved by such an addition, if proper safeguards against abuse can be formulated, and if a proper juridical basis can be provided to compensate an injured spouse.

Since the adoption of the first Texas divorce act in 1841,¹⁶⁴ Texas law has provided temporary alimony to the wife, and since 1969 to the husband,¹⁶⁵ in recognition of the right to spousal support during marriage. Because the marital bond was not severed by judicial separation, the ecclesiastic courts had granted the innocent wife continued support, called alimony. When the secular courts began to grant complete dissolution of marriage, they engrafted the concept of alimony onto secular divorce, usually in the form of a support for the ex-wife until remarriage. Such awards were based upon the fault of the husband, but as the name of the relief implies, it was an adaptation of an ecclesiastical institution that had lost touch with its rational basis, that is, the provision for continued support *during* marriage. In spite of frequent complaints about its use, the institution has been adopted in all

156. *Bokhoven v. Bokhoven*, 559 S.W.2d 142 (Tex. Civ. App.—Tyler 1977, no writ); *Clay v. Clay*, 550 S.W.2d 730, 734 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Smallwood v. Smallwood*, 548 S.W.2d 796 (Tex. Civ. App.—Waco 1977, no writ).

157. *Jackson v. Jackson*, 552 S.W.2d 630, 632 (Tex. Civ. App.—Austin 1977, no writ).

158. *Mills v. Mills*, 559 S.W. 2d 687 (Tex. Civ. App.—Fort Worth 1977, no writ); *Trevino v. Trevino*, 555 S.W.2d 792, 802 (Tex. Civ. App.—Corpus Christi 1977, no writ); *Gwartney v. Dahlin & Fitch*, 551 S.W.2d 781, 782 (Tex. Civ. App.—Fort Worth 1977, no writ); *Haggard v. Haggard*, 550 S.W. 2d 374, 379 (Tex. Civ. App.—Dallas 1977, no writ); *Fortenberry v. Fortenberry*, 545 S.W. 2d 40 (Tex. Civ. App.—Waco 1976, no writ); Comment, *Award of Attorney's Fees in Divorce Litigation in Texas*, 13 HOUS L. REV. 1016 (1976). For tax considerations see *Jimmie T. Jernigan v. Jernigan*, 1975-32 T.C.M. (P-H) ¶ 75,132 (1975); Brock, *Statutory Attorney Fees in Texas*, 40 TEX. B.J. 139, 142 (1977) (where a very questionable comment on § 3.65 of the Texas Family Code was made); Note, *Court Awarded Attorneys' Fees in Divorce: "Necessities" or "Factors in Property Division"?*, 29 BAYLOR L. REV. 172 (1977).

159. *Clay v. Clay*, 550 S.W.2d 730, 735 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

160. *Huff v. Huff*, 554 S.W.2d 184 (Tex. Civ. App.—Waco 1977, writ dismissed).

161. *Delaney v. Delaney*, No. 1724 (Tex. Civ. App.—Houston [14th Dist.] Jan. 18, 1977, no writ). The court may partition the community homestead and sell it to achieve partition, but it cannot order that proceeds be applied to general debts.

162. *McCartney v. McCartney*, 548 S.W.2d 435 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (court remanded case to trial court for sole purpose of determining appropriate disposition of parties' respective income tax liabilities).

163. See Adams, *Proposed Revisions of the Family Code*, 37 TEX. B.J. 1159, 1162 (1974).

164. 1841 Tex. Gen. Laws, An Act Concerning Divorce and Alimony, §§ 1-14, at 19-22, 2 H. GAMMEL, LAWS OF TEXAS 483-86 (1898).

165. TEX. FAM. CODE ANN. § 3.59 (Vernon 1975).

states except Texas and Pennsylvania¹⁶⁶ and in a very small way in Delaware and North Carolina.

Nevertheless, there is no sound reason that support, as such, should continue after dissolution of marriage. If there is some reason in law for granting a monetary judgment on divorce, that reason should be identified for what it is. The social purpose advanced to defend alimony in many states—that it provides for the needy, unskilled and lazy—cannot be rationally justified in a legal system that recognizes absolute dissolution of marriage and does not discriminate because of sex.¹⁶⁷ If, under the circumstances, a breach of obligation has occurred which should be compensated as a matter of law, an award of damages rather than support should be made. It is incongruous that damages for breach of an executory contract to marry are assessed on the usual grounds for breach of contracts generally¹⁶⁸ whereas liability for breach of an executed contract of marriage is limited in Texas to the accumulated assets of the partnership.¹⁶⁹

Until 1970 Texas divorces were grounded almost wholly on fault. As long as this was so, the reason underlying disposition of claims as between the spouses went unquestioned because the juridical concepts of fault and breach are so closely related. Because no-fault divorce has become the usual practice¹⁷⁰ since its inception in 1969, justifying disposition of claims on the basis of fault is difficult. Texas law is therefore faced with a choice: either (1) to treat marital claims as well as divorce as unrelated to fault and to divide the related assets, liabilities, and claims accordingly; or, (2) to devise a rational approach to the disposition of claims unrelated to the grounds for divorce. Pursuit of the first alternative logically leads to an equal division of common property with a set-off for reimbursement and costs of the process of dissolution. The second alternative points to a rational basis for disposition of claims under ordinary principles of breach of contract.¹⁷¹

Pursuing the second alternative further, legislative authorization of dissolution of status does not necessarily dispose of rights arising from a breach of the marital contract. The concepts of dissolution and breach are not necessarily mutually dependent. Indeed, as to the latter, the state is constitutionally forbidden to interfere with contractual obligations in general.¹⁷² Although Texas courts assess damages for breach of contract in a manner similar to that used for disposition of claims on divorce, the two are not quite the same. Nor are the consequences always the same even if the

166. In Pennsylvania alimony is awarded only for the support of an insane ex-spouse.

167. TEX. CONST. art. I, § 3.

168. For a recent non-Texas case see *Stanard v. Bolin*, 88 Wash. 2d 614, 565 P.2d 94 (1977).

169. If such a limitation is regarded as an implied term on entering into a Texas marriage, one might look otherwise at the situation. But it has never been suggested that there is such an implied term. Texas courts have tended to respond coolly to the argument that terms limiting dissolution are implied in foreign marriages. See *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), *cert. denied*, 423 U.S. 928 (1975).

170. It is asserted that a divorce court may make a discretionary choice in granting a divorce on grounds of fault or no-fault. *Clay v. Clay*, 550 S.W.2d 730 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

171. In response to *Marvin*, Kurtz poses a pointed question: If contractual damages are to be awarded for the breakdown of a meretricious relationship, why not on the occasion of divorce? Kurtz, *supra* note 3, at 122-23.

172. TEX. CONST. art. I, § 16.

standards are similar. A striking difference in consequences arises from the fact that the division of property is the sole means of disposing of marital claims. Hence the effectiveness of the remedy is limited by the amount of property on hand. This approach obviously limits appropriate relief in those cases when the value of the property will not adequately compensate for the consequences of breach.

What is suggested as an alternative is not an expansion of the concept of equitable division of property in the sole discretion of the judge.¹⁷³ Rather, the ordinary principles of breach of contract should be applied, with due attention to all causes of breach, attempts to avoid breach, and efforts made to mitigate damages once breach is inevitable. The shift from an equitable division approach to a more rational breach of contract approach will require considerable readjustment in judicial analysis. Under the suggested analysis the spouses' disparity of earning capacity and needs should not be considered in measuring contractual damages, unless related to the contract and its breach. On the other hand, the claimant's efforts to avoid breach and to mitigate the consequences of breach should be considered. Laziness and helplessness are not acceptable grounds for seeking damages for breach of contract. In fact, such behavior may be a factor contributing to the breach or may even be its direct cause. Fault in breach cannot be rewarded. Instead, fault must be dealt with in reaching a settlement of claims and division of property just as it is dealt with in resolving other types of breach of contract and partnership dissolution. Use of a breach of contract analysis to dispose of marital claims is facilitated by the realization that contracts between spouses entered into before or during marriage are judicially enforceable.¹⁷⁴ Further, Texas courts have never applied the principle of interspousal immunity to claims for misapplication of funds during marriage.¹⁷⁵ Since the Supreme Court of Texas has held that the principle of interspousal immunity is no longer applicable to intentional torts,¹⁷⁶ the joinder of such damage claims in divorce cases is likely to hasten acceptance of a breach of contract analysis in solving all interspousal disputes on dissolution. Moreover, for some time the award of a money judgment to one spouse in order to equalize shares in property division has been customary practice.¹⁷⁷ Further, even in the absence of adequate property to divide, the Dallas court of civil appeals has approved a money judgment as compensation for culpable dissipation of marital assets.¹⁷⁸

If there is no community property to be divided, there is no reason in Texas law why an innocent spouse should not be awarded a money judg-

173. See text accompanying note 163 *supra*.

174. Claims based on interspousal contracts were sometimes recognized even when married women suffered under disabilities of coverture. See *Ryan v. Ryan*, 61 Tex. 473, 474, 476 (1884). At any rate, use of property of one spouse by the other is subject to reimbursement upon dissolution of the marriage. See also *Padgett v. Padgett*, 487 S.W.2d 850 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.), *commented upon* in *McKnight*, *supra* note 21, at 454-55.

175. See, e.g., *Stramler v. Coe*, 15 Tex. 211 (1855); *Mahoney v. Snyder*, 93 S.W.2d 1219 (Tex. Civ. App.—Amarillo 1936, no writ); *Coss v. Coss*, 207 S.W. 127 (Tex. Civ. App.—San Antonio 1918, no writ).

176. *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977), overruling the principle enunciated in *Nickerson & Matson v. Nickerson*, 65 Tex. 281 (1886). See Note, *Abolition of the Interspousal Immunity in Community Property States*, 17 Sw. L.J. 480 (1963).

177. See cases cited in *McKnight*, *supra* note 21, at 438 n.151.

178. *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. Civ. App.—Dallas 1974, no writ).

ment for breach of contract. On the other hand, when community assets are available, they may be divided so that the innocent spouse is given all or a larger share of them in lieu of a money judgment for breach of contract. If a preponderance of the evidence does not fix responsibility for breach on either spouse to the exclusion of the other, the court should leave the parties where it finds them and divide the community property equally, rather than equitably. In that situation need and disparity of earning power would be beside the point.

Although it is contrary to the holding¹⁷⁹ and rationale¹⁸⁰ of *Eggemeyer* to award the separate property of one spouse to the other, a money judgment for breach of contract may be awarded against a spouse who is guilty of breach and that judgment may be enforced against separate property as in the case of any other judgment. Such judgments would be no more, and might possibly be somewhat less, vulnerable to the effects of bankruptcy discharge than are property divisions on divorce.¹⁸¹

Appeal. As a general rule, the voluntary acceptance of financial benefits under a decree dividing property on divorce bars an appeal from the decree. In *Carle v. Carle*,¹⁸² however, the Supreme Court of Texas held that when benefits are accepted under financial duress, appeal is not precluded by acquiescence.¹⁸³ In the absence of imposition, however, mere possession of benefits may constitute a bar to appeal within the rule.¹⁸⁴ Consumption of the benefits of a property division also precludes pursuance of a bill of review.¹⁸⁵

Disputes After Divorce. Once a couple is divorced, their community property becomes a tenancy in common¹⁸⁶ and the couple's responsibility toward the property *inter se* is determined by the ordinary rules governing tenants in common. In *McKean v. Thompson*¹⁸⁷ an ex-husband sought to recover from his former wife expenses attributable to her part of the former community's share in a joint venture interest. The court rejected the claim for liability undertaken without the ex-wife's consent. The ex-husband was, however, entitled to a credit on the books of the venture for his contribution, and he would be entitled to an allowance for his contribution on distribution of assets; if the assets should be insufficient to cover liabilities, the risk would fall on the contributing ex-spouse.

A property settlement recital that the properties mentioned constitute all the community property is not determinative of whether there is property

179. As to separate realty.

180. As to separate personalty.

181. See text accompanying notes 212-16 *infra*.

182. 149 Tex. 469, 234 S.W.2d 1002 (1950).

183. See *Trevino v. Trevino*, 555 S.W.2d 792 (Tex. Civ. App.—Corpus Christi 1977, no writ). See also McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 111 (1977).

184. *Haggard v. Haggard*, 550 S.W.2d 374 (Tex. Civ. App.—Dallas 1977, no writ). See also *O'Brien v. Gibbs*, 555 S.W.2d 199 (Tex. Civ. App.—Dallas 1977, no writ).

185. *Biggs v. Biggs*, 553 S.W.2d 207 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ *dism'd w.o.j.*).

186. *Martin v. Flener*, 543 S.W.2d 756 (Tex. Civ. App.—Tyler 1976, writ *ref'd n.r.e.*).

187. 555 S.W.2d 136 (Tex. Civ. App.—Dallas 1977, no writ).

left undivided on divorce and hence a tenancy in common to partition later.¹⁸⁸ Contingent community property undivided on divorce is subject to partition once the interest has accrued. In *Vibroch v. Vibrock*,¹⁸⁹ which involved an asserted community property interest in an insurance agent's renewal commissions unaccrued on divorce, the court did not reach the issue of partition because a partitionable interest had not been proved.¹⁹⁰ But in *Taggart v. Taggart*¹⁹¹ the Supreme Court of Texas determined that contingent community property rights to military retirement benefits left undivided on divorce but since accrued, although not matured, were subject to partition.¹⁹² In *Thibodeaux v. Thibodeaux*¹⁹³ the ex-wife joined the ex-husband's employer in a suit to partition employee retirement benefits. The appellate court held that the trial court had properly dismissed the employer as a party since the ex-wife would be adequately protected by the statute¹⁹⁴ that requires a private employer who has notice of a claim to pay the claimant even if the employee has already been paid. In contrast, in *Collida v. Collida*,¹⁹⁵ a divorce case involving a public retirement fund in which the trustee indicated that benefits would not be divided between the spouses unless ordered by the court, the court ordered the trustee as a party to the suit to make payments directly to the ex-wife.

With respect to federal retirement benefits, courts have generally ordered the recipient to pay the ex-spouse a share of the benefits as received. In the Fifth Circuit Court of Appeals¹⁹⁶ a Texas ex-wife, armed with such an order, was unsuccessful in her attempt to garnish the Army Finance and Accounting Center for her share. She relied on the 1974 federal statute¹⁹⁷ providing that "the United States . . . shall be subject . . . to legal process brought for the enforcement [of] alimony payments." The court rejected her contention on the ground that the obligation which she sought to enforce could not be termed "alimony" under Texas law. The El Paso court of civil appeals, however, has rejected the reasoning of the Fifth Circuit¹⁹⁸ and interpreted

188. *Martin v. Flener*, 543 S.W.2d 756, 759 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (proceeding on the death of an ex-spouse). See also *Potter v. Potter*, 545 S.W.2d 43 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); *Parr v. White*, 543 S.W.2d 440 (Tex. Civ. App.—Corpus Christi), writ ref'd n.r.e. per curiam, 559 S.W.2d 344 (Tex. 1977), noted in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 130 (1977).

189. 549 S.W.2d 775 (Tex. Civ. App.—Fort Worth), writ ref'd n.r.e. per curiam, 20 Tex. Sup. Ct. J. 499 (July 27, 1977).

190. See text accompanying note 52 *supra*; *Hicks v. Hicks*, 546 S.W.2d 71 (Tex. Civ. App.—Dallas 1976, no writ). Where a portion of an ex-husband's workmen's compensation benefits recovered after divorce were sought by the ex-wife, the court held that the burden was upon the ex-wife to show that the benefits recovered included a community element. See also *Echols v. Austron, Inc.*, 529 S.W.2d 840 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), with respect to an ex-spouse's bonus received after divorce.

191. 552 S.W.2d 422 (Tex. 1977).

192. In this instance of an incremental acquisition occurring during a period of both single and marital status, the court determined that the community element in the benefits was measured by the ratio of the number of months in service while married to the total number of months in service. *Id.* at 424.

193. 546 S.W.2d 662 (Tex. Civ. App.—Beaumont 1977, no writ).

194. TEX. REV. CIV. STAT. ANN. art. 5221(d) (Vernon 1971).

195. 546 S.W.2d 708 (Tex. Civ. App.—Beaumont 1977, writ dismissed).

196. *Marin v. Hatfield*, 546 F.2d 1230 (5th Cir. 1977).

197. 42 U.S.C. § 659 (Supp. V 1975); see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 125 (1977).

198. *United States v. Stelter*, 553 S.W.2d 227 (Tex. Civ. App.—El Paso 1977, writ granted).

"alimony" as any award by a divorce court.¹⁹⁹ If this conclusion is sustained, federal anti-assignment statutes,²⁰⁰ which have barred enforcement of awards of federal retirement benefits against the United States, will finally have been breached. The use of the correlative state anti-assignment act²⁰¹ as an impediment also appears to have been eliminated in *Collida*.²⁰²

During the survey period several cases dealt with post-divorce enforcement²⁰³ of property settlement and contractual alimony provisions incorporated in divorce decrees by agreement. In *Vickers v. Vickers*²⁰⁴ the agreed judgment included a provision that one spouse pay the utility bills of the other as long as the latter should occupy the former family home. The provision was, of course, enforceable as a contract,²⁰⁵ and the court had no difficulty in so treating it. If one ex-spouse seeks to enforce some aspect of a property settlement agreement, the other is entitled to plead a counterclaim for breach of other provisions.²⁰⁶ In *Crouch v. Crouch*²⁰⁷ an ex-wife sued in federal court for breach of a separation agreement. The court rejected the argument that federal courts should abstain from intervention in a domestic relations proceeding because the action was primarily one for breach of contract to which the domestic overtones were subsidiary.²⁰⁸ In addition to the arrears which she sought, the ex-wife was also allowed to recover damages for anticipatory breach in the value of future payments as a lump sum.²⁰⁹ Although the agreement contained a provision that future incapacity

199. The El Paso court relied on *Williams v. Williams*, 338 So. 2d 869 (Fla. Dist. Ct. App. 1976), a Florida case involving a Texas divorce decree. The Florida court had relied on a rather garbled version of *In re Nunnally*, 506 F.2d 1024, 1026-27 (5th Cir. 1975), in which the Fifth Circuit treated an award for reimbursement on divorce as "alimony" for purposes of non-dischargeability under § 17 of the Bankruptcy Act, 11 U.S.C. § 35(a)(7) (1970). For a brief discussion of *Nunnally* and its progeny see McKnight, *supra* note 21, at 476-77.

200. 31 U.S.C. § 203 (1970) and related special statutes, e.g., that barring assignment of a military serviceman's pay, 37 U.S.C. § 701(c) (1970). See McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 45-46 (1969).

201. TEX. REV. CIV. STAT. ANN. art 6243(e), § 13 (Vernon 1970).

202. 546 S.W.2d 708 (Tex. Civ. App.—Beaumont 1977, writ dismissed). There the pensioners' trustee sought to rely on *Prewitt v. Smith*, 528 S.W.2d 898 (Tex. Civ. App.—Austin 1975, no writ), which was not regarded as controlling. But see *Addison v. Addison*, 530 S.W.2d 920 (Tex. Civ. App.—Houston [1st Dist.] 1975), holding a state instrumentality performing governmental functions is exempt from garnishment for an award of a divorce court.

203. With respect to enforcement in general see Fullenweider & Feldman, *Domestic Relations Judgments in Texas: Draftsmanship and Enforceability*, 18 S. TEX. L.J. 1 (1977). Two child support cases supply precedents with respect to contempt that are also applicable in matters of property. In *Ex parte West*, 559 S.W.2d 674 (Tex. Civ. App.—Dallas 1977, no writ), the court held that a new district court which replaces an old domestic relations or juvenile court is the same court for the purposes of enforcing orders of the old court by contempt. In *Ex parte Oden*, 556 S.W.2d 573 (Tex. Civ. App.—Dallas 1977, no writ), however, the court pointed out that a court to which a matter is transferred under TEX. FAM. CODE ANN. § 11.05 (Vernon 1975) has no power to enforce an order of the transferring court by the process of contempt. The most significant aspect of "continuing jurisdiction" in the suit for divorce, as distinguished from one affecting the parent-child relationship, is the power of the court to enforce by citation for civil contempt.

204. 553 S.W.2d 768 (Tex. Civ. App.—Beaumont 1977, no writ).

205. *Id.* at 770. In *United States v. Rye*, 550 F.2d 682 (1st Cir. 1977), the court held that a federal tax lien against the ex-wife might attach to her right to receive support payments from the ex-husband.

206. *Smith v. Carr-Smith*, 551 S.W.2d 799 (Tex. Civ. App.—Fort Worth 1977, no writ).

207. 566 F.2d 486 (5th Cir. 1978).

208. *Id.* at 487. See generally McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 67, 75 (1976).

209. See McKnight, *supra* note 21, at 413 & n.349. Damages were also awarded for anticipatory breach in *Atkinson v. Atkinson*, 560 S.W.2d 200 (Tex. Civ. App.—Amarillo 1977, no writ), but no point of error was raised as to that issue.

of the ex-husband would relieve him of future liability, the court considered this eventuality too speculative to bar recovery. If the petitioning ex-spouse chooses to rely merely on the prior judgment rather than the settlement contract, the Amarillo court of civil appeals has invoked, under such facts, the principle of collateral attack on a judgment to preclude recourse to extrinsic evidence.²¹⁰ If a divorce decree is entered on the basis of an agreement that a spouse keep a life insurance policy in force in favor of the children and the insured later changes the beneficiary, the right of the children is protected in equity.²¹¹

Ex-spouses who must satisfy liabilities under property settlements and divorce decrees continue to seek the relief of discharge in bankruptcy. Among those debts which are not subject to discharge under section 17 of the Bankruptcy Act "are those for alimony due or to become due, or for maintenance or support of a wife. . . ." ²¹² Those debts related to property division are, however, dischargeable. In federal circuits where state adjudication of property division and grants of alimony are dealt with as distinct elements in divorce decrees,²¹³ there is a tendency to draw a sharp line between the two—discharging the former and protecting the latter. Following the approach of the Fifth Circuit,²¹⁴ lower federal courts have tended to find an "alimony substitute" in most cases and have therefore refused to grant a discharge.²¹⁵ This disparity of approach seems to presage resolution of conflicts by the Supreme Court of the United States. That likelihood should be heightened by the recent holding of a Rhode Island bankruptcy court that the bankruptcy bar to discharge is too sexist to pass constitutional muster.²¹⁶

IV. MANAGEMENT AND LIABILITY

Interspousal gifts. Section 2036 of the Internal Revenue Code provides that if one spouse makes an inter vivos gift to the other, to the extent that income from the gift is retained by the donor, that part of the gift is

210. *Atkinson v. Atkinson*, 560 S.W.2d 200 (Tex. Civ. App.—Amarillo 1977, no writ).

211. *Tomlinson v. Lockey*, 555 S.W.2d 810 (Tex. Civ. App.—El Paso 1977, no writ); *Roberts v. Roberts*, 560 S.W.2d 438 (Tex. Civ. App.—Beaumont 1977, no writ); *Wunsche v. Equitable Life Assurance Soc'y*, 551 S.W.2d 84 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.); *O'Neill v. Connecticut Mut. Life Ins. Co.*, 544 S.W.2d 741 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

212. Bankruptcy Act § 17(a), 11 U.S.C. § 35(a) (1970).

213. See *In re Woods*, 561 F.2d 27 (7th Cir. 1977); *Cox v. Cox*, 543 F.2d 1277 (10th Cir. 1976); *Nichols v. Hensler*, 528 F.2d 304 (7th Cir. 1976); Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten*, 52 IND. L.J. 469 (1977). Courts in other circuits have also wrestled with distinguishing what the divorce courts *term* a particular award and what it actually *is*. See *In re Woods*, 561 F.2d 27 (7th Cir. 1977). See also *In re Smith*, 436 F. Supp. 469 (N.D. Ga. 1977).

214. *In re Nunnally*, 506 F.2d 1024 (5th Cir. 1975), discussed in *McKnight*, *supra* note 21, at 476; *McKnight*, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 88-89 (1976); *McKnight*, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 92 (1975). See also *In re Smith*, 436 F. Supp. 469 (N.D. Ga. 1977).

215. See, e.g., *McKnight*, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 89 & nn.154, 155 (1976). The Beaumont court of civil appeals also followed the approach of the Fifth Circuit. *Matthews v. Matthews*, No. 8047 (Tex. Civ. App.—Beaumont, Dec. 22, 1977, no writ).

216. *In re Wasserman*, [1977] 2 BANKR. L. REP. (CCH) ¶ 66,471, discussed in *Young*, *Is There Alimony After Bankruptcy: The Wasserman Test*, 31 PERSONAL FINANCE L.Q. No. 4, 1977, at 80. See also *Meloon v. Helgemoe*, 564 F.2d 602 (1st Cir. 1977), declaring the New Hampshire rape statute unconstitutional.

includable in the donor's gross taxable estate at death.²¹⁷ In Revenue Ruling 75-504²¹⁸ the Treasury took the position that the section was applicable to the gift by a Texas husband to his wife of his *separate* property; at least it was applicable as to half the amount of the gift since, as a general rule, income generated by separate property is equally shared by the spouses as community property. In reaching this conclusion the Service failed to consider the conclusion of the Supreme Court of Texas in *Hutchinson v. Mitchell*²¹⁹ that a husband intended that all the income of a trust which he set up for his wife should be her separate property. The point has been twice reiterated by that court, once with respect to an outright interspousal gift²²⁰ and on another occasion in a dictum in a case not involving an interspousal situation.²²¹ Lower courts have reached the same conclusion.²²²

In the light of its revenue ruling, however, it is not surprising that the Treasury took the same position in a case before the tax court involving an interspousal gift of *community* property. In *Castleberry v. Commissioner*²²³ the husband had made inter vivos gifts to his wife of community securities. As to half their value the Treasury asserted that these securities were includable in the husband's estate for estate tax purposes. As a result of the gift the securities became the separate property of the wife, but since separate property generates income for the community, one-half the securities were included in the husband's gross estate. Although it is an accurate statement of Texas law to say that income of separate property is community in most instances, that principle is not necessarily applicable to this situation. Indeed, if rather than making an outright gift, a donor utilizes the trust device so that each increment of income may be perceived as a deferred receipt of the gift, it is easier to conclude that the benefit is separate property.

Nonetheless, if the gift is in trust, the federal authorities will contend that what the donee receives is *trust income*; that is, community property.²²⁴ As

217. I.R.C. § 2036.

218. Rev. Rul. 75-504, 1975-2 C.B. 363.

219. 39 Tex. 488 (1873).

220. *Strickland v. Wester*, 131 Tex. 23, 112 S.W.2d 1047 (1938).

221. *Cauble v. Beaver-Electra Ref. Co.*, 115 Tex. 1, 6, 274 S.W. 120, 121 (1925), decided the same day as *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925). In *Arnold* the court did not discuss the point at issue, but the case is, nevertheless, relied on by the Treasury in reaching its conclusion in Rev. Rul. 75-504, 1975-2 C.B. 363, and by the Tax Court in *Castleberry v. Commissioner*, 68 T.C. 682 (1977).

222. *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). *But see In re Long*, 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1976, no writ); *Mercantile Nat'l Bank v. Wilson*, 279 S.W.2d 650 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.). Compare *Commissioner v. Porter*, 148 F.2d 566, 567 (5th Cir. 1945), where, in discussing some of these cases, the court reserved judgment concerning a situation involving a specific trust provision giving the income to the beneficiary as separate property. *Id.* at 569. But a dictum in *Commissioner v. Hinds*, 180 F.2d 930 (5th Cir. 1950), *aff'g* 11 T.C. 314 (1948), *nonacquiesced in*, 1949-1 C.B. 5, is in agreement with the position taken in the Texas cases. 180 F.2d at 934.

223. 68 T.C. 682 (1977). See also *Commissioner v. Wyly*, 69 T.C. No. 17 (1977).

224. *Commissioner v. Porter*, 148 F.2d 566 (5th Cir. 1945); *Commissioner v. Wilson*, 76 F.2d 766 (5th Cir. 1935). See also *United States v. Grace*, 395 U.S. 316 (1969); *Irwin v. Gavitt*, 268 U.S. 161 (1925). Neither case involved Texas law and neither is really in point. The issue is not whether there is taxable federal income but whether the beneficiary of a trust created by another receives trust income as separate or community property.

indicated by the Texas Supreme Court in *Hutchinson*, this conclusion need not follow. The mere fact that property is received *periodically* or is shown to be the *income* from a fund does not brand it irrefutably as community. To argue that it is community, it is necessary for the tax authorities to assert that the trust beneficiary is the owner of an intermediate separate estate which, as a consequence of the gift, is the source of the income. In the case of a gift in trust the beneficiary is, therefore, said to own the equitable estate which produces the income. The fallacy of this line of reasoning is that the only measure of tangible value of that so-called equitable estate is the *income*, the true object of the donor's gift. Depending on the terms of the trust, the income beneficiary may or may not ultimately receive the trust corpus, but for the life of the trust the corpus is vested in the trustee and the beneficiary is periodically receiving deferred donations through the trustee. The trust income is, therefore, the subject matter of the gift as intended by the donor.²²⁵

Joint Tenancies. A federal estate tax case involving Louisiana spouses deals with a problem that has not been before a Texas appellate court since the enactment of the community property management statute which became effective on January 1, 1968. In *Cooper v. United States*²²⁶ a husband and wife using community funds purchased United States Series E savings bonds registered in the names of both, with the right of survivorship. The husband predeceased the wife by fifteen years. It was in respect of her estate, however, that their children claimed a deduction for their interest stemming from their father's half-share in the bonds as adjudicated by a Louisiana court following his death. Relying on *Free v. Bland*²²⁷ the federal district court denied the children any ownership interest even though one-half the value of the bonds had been properly included in the deceased husband's estate.²²⁸ In *Free* the Texas husband, as sole manager of general community funds, bought Series E bonds in the joint names of the spouses with the right of survivorship, but the husband was the survivor.

The immediate Texas background of the law with respect to joint tenancies in federal securities begins with the 1958 case *Ricks v. Smith*.²²⁹ In that case the Texas Supreme Court upheld the surviving wife's right to federal savings bonds purchased by the husband in their joint names, with a right of survivorship, pursuant to federal regulations. The holding rested on the supremacy of the federal regulations which were a part of the third-party-beneficiary contract under which the bonds were purchased.²³⁰ In 1961 the

225. This view is well illustrated by Counts, *Trust Income—Separate or Community Property*, 30 TEX. B.J. 851 (1967). Unlike many articles that appeared at the time in that journal, this was not the by-product of research for a brief in litigation. This article is a quasi-judicial decision, the conclusion of an arbitrator chosen by both parties to resolve a dispute and to render an opinion based on conclusions of law.

226. 429 F. Supp. 535 (W.D. La. 1975).

227. 369 U.S. 663 (1962).

228. I.R.C. § 2040.

229. 308 S.W.2d 941 (Tex. Civ. App.—Houston), *aff'd*, 159 Tex. 280, 318 S.W.2d 439 (1958).

230. Although the reference to this third party beneficiary element is extrapolated from the decision of the lower appellate court, 308 S.W.2d at 946, it seems justified in the light of the

court considered *Hilley v. Hilley*²³¹ which concerned corporate stock bought by the husband in the wife's presence and which were, at his direction, issued in their joint names with the right of survivorship. The wife survived and claimed full ownership of the stock. In rejecting this claim the court repudiated the authority of *Ricks*, holding that the third-party-beneficiary contract theory on which *Ricks* was said to rest was a mere blind for the survivorship agreement of the spouses; as such, it was regarded as repugnant to constitutional and statutory rules governing Texas community property law. Six weeks later, when the court again had a federal savings bond case before it in the *Free* case itself,²³² the opinion of the court of civil appeals in favor of the survivor was reversed *per curiam*. The United States Supreme Court then granted certiorari and ruled in favor of the Texas husband who, as sole manager of general community funds, had bought Series E bonds in the joint names of the spouses, with the right of survivorship.²³³ In this instance the husband survived the wife. In a dispute between the husband and the wife's heir, the Supreme Court sustained the husband's absolute right to the bonds as survivor on the grounds of federal supremacy.²³⁴ In order to borrow money, the Court said, the federal government must have unfettered right to contract with lenders in terms of survivorship in spite of state law which would have precluded such direct conversion of community property to a joint tenancy, unless "the circumstances manifest fraud or a breach of trust tantamount thereto on the part of the husband while acting in his capacity as manager of the general community."²³⁵ On remand the Supreme Court of Texas found no issue of fraud alleged, and, therefore refused the writ of error, no reversible error.²³⁶ In a later case from the State of Washington,²³⁷ the Supreme Court of the United States reiterated that a showing of fraud could preclude the application of the supremacy doctrine.

Contrary to the dismal prophecy of Justice Walker in *Hilley*,²³⁸ the Texas constructive fraud doctrine has since matured to the point²³⁹ that the husband's separate taking as survivor under his own contingent community contract with the United States Treasury would constitute a constructive fraud on his wife's estate.²⁴⁰ The fraud exception, therefore, seems to

opening remarks of Hickman, C.J., speaking for the majority of the supreme court, 159 Tex. at 280-81, 318 S.W.2d at 439-40, and those of Walker, J., speaking for the court in *Hilley v. Hilley*, 161 Tex. 569, 576-77, 342 S.W.2d 565, 569-70 (1961).

231. 161 Tex. 569, 342 S.W.2d 565 (1961).

232. *Bland v. Free*, 162 Tex. 72, 344 S.W.2d 435 (1961).

233. *Free v. Bland*, 369 U.S. 663 (1962).

234. *Id.* at 670.

235. *Id.*

236. 163 Tex. 594, 359 S.W.2d 297 (1962).

237. *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964).

238. "[I]t will usually be difficult or impossible to establish actual fraud and we do not anticipate that constructive fraud will be defined with such clarity as to provide a satisfactory standard that will insure even reasonably fair treatment to the marital partners and their estates in various situations that may arise." 161 Tex. at 578, 342 S.W.2d at 571.

239. McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 89 (1976); McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 79-80 (1974).

240. As is suggested in *Hilley*, the same result should follow with respect to a community life insurance policy contracted by the husband on the life of the wife with the husband as beneficiary, old authorities to the contrary notwithstanding. See *Martin v. McAllister*, 94 Tex. 567, 63 S.W. 124 (1901).

undermine the applicability of *Free* to the very facts that gave rise to the decision.²⁴¹ Nevertheless, if the spouse who purchases a federal survivorship bond with community funds is not the ultimate taker, or if both spouses buy a federal bond together with the right of survivorship,²⁴² the result of *Free* is still applicable since the fraud exception is inapplicable to those situations.²⁴³ In reaching that conclusion, however, it must be realized that all the arguments of *Hilley* and *Free* would be advanced in the federal context, very much akin to that of *Free*, in which the principles of *Hilley* have previously triumphed in a non-federal context. Although neither of those cases has been before a Texas appellate court, *Bowman v. Simpson*²⁴⁴ presented most of the same arguments and the Supreme Court of Texas marked it *error refused*. In *Bowman* the husband and wife maintained a federal credit union²⁴⁵ account in joint names with right of survivorship. On the husband's death the wife relied on *Free* in asserting the right to the entire fund. The Beaumont court of civil appeals rejected this contention on the ground that the federal statute on joint tenancies was not created to preempt state law but only to place federal credit unions on a par with state banking institutions. The court reasoned that since the federal government was not a party to the dispute, its interests were not involved. The strains of *Hilley* are replayed with very little variation: "[s]tate law will control in cases where the litigation is between two private parties and does not intrude upon the rights and duties of the United States."²⁴⁶ Thus, judicial reasoning has come full circle to that prevailing in January 1961 unless a clear distinction can be drawn between the federal intent in selling bonds and that of maintaining credit unions. Finally, no Texas case has dealt with the simplest of federal bond situations, that is, where one spouse has bought a bond in his or her own name alone. Since the federal Treasury Regulations state, however, that the named purchaser is "the owner,"²⁴⁷ the principle of *Free* seems to apply. On the other hand, this situation can be construed as a constructive fraud situation where the community would prevail under state and federal law.

A corollary to a spouse's right to sole management of particular community property is the right of the other spouse to claim reimbursement when the managing spouse's separate estate has been enriched at community expense. Similarly, if a spouse uses his own or the other spouse's separate

241. In light of *Wissner v. Wissner*, 338 U.S. 655 (1950), involving a National Service Life Insurance policy, *Roberts v. Roberts*, 560 S.W.2d 438 (Tex. Civ. App.—Beaumont 1977, no writ), is significant. In *Roberts* a constructive trust was fixed on the beneficiary of a policy of life insurance issued by a private company to a federal employee under federal statutory authority.

242. See, e.g., *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200 (Tex. 1974), where both spouses acted together to buy land.

243. Considerable conjecture may be entertained with respect to the management and liability status of such federal bonds both during marriage and after the dissolution of the marriage by the death of one spouse under TEX. FAM. CODE ANN. §§ 5.22, .24, .61 (Vernon 1975) and TEX. PROB. CODE ANN. § 177(b) (Vernon Supp. 1978).

244. 546 S.W.2d 99 (Tex. Civ. App.—Beaumont 1977, writ ref'd).

245. Organized under 12 U.S.C. § 1751 (1969).

246. 546 S.W.2d at 101. In *Hilley*, 161 Tex. at 577, 342 S.W.2d at 570, Walker, J., speaking for the court, asserted that "[T]he Federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved."

247. 31 C.F.R. § 315.55 (1976).

funds for the enhancement of community property, the separate estate is entitled to reimbursement.²⁴⁸ But no point has been made of those situations where the statute allows a creditor to recover against the community estate when *as between the spouses* liability might more reasonably fall on the separate estate. Although section 5.62 is provided to allow the other spouse to make such an argument at the time liability is fixed, the failure to utilize it may be excusable. If, for example, the husband is sued for commission of an intentional tort, the wife might interpose the marshalling provision of section 5.62 in order to subject the husband's separate property to the judgment creditor's execution before that of the community. But if the husband at that time has no separate property, arguing the provisions of section 5.62 would be useless. If, however, later in the marriage the husband inherits substantial separate property and subsequently dies, the wife should be able to seek reimbursement from his separate property on dissolution of the community. On the other hand, if a judgment is taken against one spouse on a *joint* obligation when the statute of limitations has run against the other,²⁴⁹ reimbursement might be sought by the spouse paying from separate property as against the community in an appropriate situation.²⁵⁰ Discharge of tax liability by one spouse for the other may also present an opportunity for the assertion of a right for reimbursement.²⁵¹

Payment by one spouse for liability incurred by the other raises no implication of gift between them. This is particularly true when liabilities are discharged in anticipation of marital dissolution by divorce. Disputes have frequently arisen involving insurance coverage of an estranged spouse for tortious liability²⁵² since liability under an insurance policy often turns on whether the tortfeasor is a member of the household of the insured.²⁵³ Although a right of reimbursement is unlikely to be involved in the subsequent division of property, the consequences of such insurance liability may have a bearing on the equitable division of the community estate.

Credit Liability. In *Suniland Furniture Co. v. Liuzza*,²⁵⁴ just prior to their divorce, a husband and wife were sued by a seller for purchases delivered to the husband. Judgment was rendered against the husband only. Summary

248. The courts have repeatedly held, however, that the use of *separate* funds for living expenses are not reimbursable by the community. See *Trevino v. Trevino*, 555 S.W.2d 792 (Tex. Civ. App.—Corpus Christi 1977, no writ).

249. In *Roper v. Jeoffrey*, 535 S.W.2d 706 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.), the statute had run against the husband but had been tolled as against the wife because she had been out of the state.

250. A claim of reimbursement against the separate property of a decedent's estate might also be asserted by a surviving spouse when only community property was sought which was paid to a stranger for tortious liability of a deceased spouse. See *Piper v. Estate of Thompson*, 546 S.W.2d 341 (Tex. Civ. App.—Dallas 1976, no writ).

251. For a discussion of some common tax liability problems see Popkin, *Deduction of Traveling Expenses by the Two-Worker Family—An Inquiry into the Role of the Courts in Interpreting the Federal Tax Law*, 55 TEXAS L. REV. 645 (1977).

252. See McCurley, *Problems of automobile insurance coverage during separation or divorce*, 11 TRIAL LAW. F. No. 2, at 18 (1976).

253. *Southern Farm Bur. Cas. Ins. Co. v. Kimball*, 552 S.W.2d 207 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.).

254. *Suniland Furniture Co. v. Liuzza*, No. 8050 (Tex. Civ. App.—Beaumont Dec. 22, 1977, no writ).

judgment was rendered in favor of the wife, and as to that judgment the plaintiff appealed. The plaintiff argued that it was owed a "community debt" by which both spouses were obligated. In rejecting this contention, the court relied on the principles of section 5.61 of the Family Code²⁵⁵ which limits liability to property subject to the management of the contracting spouse. From the brief comments of the court with respect to the facts offered by the plaintiff to rebut the wife's motion for summary judgment, it can be surmised that the plaintiff failed to allege the terms of the credit contract from which implications of mutual agency might have been indicated. All that was shown was that the husband and wife had maintained what was termed an open account with the merchant. That account was, therefore, presumably one on which the husband or the wife could make purchases on credit. More likely it was one by which purchases were billed to the husband *and* the wife. No pleadings were addressed to the terms of the account, and the wife testified that she purchased one item only and paid for it; all the rest of the purchases were made by the husband and delivered to him. Consequently, the plaintiff's reliance on *Cockerham v. Cockerham*²⁵⁶ was rejected. Nevertheless, *Cockerham*'s relevance to a fully developed fact situation with respect to the account is obvious.²⁵⁷

Fraudulent Transfer. From the point of view of a creditor of a particular spouse, a *transfer* of property by that spouse to the other in anticipation of divorce may still be challenged as fraudulent,²⁵⁸ if the transferee-spouse knowingly received a preference in respect of another creditor.

Homestead. A divorce court frequently awards occupancy of a homestead to one spouse or the other for a period of years. If there are no minor children, or other factors militating in favor of one spouse's occupying the community homestead to the exclusion of the other, the court may order sale of the home to achieve a partition. General debts, however, cannot be ordered discharged from the proceeds of such a sale.²⁵⁹

In many disputes with creditors, disagreement as to whether a particular property constitutes a homestead or not is common.²⁶⁰ The effect of the 1970 increase in urban homestead exemption, has now been fairly well accepted

255. TEX. FAM. CODE ANN. § 5.61 (Vernon 1977).

256. 527 S.W.2d 162 (Tex. 1975).

257. See Comment, *Determining the Liability of Community Property, Cockerham v. Cockerham*, 29 BAYLOR L. REV. 608 (1977).

258. In *Glasscock v. Citizen's Nat'l Bank*, 553 S.W.2d 411 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.), the assertion that the interspousal transfer was a property settlement agreement incorporated in the divorce decree was to no avail in rebutting the creditor's claim against the ex-husband. The principles of *Hawes v. Central Texas Prod. Credit Ass'n*, 503 S.W.2d 234 (Tex. 1973), are also applicable to such a situation.

259. *Delaney v. Delaney*, No. 1724 (Tex. Civ. App.—Houston [14th Dist.] Jan. 18, 1978, no writ).

260. See Comment, *Urban or Rural Homestead?*, 18 S. TEX. L.J. 145 (1976). In *re Abate*, Bk. No. W-76-213 (Bk. Ct. W.D. Tex. June 2, 1977). Inconsequential use for business purposes cannot sustain claim of business homestead.

With respect to tax exemptions on homestead see TEX. ATT'Y GEN. OP. NOS. H-1022 (1977), H-894 (1976). See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 130 n.225 (1977).

as settled.²⁶¹ A temporary change of residence does not cause a home to lose its homestead character.²⁶² Removal of a family to a new home without any intention to return to the former residence constitutes an abandonment of the earlier residence for homestead purposes.²⁶³ The burden of showing that the former home is not exempt property is, however, on the creditor. In contrast, if a homeowner attempts to set aside a conveyance of property on the ground of non-compliance with the rules of homestead conveyance, the burden of showing that the conveyed property was a homestead is upon the party who asserts that fact.²⁶⁴

That the owner's financial interest in homestead, as distinguished from any interest in the property owned by another, is a significant factor in determining the value of exempt urban realty has long been established.²⁶⁵ The same approach would seem to be applicable in computing the value of exempt personalty.²⁶⁶ That issue, however, probably will not be often encountered, except in bankruptcy proceedings. Similarly, an adjudication with respect to whether business equipment is so "reasonably necessary" as to be exempt within article 3836(a)(2) will most frequently arise in bankruptcy proceedings. In *In re Pratt*²⁶⁷ the bankruptcy court held that the bankrupt had not discharged the burden of showing that certain decorative and duplicative office furnishings²⁶⁸ were "reasonably necessary" contrary to the bankruptcy trustee's report.²⁶⁹ A bankruptcy court has also concluded that article 3836(a)(3) means precisely what it says—that only one automobile is exempt from the claims of creditors.²⁷⁰

261. *In re Bobbit*, Bk. No. 3-74-373F (5th Cir. Mar. 9, 1977); *Valley Bank v. Skeen*, No. 75-3950 (5th Cir. Apr. 30, 1976); *In re Aiken*, Bk. Nos. 75-HS-598, 75-HS-599 (Bk. Ct. S.D. Tex. Apr. 27, 1976); see McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 94-95 (1976).

262. *In re Holder*, Bk. No. 76-HS-123, 76-HS-124 (Bk. Ct. S.D. Tex. Sept. 27, 1976), *Gonzalez v. Guajardo de Gonzalez*, 541 S.W.2d 865 (Tex. Civ. App.—Waco 1976, no writ). In *Gonzales* the court also considered a widow's right to an allowance in lieu of a homestead.

263. *Norman v. First Bank & Trust*, 557 S.W.2d 797 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

264. *Sims v. Beeson*, 545 S.W.2d 262 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). For an instance of a defrauded spouse's assertion of an improper homestead sale see *Carter v. Converse*, 550 S.W.2d 322 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). Similarly, a showing of a sham sale was also involved in *In re Aiken*, Bk. Nos. 75-HS-598, 75-HS-599 (Bk. Ct. S.D. Tex. Apr. 27, 1976).

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

266. In *Levin v. Mauro*, 425 F. Supp. 205 (D. Mass. 1977), the court sidestepped this issue in applying the Massachusetts exemption statute.

267. Bk. No. 76-H-922 (Bk. Ct. S.D. Tex. July 19, 1977).

268. Several small paintings, scales of justice, statuette of Rodin's Thinker, an electric heater and an extra electric typewriter.

269. In *In re Neider*, Bk. No. 75-HS-1061 (Bk. Ct. S.D. Tex. July 19, 1976), the bankrupt's claim to office furnishings as "reasonably necessary" was sustained. But in that instance the claim was directed at items which were neither decorative nor duplicative in nature.

270. *In re Perwein*, Bk. No. A75-167 (Bk. Ct. W.D. Tex. Sept. 3, 1976), *aff'd*, (W.D. Tex. Apr. 28, 1977).