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Family Law: Husband and Wife

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FAMILY LAW: HUSBAND AND WIFE

by

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I. STATUS

Nonmarital Cohabitation. In several jurisdictions in which the doctrine of informal marriage had not developed or has been abolished, cohabitation of an unmarried man and woman has recently been recognized as giving rise to shared rights in the property accumulated during the relationship.[1] In those states this concept constitutes a substantial departure from the pre-existing practice of denying any property rights to participants in any but a formal marital relationship. The emerging concept may be based on an expressed understanding of the parties or may be implied by law. In the case of an expressed undertaking between the parties to share the gains acquired during their cohabitation, the property consequences of the relationship are those actually contracted. Indeed, even in a state that does not recognize informal marriage but recognizes expressed contracts between cohabiting couples, a contract stating that the property consequences of the relationship will be the same as those of a marriage should have the intended effect, including perhaps that of succession.[2]

In the light of permissive social attitudes toward nonmarital cohabitation[3] and the repeal of a criminal sanction against fornication,[4] there does

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1. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), *discussed in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 SW. L.J. 109, 116-19 (1978); *see* Mitchelson & Glucksman, *Equal Protection for Unmarried Cohabitors: An Insider's Look at Marvin v. Marvin*, 5 PEPPERDINE L. REV. 283 (1978); Comment, *Marvin v. Marvin: The Scope of Equity with Respect to Non-Marital Relationships*, 5 PEPPERDINE L. REV. 49 (1977); Note, *Beyond Marvin: A Proposal for Quasi-Spousal Support*, 30 STAN. L. REV. 359 (1978).

2. Rights of support (both inter vivos and post mortem) are independent of property rights in inter vivos acquisitions and those of succession. In Vogel v. Pan Am. World Airways, Inc., 450 F. Supp. 224 (S.D.N.Y. 1978), the court rejected a California woman's claim for the wrongful death of her male cohabitant in spite of *Marvin*. *See also* Hewitt v. Hewitt, 62 Ill. App. 3d 861, 380 N.E.2d 414 (1978); Kozlowski v. Kozlowski, 164 N.J. Super. 162, 395 A.2d 913 (Super. Ct. Ch. Div. 1978); McCullon v. McCullon, 410 N.Y.S.2d 226 (App. Div. 1978); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976).

For some thoughtful comments on marriage and marriage-like institutions in the context of comparative law, see M. GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE 4-15 (1977).

3. "The 1970 census indicates that today perhaps eight times as many couples are living together without being married as cohabited ten years ago." Marvin v. Marvin, 18 Cal. 3d 660, 665 n.1, 557 P.2d 106, 109 n.1, 134 Cal. Rptr. 815, 818 n.1 (1976) (citing Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226 (1974)). *See also* Willemsen, *Justice Tobriner and the Tolerance of Evolving Lifestyles: Adapting the Law to Social Change*, 29 HASTINGS L.J. 73 (1977).

4. 1973 Tex. Gen. Laws ch. 399, § 3(a), at 883. As another example, the state of Loui-

not seem to be any impediment in Texas to the enforceability of express contracts governing acquisitions of property during nonmarital cohabitation. If one or both parties are at the time married to someone else, the problem of dividing the accumulated property is similar to that encountered in dealing with the situation arising from a putative marriage.[5]

The difference between Texas law and that of those states recently embracing a property regime based on cohabitation is in the consequences that Texas law implies when a couple cohabits without an intention of being married and without any express contract concerning their acquisitions of property. Whereas some states now seem to imply a general partnership or joint venture[6] of cohabital gains similar to the community property regime, except as to the consequences of succession, Texas has developed the doctrine that the acquisitions of a meretricious union are shared proportionately to the contribution made by his or her direct participation in making a particular acquisition.[7] In order to show an interest it is not enough for the homemaker to demonstrate that the home was kept while the other cohabitor conducted a profitable business. In the case of a Texas *putative* marriage, however, the homemaker shares in the profits of such a business.[8]

In *Faglie v. Williams*[9] the court held that when title is taken in the name of one party to a meretricious relationship, in order to establish an interest in the property, the other party must prove either the existence of an express trust through an agreement, a resulting trust by virtue of that party's contribution to the purchase price through their mutual endeavor, or an express partnership relationship.[10] In the absence of facts to support one of these bases of recovery, the relationship does not produce property

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siana has similarly revised its criminal statute which prohibited nonmarital relationships. For a discussion, see Note, *Nonmarital Relationships: A Fair Termination Is Possible*, 24 LOY. L. REV. 128, 133-34 (1978). *See also* Henderson v. Travelers Ins. Co., 354 So. 2d 1031 (La. 1978) (nonmarital relationship did not constitute a family for purposes of workmen's compensation act).

5. *See* Davis v. Davis, 521 S.W.2d 603 (Tex. 1975). *See also* McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 68 n.5 (1975); McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 310, 340 (1974).

6. *But see* Kozlowski v. Kozlowski, 164 N.J. Super. 162, 395 A.2d 913 (Super. Ct. Ch. Div. 1978).

7. Hayworth v. Williams, 102 Tex. 308, 313-14, 116 S.W. 43, 45-46 (1909).

8. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 SW. L.J. 109, 117-18 (1978). *But see* Davis v. Tennessee Life Ins. Co., 562 S.W.2d 868, 871 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.), a sequel to Davis v. Davis, 521 S.W.2d 603 (Tex. 1975).

Under the literal terms of the Social Security Act, 42 U.S.C. § 416(h)(1)(B) (1976), a putative widow is not entitled to benefits when the actual widow had received benefits, although the actual widow's child was not that of the decedent and the actual widow had lost her benefits by remarriage. Woodson v. Califano, 445 F. Supp. 457 (S.D. Tex. 1978). For the position of a putative spouse when bankruptcy disrupts the relationship, see Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act*, 25 U.C.L.A. L. REV. 96 (1977).

9. 569 S.W.2d 557 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

10. *Id.* at 566.

rights.[11]

The uncertain and fluctuating state of the law with respect to nonmarital cohabitation requires that expressed agreements be recommended to clients who are contemplating such a relationship.[12] Clients should be warned, however, that many of their objectives, however solemnly agreed, may not prevail in case of later dispute, especially with respect to the rights of children. Further, such a contract might not prevail if the couple should later settle in a jurisdiction that does not recognize expressed contracts of this kind.

Informal Marriage. Little new law has been developed with regard to informal marriage. In a recent criminal case[13] the accused objected that the court's charge to the jury failed to submit the issue of his informal marriage to a witness. In order to exclude the witness's damaging testimony, the accused sought to have the woman declared incompetent to testify by establishing their marital relationship.[14] The court of criminal appeals concluded that the trial court did not err in refusing to submit that issue to the jury because during the time that the prisoner and the witness had cohabited, the record showed that the witness was married to someone else. Hence the witness and the appellant could not have entered into a valid marriage.

Rodriguez v. Avalos[15] illustrates the principle that an informal marriage may be shown when the cohabitation of the parties continues after the impediment of a prior marriage is removed.[16] In this instance the husband and the claimant lived together from 1946 until after the death of the husband's first wife in 1965.[17] The husband later entered into a ceremonial marriage with another woman. The court found that the claimant became a common law wife upon the death of the husband's first wife in 1965. The common law wife bore the burden of showing that her informal marriage had not been dissolved by divorce and hence that the later ceremonial marriage was invalid. As indicated in *Warren v. Kyle*,[18] a subsequent ceremonial marriage may cast doubt on an asserted prior informal marriage, but proof of a later ceremonial marriage (or two later ceremonial marriages in that instance) is not a bar to proof of a prior informal marriage.[19]

In *Faglie v. Williams*[20] and *Collora v. Navarro*[21] the existence of an

11. *See* Lawson v. Lawson, 69 S.W. 246, 247 (Tex. Civ. App. 1902, writ ref'd).

12. *See* Ferrell, *Contract Living*, 13 TRIAL LAW. F., Oct.-Dec. 1978, at 21. For a humorous approach to this problem, see *Standard Form of One Night Stand Prospective Lovers' Agreement for Individuals*, 12 BEVERLY HILLS B. ASS'N J. 231 (1978).

13. Bodde v. State, 568 S.W.2d 344, 352 (Tex. Crim. App. 1978) (en banc). For other situations dealing with a spouse's privileged testimony, see United States v. Mendoza, 574 F.2d 1373 (5th Cir. 1978).

14. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon Pam. Supp. 1966-78).

15. 567 S.W.2d 85 (Tex. Civ. App.—El Paso 1978, no writ).

16. TEX. FAM. CODE ANN. § 2.22 (Vernon 1975).

17. 567 S.W.2d at 87.

18. 565 S.W.2d 313 (Tex. Civ. App.—Austin 1978, no writ).

19. *Id.* at 318.

20. 569 S.W.2d 577 (Tex. Civ. App.—Austin 1978, no writ).

21. 574 S.W.2d 65 (Tex.), *rev'g* 566 S.W.2d 304 (Tex. Civ. App.—Corpus Christi 1978).

agreement to be married rested on the testimony of the woman who asserted the marriage. In *Faglie* the trial court found no agreement since the woman's testimony was contradicted by several witnesses;[22] that finding was sustained on appeal. In *Collora* the trial court directed the jury to return a verdict in favor of the alleged wife on the basis of the wife's sole, uncontradicted testimony as to the existence of the agreement to be husband and wife; this was the only direct evidence.[23] The court of civil appeals reversed on the ground that an instructed verdict should not be granted when the outcome of a suit turns on the evidence of an interested witness alone. Without departing from this general rule, the Texas Supreme Court concluded that the rule was inapplicable to this case for several reasons. First, the rule is not an absolute one to be applied mechanically in all cases. "The practical effect of [such an application of the rule] would be to foreclose the possibility of an instructed verdict in many, if not most, common-law marriage cases."[24] Secondly, the contestant could have resorted to cross-examination to test the witness's credibility and this he failed to do.[25] Finally, "[i]t is well-established that the agreement to marry need not be shown by direct evidence, but may be implied or inferred from evidence that establishes the elements of cohabitation and holding out to the public as husband and wife."[26] In this case the supreme court concluded that there was no need to resort to inference inasmuch as there was direct evidence of corroboration and surrounding circumstances to establish an express agreement.[27]

Right to Marry. As an aid to interpreting sections 1.07(a)(7)[28] and 3.66[29] of the Texas Family Code, the attorney general of Texas has expressed the opinion[30] that the thirty-day period after a divorce, during which divorced persons may not marry or be granted a license to marry, begins to run at the divorce court's oral rendition of divorce rather than at the entry of the

22. Testimony as to the other elements of the informal marriage—that the couple lived together as man and wife and held themselves out as such—was contradictory. 569 S.W.2d at 565.

23. In this case there was abundant evidence of the other two elements of the informal marriage.

24. 574 S.W.2d at 69.

25. *Id.* at 70.

26. *Id.* at 69 (citing *inter alia* TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1975)). *See* Standish v. Standish, 568 S.W.2d 731 (Tex. Civ. App.—Waco 1978, no writ).

27. 574 S.W.2d at 70. *See also* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 105-06 (1977) (emphasis added; footnote omitted):

> If either party to the alleged marriage testifies to an agreement to marry, the court is not entertaining an inference but is merely making its finding on the basis of the evidence adduced. If all the evidence offered as to an agreement tends to *disprove* its existence, there is no room to infer it.

28. TEX. FAM. CODE ANN. § 1.07(a)(7) (Vernon Supp. 1978-79). *See* McKnight, *Supplementary Commentary to the Texas Family Code, Title 1*, 8 TEX. TECH L. REV. 1, 3-4 (1976).

29. TEX. FAM. CODE ANN. § 3.66 (Vernon 1975); *see* McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 343 (1974).

30. TEX. ATT'Y GEN. OP. NO. H-939 (1977).

divorce decree. Although the thirty-day period during which the divorce decree may be vacated[31] begins to run from entry of judgment, the attorney general's opinion is consistent with those authorities dealing with the finality of a divorce decree rendered but not entered before a party dies.[32] The opinion also resolves the conflict between sections 1.07(a)(7) and 3.66 with respect to the remarriage of a divorced couple. In that instance the provisions of section 3.66 prevail so that the couple can remarry within thirty days after their divorce.[33]

The validity of marriages between persons related only by adoption has been dealt with in two cases from sister states. In Texas such marriages are void under section 2.21 of the Family Code.[34] A Colorado statute that prohibited marriage between brothers and sisters by adoption was held unconstitutional as denying those persons equal protection of the law.[35] The state failed to sustain the burden of showing that to deny such persons the fundamental right of marriage accomplished a compelling state interest. In contrast, a Pennsylvania court, with no specific statutory prohibition before it, found a constructive relationship between children of adoptive parents, equivalent to a relationship of consanguinity for the purpose of the statutory bar to marriage between a brother and sister.[36] The rationale enunciated by the Pennsylvania court—the necessity to protect the family unit and to maintain the "sanctity of the home"—is that on which the Texas statute is based.[37]

Mutual Support. On the advice of its Family Law Section, the State Bar of Texas has recommended equalization of the standard of mutual support between spouses, and legislation to this effect has been introduced at the regular legislative session.[38] In the one appellate case[39] in which support duties were discussed during the past year, however, the issue was the extent to which a wife might recover for domestic service rendered to her husband as a consequence of an injury for which he also sought recovery. In that instance a determination had to be made whether nursing services rendered by the wife were ordinary domestic services or extraordinary services under the circumstances. Only when such services are extraordinary are they compensable.

Interference with Marital Relations. Although the tort of criminal conver-

31. TEX. R. CIV. P. 329b.
32. *See* notes 187-94 *infra* and accompanying text.
33. *See* TEX. ATT'Y GEN. OP. NO. H-939 (1977); McKnight, *Supplementary Commentary to the Texas Family Code, Title 1*, 8 TEX. TECH L. REV. 1, 3-4 (1976).
34. TEX. FAM. CODE ANN. § 2.21(a)(2) (Vernon Supp. 1978-79).
35. Israel v. Allen, 577 P.2d 762 (Colo. 1978).
36. *In re* M.E.W., 3 Fam. L. Rep. 2601 (Pa. Dist. Ct. 1978).
37. *See* McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 311 (1974).
38. The bill will amend TEX. FAM. CODE ANN. §§ 3.59, 4.02 (Vernon 1975). *See* Sampson, *Proposed Amendments to the Family Code*, 42 TEX. B.J. 21 (1979).
39. Finch v. Texas Employers' Ins. Ass'n, 564 S.W.2d 807 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

sation has been abolished by statute,[40] a spouse still has a cause of action in tort against a third person for the intentional invasion of the marital relationship. Either a wife[41] or a husband[42] may recover for the alienation of affection caused[43] by such invasion provided that the spouse bringing the suit proves its three essential elements.[44] One of these elements is the requirement that the defendant's conduct be the controlling cause of the loss of affection. In *Lueg v. Tewell*[45] the defendant attempted to show that the plaintiff's business practices were the controlling cause of the plaintiff's wife's loss of affection. When the plaintiff-husband failed to respond to motions for discovery of his business records, the trial court dismissed his action. On appeal, the plaintiff-husband argued that his wife's attitudes and thoughts concerning his business affairs and the financial position of the parties were the only matters relevant to the issue, not the actual status of the business. The court, however, concluded that evidence to support the wife's knowledge and beliefs as to the matters causing her loss of affection was discoverable.[46]

In suing for the loss of consortium when her husband was injured by the negligent driving of a third party, a Texas wife was met with the defense that she could not recover for loss of consortium. In *Whittlesey v. Miller*[47] the Supreme Court of Texas provided the state's highest authority in support of a cause of action on behalf of the wife[48] as well as the husband[49] for negligent impairment of consortium.[50] In defining the action as includ-

40. The legislative oversight in the caption of § 4.05 of the Texas Family Code is commented on in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 30 SW. L.J. 68, 70-71 (1976); McKnight, *Supplementary Commentary to the Texas Family Code, Title 1*, 8 TEX. TECH L. REV. 1, 16 (1976). The proponent of the section added to the Family Code in 1975 sought to abolish the torts of both criminal conversation and alienation of affection. The legislature, however, disagreed as to the latter tort. A similar judicial attitude toward the two torts is exemplified by Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978).

41. Norris v. Stoneham, 46 S.W.2d 363 (Tex. Civ. App.—Eastland 1932, no writ).

42. Lisle v. Lynch, 318 S.W.2d 763 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.).

43. *See* Comment, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper*, 25 SW. L.J. 594 (1971).

44. The issues material to an alienation of affection suit are set out in McQuarters v. DuCote, 243 S.W.2d 433 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.).

45. 572 S.W.2d 97 (Tex. Civ. App.—Corpus Christi 1978, no writ).

46. *Id.* at 103.

47. 572 S.W.2d 665 (Tex. 1978).

48. *See also* Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.), in which the court of civil appeals expressly stated that the wife had no cause of action for impairment of consortium when her husband was negligently injured by a third person.

49. *See* Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864 (1976).

50. This decision came as no surprise after the Texas Supreme Court's decision in Felsenthal v. McMillan, 493 S.W.2d 729 (Tex. 1973), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 66-67 (1974). *See also* Comment, *supra* note 49. As pointed out by the Texas Supreme Court, the wife's cause of action has been widely recognized in the United States during the last 25 years. Whittlesey v. Miller, 572 S.W.2d at 666. For similar recent developments elsewhere, see Pascal v. Charley's Trucking Serv., Inc., 436 F. Supp. 455 (D.V.I. 1977); Benjamin v. Cleburne Truck & Body Sales, Inc., 424 F. Supp. 1294 (D.V.I. 1976). In these decisions the court relied upon the federal constitutional principle of equal protection and stated that there is no reasonable distinction between the wife's claim for negligent impairment of consortium and a similar claim by her husband. In

ing "the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage,"[51] the court was careful to point out that loss of "services" is not an element of the cause of action in Texas.[52]

II. CHARACTERIZATION OF MARITAL PROPERTY

Marriage Contracts. The Supreme Court of Texas has been cautious in dealing with antenuptial contracts that seek to affect the character of property to be acquired by the prospective spouses during marriage. The court has been particularly anxious to avoid a constitutional confrontation in this context.[53] In *Williams v. Williams*,[54] however, the court was forced to consider the constitutional implications of a premarital agreement on the homestead rights of the spouses. Having been drawn into the constitutional maelstrom, the court also commented briefly, by way of obiter dictum, on the constitutional effect of provisions of such contracts that seek to cause property acquired during marriage, that would otherwise be community, to be separate.

The parties to the marriage contract were of mature years and each had children by a previous marriage. The object of the contract was to preclude each party from making any claim to the separate property of the other or any income accumulated therefrom or from salaries. To achieve this aim the parties agreed that neither would have any claim to the separate property of the other and that all income from separate property and salary of either that accumulated, after providing for living expenses, would be the separate property of the spouse whose separate property or whose efforts produced it. Less than five months after the marriage the

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contrast, the Tenth Circuit made no mention of federal constitutional principles when it applied the law of Utah in denying the existence of a wife's cause of action. *See* Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978).

For an application of the general rule preventing recovery in a cause of action for loss of consortium resulting from facts occurring before marriage, see Wagner v. International Harvester Co., 455 F. Supp. 168 (D. Minn. 1978).

51. 572 S.W.2d at 666.

52. *Id.*

53. When the court reviewed the judgment and opinion of the commission of appeals in Gorman v. Gause, 56 S.W.2d 855 (Tex. Comm'n App. 1933, judgmt adopted), the supreme court adopted the judgment but not the opinion, which relied in part on constitutional grounds. In the only marriage contract case in this century argued to the court under pre-1968 statutory law, Burton v. Bell, 380 S.W.2d 561 (Tex. 1964), the court was cautious to rest its opinion invalidating the contract on the order of descent provision of the old statute and not on constitutional grounds.

Only two other marriage contract cases have been reviewed by the Texas Supreme Court. In Castro v. Illies, 22 Tex. 479 (1858), the court held that a marriage contract executed in another jurisdiction and not specifically indicating that the parties anticipated a change of domicile would not affect the nature of realty acquired in Texas after their move to Texas, which took place long after the marriage. In Ellington v. Ellington, 29 Tex. 2 (1867), the court declined to give effect to a marriage contract that was not executed with proper formalities.

54. 569 S.W.2d 867 (Tex. 1978), *discussed in* Comment, *Antenuptial Agreements: Perspectives on the Texas Constitution and the Community Property System*, 56 TEXAS L. REV. 861 (1978), *and noted in* 10 TEX. TECH L. REV. 202 (1978).

husband died. Under his will the children of his first marriage were the takers of all of his property. Most of this property was brought into the second marriage by the husband. The heirs, evidently feeling a strong attachment to the home and its furnishings, sought enforcement of the premarital agreement. The widow asserted unwaiveable rights to the homestead and exempt personalty in derogation of the antenuptial agreement. The supreme court concluded that while the Texas Constitution[55] and Probate Code[56] grant a right to occupy the homestead, a premarital agreement may properly waive this right as well as rights to exempt personalty.[57]

The widow argued that part of the consideration for the contract was the provision that income from separate property and salaries of each spouse would be the separate property of the spouse who owned the separate property or earned the salary. She asserted that this provision was void, as the trial court had held, and therefore that the rest of the contract was void. Thus the court was drawn into a discussion of the validity of that provision. While the court stated that the provision was void,[58] it nevertheless upheld the contract.[59] Though the statement was unnecessary to the decision of the case,[60] the court's comment in this context requires

55. TEX. CONST. art. XVI, § 52.

56. TEX. PROB. CODE ANN. §§ 271, 272, 273 (Vernon 1956 & Supp. 1978-79) direct that the homestead and certain exempt personal property be set aside for a surviving widow. *Id.* §§ 283, 284 (Vernon 1956) codify the provisions of TEX. CONST. art. XVI, § 52 to the effect that the probate homestead shall not be partitioned among heirs of a decedent during the lifetime of a surviving spouse who chooses to use it as a homestead.

57. 569 S.W.2d at 870. Three judges dissented. The dissent noted that the agreement did not specifically mention homestead rights and asserted that an explicit agreement should be required to waive such rights. 569 S.W.2d at 875-76. But the dissenting judges do not rely on the argument of the intermediate appellate court that rights not yet acquired cannot be renounced. Williams v. Williams, 548 S.W.2d 492, 493 (Tex. Civ. App.—Austin 1977), *commented on in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 SW. L.J. 109, 120 (1978). This argument must, therefore, be regarded as without merit. Nothing is said in the majority or dissenting opinion about the power to renounce a right of reimbursement acquired during marriage.

58. 569 S.W.2d at 870. A similar conclusion is reached by the dissenting judges. *Id.* at 872. There it was said that the invalid portion of the contract should vitiate the rest. Reliance was put on Land v. Marshall, 426 S.W.2d 841, 849 (Tex. 1968), where the court invalidated the whole of a marital property transaction when avoidance of only half of it would have produced a highly inequitable result. The precedent seems inapposite in this context. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 SW. L.J. 44, 52-53 (1969).

59. The court rejected the widow's contention that the invalidity of any part of the consideration for the contract vitiated the entire contract, since other consideration was shown. "Mutual promises to marry, subsequently performed, provide valid consideration for the premarital agreement in question." 569 S.W.2d at 871. The provisions of TEX. FAM. CODE ANN. § 5.41 (Vernon 1975) were carefully worded in terms of agreement, rather than "contract," so that no consideration is needed to support such an agreement. *See* McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 376 (1974). But an agreement not supported by consideration in money or money's worth will be subject to federal gift tax liability. Treas. Reg. § 25.2512-8 (1978). *See also* Berall, *Estate Planning for the Second Marriage*, in 1 NOTRE DAME EST. PLAN. INST. 343, 357-64 (R. Campfield ed. 1977).

60. Nor does the issue of validity of that part of the contract seem to have been before the court. There was a small amount of property accumulated during the marriage, which the trial court awarded to the widow. It appears from the opinion of the Austin court of civil

some attention:

> [T]he agreement was void to the extent that income or other property acquired during marriage should be the separate property of the party who earned [it] or whose property produced such income or acquisition. Such provisions were no more than a mere agreement between the parties to establish the character of the property prior to its acquisition during marriage in violation of the Texas Constitution and the Family Code . . . .[61]

This terse enunciation of Texas law tends to denigrate the public policy favoring contractual freedom[62] inherent in the court's handling of that part of the agreement that constituted a renunciation of homestead and exempt property rights. For purposes of family property and tax considerations the court's comment requires evaluation.

Prior to 1968[63] considerable confusion existed between cases involving marriage contracts entered into before marriage by parties sui juris and those involving partition agreements entered into during marriage when the wife was under heavy disabilities of coverture, at least before 1963.[64] In *King v. Bruce*[65] the supreme court had made it abundantly clear that partitions of community property between spouses were invalid except when made in anticipation of divorce.[66] In response to *King* and for reasons largely motivated by federal estate tax considerations, the Texas Constitution was amended in 1948 to allow community property partitions.[67] Since the strictures of the old marriage contract statute were regarded as

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appeals, 548 S.W.2d 492 (Tex. Civ. App.—Austin 1977), *commented on in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 120-21 (1978), that no appeal was taken to that court with respect to the holding of the trial court on the community property issue. Hence, if the issue had not been raised before the intermediate appellate court, it could not have been raised in the supreme court. TEX. R. CIV. P. 469(e); Texas State Highway Dep't v. Fillmon, 150 Tex. 460, 464, 242 S.W.2d 172, 174 (1951). *See also* Delaney v. Fidelity Lease Ltd., 526 S.W.2d 543, 546 (Tex. 1975); McKelvy v. Barber, 381 S.W.2d 59, 64 (Tex. 1964).

The petitioner sought review in the supreme court on two points. Point 1 referred to the decision below with respect to homestead rights only. Point 2 is couched in broader terms: "The court of civil appeals erred in voiding the agreement, since future rights in marital property may validly be waived." 20 Tex. Sup. Ct. J. 468 (July 23, 1977). It is clear from the petitioner's application for writ of error that the only "marital property" referred to is the homestead and exempt property. Petitioner's Application for Writ of Error at 14-26. Moreover, the holding to which the writ of error was directed dealt only with rights to the homestead and exempt personalty. After the court handed down its opinion, a motion for rehearing was filed by the widow. An amicus curiae brief was also filed in which it was suggested that the court's comment on the validity of the contract with respect to the characterization of marital acquisitions should be altered. But the parties settled the case before a hearing could be had on the motion.

61. 569 S.W.2d at 870.

62. *See* text accompanying note 72 *infra*.

63. The Texas Matrimonial Property Act of 1967 became effective on Jan. 1, 1968. It contained a thoroughly revised provision on marriage contracts, art. 4610, which was recodified as § 5.41 of the Texas Family Code, effective Jan. 1, 1970.

64. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 Sw. L.J. 39, 45-46 (1967).

65. 145 Tex. 647, 201 S.W.2d 803 (1947).

66. *See* Rains v. Wheeler, 76 Tex. 390, 395, 13 S.W. 324, 325-26 (1890).

67. *See* TEX. CONST. art XVI, § 15, comment.

equally applicable to both community partitions and premarital contracts,[68] the liberalized constitutional provision allowing partitions eased the way for a more liberal handling of marriage contracts.[69] To facilitate the drafting of effective marriage contracts the statutory language that had been a barrier to their validity was repealed in 1967.[70] Though the court in *Williams* adverts[71] to some of the earlier authorities imposing strict standards on spousal dealing with marital property, the court also said that

> the [marriage contract] statute should be construed as broadly as possible in order to allow the parties as much flexibility to contract with respect to property or other rights incident to the marriage, provided the constitutional and statutory definitions of separate and community property or the requirements of public policy are not violated.[72]

The court's dictum with respect to the validity of provisions intended to change the character of marital acquisitions is a useful admonition for those who are about to prepare effective marriage contracts for their clients. The court's message is that a "mere agreement" between prospective spouses is ineffective when it purports merely to define as separate property that which would be community property by operation of law: a mere self-executing, premarital agreement to convert marital acquisitions automatically and prospectively to separate property is ineffective. But the subsequent performance of such an agreement is clearly valid,[73] and a premarital undertaking to transfer[74] or partition[75] acquisitions during marriage is subject to judicial enforcement.[76] The supreme court's dictum anticipates a two-step process analogous to that already approved for the creation of joint tenancies:[77] an enforceable agreement or contract followed by its performance, or a court order that it be performed, during marriage. Other devices are available as supplements or substitutes—the mutual will or the contract to make a will, both of which may be utilized before or during marriage.[78]

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68. Graser v. Graser, 147 Tex. 404, 413, 215 S.W.2d 867, 873 (1948); Gorman v. Gause, 56 S.W.2d 855 (Tex. Comm'n App. 1933, judgmt adopted).

69. Huff v. Huff, 554 S.W.2d 841 (Tex. Civ. App.—Waco 1977, writ dism'd), *commented on in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 120-21 (1978), exemplifies this liberalized approach.

70. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 120 n.101 (1978). *See also* McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 374-76 (1974).

71. 569 S.W.2d at 870 (citing Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565 (1961); Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925)).

72. 569 S.W.2d at 870.

73. In McFadden v. McFadden, 213 S.W.2d 71 (Tex. Civ. App.—Amarillo 1948, mand. overr.), an invalid marriage contract was given effect by subsequent gifts between the spouses at the time when partitions of community property were not allowed.

74. Gorman v. Gause, 56 S.W.2d 855, 858 (Tex. Comm'n App. 1933, judgmt adopted).

75. *See* Hornsby v. Hornsby, 60 S.W.2d 489 (Tex. Civ. App.—San Antonio 1933), *rev'd on other grounds*, 127 Tex. 474, 93 S.W.2d 379 (1936).

76. *See* the commentary of the draftsmen of the 1967 revision of art. 4610, *quoted in* McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 375 (1974).

77. Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565 (1961), *cited in* Williams v. Williams, 569 S.W.2d 867, 870 (Tex. 1978).

78. For some of the pitfalls that may militate against the use of these devices, see Com-

Presumption of Community. The presumption[79] that all property acquired during marriage is community property is most commonly rebutted either by tracing the property in issue to a separate source or by showing inception of title in a premarital transaction. In all but the simplest tracing cases the presumption is difficult to overcome.[80] The reasoning applied in *McKinley v. McKinley*,[81] the leading recent case on tracing funds through bank accounts, is difficult to formulate as an abstract standard of proof for other situations.[82] A spouse deposited a sum of separate property in a savings account prior to marriage. During marriage an amount equal to all the interest theretofore earned prior to and during marriage was withdrawn by the spouse whose separate funds were on deposit. From this act the court inferred that the spouse intended to withdraw the interest, which included community property, and leave only the separate property in the account.[83] Later, more interest was allowed to accumulate. Then an amount greater than the initial deposit of separate property was withdrawn and a small amount was left in the account. The court concluded that the spouse had withdrawn all of the separate property along with a portion of the accumulated community interest.[84] As to the conclusion that the initial withdrawal constituted interest only, the court seems to have been guided by the fact that the amount withdrawn was precisely the amount of interest that had been accumulated. As to the characterization of the second withdrawal, however, no such inference can be relied on. Stating its narrow holding as broadly as possible, *McKinley* stands for the proposition that when separate property is on deposit drawing interest, and substantially all of the fund, or more than the amount deposited, is withdrawn, that part withdrawn is deemed to include the separate property of the depositor. The court failed to explain the reasons underlying this axiom, however, and could have just as reasonably concluded that only separate property

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ment, *Antenuptial Agreements: Perspectives on the Texas Constitution and the Community Property System*, 56 TEXAS L. REV. 861, 879-81 (1978). *See also* Annot., *Right of Party to Joint or Mutual Will, Made Pursuant to Agreement as to Disposition of Property at Death, to Dispose of Such Property During Life*, 85 A.L.R.3d 8 (1978).

On marriage contracts in general, see P. ASHLEY, OH PROMISE ME—BUT PUT IT IN WRITING (1978), *reviewed by* Bysiewicz, Book Review, 64 A.B.A.J. 1727 (1978); 1 & 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS (1978); J. WHITAKER, PERSONAL MARRIAGE CONTRACT (1976), from which a short extract appears in Whitaker, *Personal Marriage Contract*, 13 TRIAL LAW. F., Oct.-Dec. 1978, at 27. *See also* Clark, *Antenuptial Contracts*, 50 COLO. L. REV. 141 (1979); Comment, *Antenuptial Contracts Determining Property Rights on Death or Divorce*, 47 U. MO. K.C. L. REV. 31 (1978).

79. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975) states: "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property."

80. Proof by tracing failed in Poulter v. Poulter, 565 S.W.2d 107, 110 (Tex. Civ. App.—Tyler 1978, no writ). Proof by application of the inception of title doctrine failed to rebut the presumption in MacMillan v. Callahan, 555 S.W.2d 771, 774 (Tex. Civ. App.—Eastland 1977, no writ).

81. 496 S.W.2d 540 (Tex. 1973).

82. The Fort Worth court of civil appeals called *McKinley* "the most liberal tracing case that we have seen." Latham v. Allison, 560 S.W.2d 481, 484 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). Its peculiarities in reasoning are not perceived in Comment, *Community Property: The Concept of Tracing Ownership*, 8 TEX. TECH L. REV. 637 (1977).

83. 496 S.W.2d at 542-43.

84. *Id.* at 543. Therefore, the residue in the savings account was accumulated interest.

remained in the account. In *Latham v. Allison*[85] the course of depositing and withdrawing funds was much more complex than in *McKinley*, and there was nothing more than conjecture that separate funds were deposited in the first place. Hence an insufficient predicate was laid for overcoming the community presumption.[86]

When title to property is taken in the name of one spouse and the purchase price is paid with the separate property of the other, there is either a gift to the spouse in whose name the property is taken or a resulting trust in favor of the spouse furnishing the purchase price, depending on the intention of the spouse who furnishes the price. *Ford v. Simpson*[87] involved a dispute between a wife and her husband's heir with respect to land she had purchased in 1934, taking title in her husband's name. The downpayment was made with her separate funds, and after her husband's death she paid the rest of the purchase price with her separate property. In determining that ownership of the land was in the wife, the court applied the rule commonly accepted as law in 1934 that when a wife purchases property with her separate funds and takes title in her husband's name, a resulting trust arises in her favor.[88] In contrast, had the husband purchased land with his separate property and taken title in his wife's name, a gift would have been presumed in favor of the wife.[89] In the light of reformed constitutional[90] and statutory[91] standards toward spousal equality, however, such a dual standard can no longer be maintained.[92] Such a purchase by a wife should be construed as a presumed gift in favor of the husband unless a contrary intent of the purchaser can be shown.

Whether a husband's interest in a partnership created during his marriage was separate or community property was at issue in *Smoot v. Smoot*.[93] The husband's father acquired a tract of land in 1948. The father then created a partnership between himself and his son. Though the land was held in the father's name, it was treated as belonging to the partnership. Over a number of years the father sold much of the land on behalf of the partnership. The court construed these facts as showing a gift to the husband of an interest in the partnership and the land as a partnership

85. 560 S.W.2d 481 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

86. *Id.* at 485. *See also* Windham v. Windham, 561 S.W.2d 933, 934-35 (Tex. Civ. App.—Eastland 1978, no writ) (tracing for purposes of reimbursement).

87. 568 S.W.2d 468 (Tex. Civ. App.—Waco 1978, no writ).

88. *See* O. SPEER, LAW OF MARITAL RIGHTS IN TEXAS 532-34 (3d ed. 1929). This is the author's last edition of this tremendously influential work. Subsequent editions have carried Speer's name but the quality of his analysis has not been perpetuated. The current work is, nonetheless, a useful compendium of citations, topically arranged.

89. 568 S.W.2d at 470; *see* Thomason v. Pacific Mut. Life Ins. Co., 74 S.W.2d 162, 164 (Tex. Civ. App.—El Paso 1934, writ ref'd); Comment, *The Family Code—Has It Substantially Changed Marital Property Rights in Texas?*, 9 HOUS. L. REV. 120, 124 (1971).

90. TEX. CONST. art. I, § 3(a).

91. TEX. FAM. CODE ANN. § 4.03 (Vernon 1975).

92. *See* Comment, *supra* note 89, at 128-30. *See also* Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975), in which Justice Reavley, in his dissenting opinion, labeled the old rule "passé." *Id.* at 175.

93. 568 S.W.2d 177 (Tex. Civ. App.—Dallas 1978, no writ).

asset.[94] The court was evidently speaking figuratively with respect to the partnership as an entity (or in pre-1962 aggregate partnership terms) when it remarked that the wife "may have had a community interest in the partnership (as distinguished from partnership assets) to the extent of any assets derived from profits of the partnership."[95] As to partnerships created after 1961, the community would not have any interest in the specific assets of a partnership in which a spouse owns a separate interest.[96] Hence, unless the partnership retained its aggregate character after the adoption of the Texas Uniform Partnership Act,[97] there were no partnership assets in which the community could have had an interest, that is, the community would have no interest in undistributed profits under a strict entity approach.[98]

The case also suggests a distinction which may need to be made when separate property is used for partnership purposes, as when a community partnership is conducted on separate realty. The underlying realty need not be an asset of the partnership, and its character need not affect the character of the partnership.[99] Similarly, a separate partnership might be conducted on community land.

In *Nail v. Nail*[100] the Supreme Court of Texas held that the goodwill of a doctor's medical practice is not community property because it represents the person of the professional and is incapable of being segregated.[101] The court expressly left open the question of goodwill of a professional corporation.[102] In *Geesbreght v. Geesbreght*[103] the Fort Worth court of civil appeals attempted to resolve this question. The husband was a physician and part-owner of a professional corporation that furnished emer-

94. *Id.* at 180. A conveyance to the husband of a half interest in the land by the father and his late wife's executors in 1967 supplied the necessary passing of formal title which recited the partnership relationship.

95. 568 S.W.2d at 181. In *In re* Higley, 575 S.W.2d 432, 434 (Tex. Civ. App.—Amarillo 1978, no writ), it is evident that the trial court misconceived the nature of partnership assets in awarding the wife rights of reimbursement for apparent expenditure of partnership funds for improvement of partnership property and awarding her a share in maturing partnership assets. No appeal was taken by the husband in these regards.

96. TEX. REV. CIV. STAT. ANN. art. 6132b, § 28-A(1) (Vernon 1970).

97. *Id.* art. 6132b, effective Jan. 1, 1962.

98. That is, the community would have no interest unless the partners expressly agreed otherwise or such an agreement may be inferred from their conduct.

99. One can easily imagine a situation in which a husband and a third person engage in a ranching partnership using land belonging to the third person. Likewise, the husband might own land that is used by the partnership. A similar fact situation occurred in Coleman v. Coleman, 348 S.W.2d 384, 387-88 (Tex. Civ. App.—Austin 1961, writ dism'd).

For another case involving an allegation of a partnership as community property, see Windham v. Windham, 561 S.W.2d 933 (Tex. Civ. App.—Eastland 1978, no writ).

100. 486 S.W.2d 761 (Tex. 1972), *commented on in* McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 432 (1976); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 27 (1973); Note, *The Exclusion of Professional Goodwill from Partition on Divorce*, 10 HOUS. L. REV. 966 (1973).

101. 486 S.W.2d at 764. For authorities dealing with the somewhat related argument that professional qualifications acquired during marriage have a marital property character, see notes 330-31 *infra*.

102. 486 S.W.2d at 764.

103. 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, writ dism'd).

gency medical services to hospitals. In a partition proceeding following a divorce the trial court agreed with the ex-wife that her former husband's interest in the corporation was community property. In valuing that interest, however, the court ignored the accrued goodwill of the corporation. Recognizing that the goodwill of a corporation will usually survive the departure of one or more of its owners, while the goodwill of an individual professional practice has no value apart from the professional person,[104] the appellate court held that the goodwill of a professional corporation may also constitute community property.[105] It is perhaps significant that the professional corporation in this case did not conduct business under the name of a particular professional practitioner.[106]

A beneficiary-spouse's anticipated receipt of income from a discretionary trust is somewhat analogous to anticipated but undistributed dividends of a corporation in which the spouse owns separate stock. In both cases the spouse has no right to the income but merely an expectancy. In *Burns v. Burns*[107] it was alleged that the undistributed income of discretionary trusts of which a spouse was beneficiary was community property.[108] But whether the undistributed trust income was separate or community depended on whether the property was "acquired" within the context of section 5.01 of the Family Code.[109] Having found that the income was acquired by the trust and not by the spouse actually or constructively, the court stated that the property remained a part of the trust and was not subject to division on divorce.[110]

Incremental Acquisitions. Acquisitions of land by prescription are incremental in the sense that title to land accrues over a period of time. These acquisitions, however, are characterized as separate or community property by the nature of the entry that causes the prescriptive period to run. If entry is made under color of right, title acquired at the end of the prescriptive period relates back to the moment of entry.[111] If entry is by trespass, however, the right is fixed at the end of the period.[112] Similarly, rights in a

104. *Id.* at 435-36.

105. *Id.* at 434.

106. *Id.* If the business were conducted under an individual's name, the goodwill would be less susceptible to transfer, and thus, the situation might come within the holding in *Nail v. Nail*, discussed at notes 100-02 *supra* and accompanying text. In *In re* Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979), *noted in* 6 COMMUNITY PROP. J. 89 (1979), goodwill was not included in valuing the stock of an incorporated legal practice when all interests were subject to a stock purchase formula from which goodwill was excluded as an element of valuation.

107. 573 S.W.2d 555 (Tex. Civ. App.—Texarkana 1978, no writ).

108. For previous instances where Texas appellate courts have reiterated the proposition that undistributed income from a discretionary trust is not community property, see McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 430-31 (1976); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 112-13 (1977).

109. 573 S.W.2d at 557.

110. *Id.* at 557-58.

111. Strong v. Garrett, 148 Tex. 265, 271-72, 224 S.W.2d 471, 474-75 (1949).

112. *Id.* at 271, 224 S.W.2d at 474. Brown v. Foster Lumber Co., 178 S.W. 787 (Tex. Civ. App.—Galveston 1915, writ ref'd). *But see* Scott v. Washburn, 324 S.W.2d 957, 960 (Tex.

life insurance policy take the character of the contract right, which is separate or community depending on the time and mode of acquisition,[113] although the value of a policy purchased prior to marriage increases by regular increments during marriage as premiums are paid with community funds.[114] A service contract and its proceeds are characterized in the same manner. Although a portion of the services due under a contract made prior to marriage are actually performed during marriage, the profits from the contract relate back to the status of the contracting spouse at the time the contract was entered into.[115] Retirement or pension rights are treated differently. These supplemental benefits, normally stemming from employment contracts,[116] take their character from the marital status of the prospective pensioner at the time they are earned.[117] Further, the pay-

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Civ. App.—Waco 1959, writ ref'd n.r.e.), discussing whether one with a claim under a faulty deed is a trespasser.

113. As to time of acquisition, if the policy is acquired prior to marriage, it is separate property. If the policy is acquired during marriage, it is presumed to be community property. As to mode of acquisition, if the seller of the policy looks solely to the separate estate of the spouse purchasing the policy during marriage, the policy is separate. A policy acquired by gift or inheritance during marriage is also separate property.

114. *See* McCurdy v. McCurdy, 372 S.W.2d 381, 383 (Tex. Civ. App.—Waco 1963, writ ref'd). A policy of life insurance acquired by a spouse during marriage is also separate property if it is acquired by gift or under an agreement that all premiums will be paid with separate property.

One of the policies in *McCurdy* appears to have been a term policy acquired before marriage. Though the court makes no particular point of this fact, various arguments may be made in favor of separate or community character of such a policy. *See* Higbee, *Applying the Risk Payment Doctrine to Community and Separate Property Interests in Life Insurance Proceeds: Its Federal Estate Tax Consequences*, 4 COMMUNITY PROP. J. 87, 90-92 (1977). With respect to Texas inheritance taxes on a term life insurance policy, see Bullock v. City Nat'l Bank, 550 S.W.2d 763, 766 (Tex. Civ. App.—Austin 1977, no writ).

115. Bishop v. Williams, 223 S.W. 512 (Tex. Civ. App.—Austin 1920, writ ref'd). Gulf Oil Corp. v. Shell Oil Co., 410 S.W.2d 260 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.), illustrates the converse situation, involving a contract for services entered into while the contracting spouse was married. Although the services were subsequently rendered while he was single, the court held that the proceeds from the contract were community property. *Id.* at 263. *See also* Due v. Due, 342 So. 2d 161, 163 (La. 1977), in which the Supreme Court of Louisiana held that an attorney's interest in a pending contingent fee contract constitutes community property to be divided on divorce. Assigning a value to such an interest may prove difficult, however, as the value of services to be rendered after divorce must be taken into consideration.

116. In characterizing pension rights as separate or community property, Texas law makes no distinction between rights grounded in express or implied terms of a contract and those resting on a statutory enactment. Nor have any distinctions been made between those pension schemes to which the prospective pensioner contributes and those to which he does not contribute. Rights that accrue prior to marriage are clearly separate property. *See* Sena v. Roudebush, 442 F. Supp. 153, 155 (D.N.M. 1977) (Veterans Administration disability payments). *See also* Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 U.C.L.A. L. REV. 417, 438-39 (1978), in which the distinction is drawn between contractual and noncontractual schemes under California law. Reppy treats the preemption principle at pp. 485-517.

For a brief analysis of different types of retirement benefits as dealt with by Texas courts, see Sampson, *Disposition of Retirement Benefits on Divorce*, in MARRIAGE DISSOLUTION IN TEXAS ch. D (State Bar of Texas 1978). *See also* Corrigan, *Federal Retirement Benefits in Texas: Division as Property Right Between Former Spouses by Divorce Court*, 41 TEX. B.J. 435 (1978); Udinsky, *An Economist's Views on Community Property*, 6 COMMUNITY PROP. J. 52 (1979).

117. Perez v. Perez, 576 S.W.2d 477 (Tex. Civ. App.—San Antonio 1978, no writ) (mili-

ments from a disability pension, whether or not the retirement was occasioned by the disability, is also a community interest to the extent that the pension rights were earned during marriage,[118] unless it is shown that the benefits are for personal incapacity not measured by loss of earning power.[119] This principle is reiterated in *Simmons v. Simmons*[120] in which the husband was forced by disability to retire during marriage. The pensioner in *Simmons* relied unsuccessfully on *Ramsey v. Ramsey*,[121] which treated Veterans' Administration disability benefits as separate property, as authority for the proposition that disability benefits received from a corporate pension fund are separate property.[122] In *Simmons* the court refused to follow *Ramsey*, noting that the opinion failed to disclose whether the husband's disability arose before or during marriage.[123] *Ramsey* was again discussed in *Brownlee v. Brownlee*,[124] a divorce case involving the division of accrued military retirement and disability benefits. The husband had completed twenty-one years in the Air Force and was eligible for voluntary retirement. The court of civil appeals held that the disability payments received were community property, distinguishing *Ramsey* as applicable only when a serviceman has failed to serve long enough to earn retirement benefits.[125] These strained distinctions are unnecessary. In *Ramsey* the court misconstrued retirement disability pay as being analogous to a recovery for personal injury.[126] That confusion was further compounded by the court's failure to distinguish between recovery for personal injury related to earning capacity (community property) and payments not related thereto (separate property).[127] *Ramsey* was followed, however, in *In re Butler*,[128] another military disability retirement case involving Veterans' Administration benefits. Since the difference between these cases and other retirement benefits cases is insignificant, *Ramsey* and its progeny should be ignored as freaks.

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tary readjustment pay). In Sprott v. Sprott, 576 S.W.2d 653 (Tex. Civ. App.—Beaumont 1978, no writ), however, the court held that fleet reserve retainer pay to be received after divorce will be the separate property of the ex-spouse.

118. Busby v. Busby, 457 S.W.2d 551 (Tex. 1970); Dominey v. Dominey, 481 S.W.2d 473 (Tex. Civ. App.—El Paso), *cert. denied*, 409 U.S. 1028 (1972).

119. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 31 (1973).

120. 568 S.W.2d 169 (Tex. Civ. App.—Dallas 1978, writ dism'd).

121. 474 S.W.2d 939 (Tex. Civ. App.—Eastland 1971, writ dism'd).

122. *Id.*

123. 568 S.W.2d at 171.

124. 573 S.W.2d 878 (Tex. Civ. App.—El Paso 1978, no writ).

125. *Id.* at 879.

126. 474 S.W.2d at 941. *See* McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 442 n.175 (1976); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 31 (1973).

127. For a comparative analysis of the various approaches of community property jurisdictions to the characterization of personal injury recoveries, see Akers, *Blood and Money—Separate or Community Character of Personal Injury Recovery*, 9 TEX. TECH L. REV. 1 (1977).

128. 543 S.W.2d 147 (Tex. Civ. App.—Texarkana 1976, no writ), *commented on in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 116 (1977).

The federal preemption[129] or sovereign gratuity[130] argument was given short shrift by the early Texas appellate cases concerning military retirement benefits and was seemingly put to rest in *Bushy v. Bushy*[131] in 1970. In its opinion on a motion for rehearing in *Valdez v. Ramirez*,[132] however, the Supreme Court of Texas treated the preemption doctrine as an alternative or supplementary ground for its decision concerning federal civil service retirement benefits.[133] That case, however, seems more solidly grounded on the legislative commitment to the principle that community property that is the product of the employment of a spouse is subject to that spouse's sole management.[134]

In its reliance on the preemption principle, *Valdez* anticipated the United States Supreme Court's decision in *Hisquierdo v. Hisquierdo*,[135] which occurred less than six months later. *Hisquierdo*'s immediate local impact is merely to resuscitate the authority of *Allen v. Allen*[136] wherein the Houston court of civil appeals held that a spouse's interest in the federal railway retirement fund did not constitute community property. Yet it is certain to be asserted that *Hisquierdo* has more far-reaching implications than that.

The United States Supreme Court approached the issue before it in a way that Texans may find unusual. In determining whether property is community or separate, a Texas lawyer will first ask whether the property was acquired during marriage. If so, he will presume[137] that it is community. If the acquisitions are acquired as earnings, there is an even stronger inference of their community character. Separate character must then be proved by the party who asserts it. Nevertheless, in distinguishing between income from property and a gift, we sometimes look to the intention of the transferor[138] in order to characterize the property received by a spouse. It

129. Webster v. Webster, 442 S.W.2d 786, 788 (Tex. Civ. App.—San Antonio 1969, no writ).

130. Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd), *noted in* 22 Sw. L.J. 888 (1968); Kirkham v. Kirkham, 335 S.W.2d 393, 394 (Tex. Civ. App.—San Antonio 1960, no writ).

131. 457 S.W.2d 551 (Tex. 1970).

132. 574 S.W.2d 748, 753 (Tex. 1978), *discussed at* text accompanying notes 370-75 *infra*.

133. In Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), the court held that state property law is not preempted by the Federal Employee Retirement Income Security Act of 1974 (ERISA). 450 F. Supp. at 932. *Accord*, Johnston v. Johnston, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (1978), *noted in* 6 COMMUNITY PROP. J. 85 (1979); Johns v. Retirement Fund Trust, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978), *noted in* 5 COMMUNITY PROP. J. 274 (1978). *Contra*, Francis v. United Technologies Corp., 458 F. Supp. 84 (N.D. Cal. 1978). *See generally Report of the Committee on ERISA*, 13 REAL PROP. PROBATE & TRUST J. 977, 1000-01 (1978).

134. TEX. FAM. CODE ANN. § 5.22(a) (Vernon 1975); *see* notes 370-75 *infra* and accompanying text.

135. 99 S. Ct. 802, 59 L. Ed. 2d 3 (1979).

136. 363 S.W.2d 312 (Tex. Civ. App.—Houston 1962, no writ). *Allen* had been superseded by Eichelberger v. Eichelberger, 557 S.W.2d 587 (Tex. Civ. App.—Waco 1977, writ granted).

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

138. Strickland v. Wester, 131 Tex. 23, 25-26, 112 S.W.2d 1047, 1048 (1938); Cauble v. Beaver-Electra Ref. Co., 115 Tex. 1, 6, 274 S.W. 120, 121 (1925) (dictum); Hutchinson v. Mitchell, 39 Tex. 488, 493-94 (1873); Sullivan v. Skinner, 66 S.W. 680, 681 (Tex. Civ. App.

is at this sort of secondary level of inquiry that the Supreme Court of the United States commences its resolution of the issue of characterization in *Hisquierdo*. The method is, therefore, not wholly unfamiliar to us, but the court never clearly propounds what we normally regard as the threshold question: was the acquisition gained as compensation or not? The Court's approach is sovereign-centered rather than conceptual, in that it looks to the intent of Congress rather than the concept of community property as defined by state law.

The property in question was an interest gained by a railroad employee in the federal railroad retirement pension fund. The fund was created for railroad workers under the Railroad Retirement Act of 1937,[139] as reenacted in 1974.[140] Many provisions of this Act are similar to those of the Social Security Act for workers in general.[141] The fund is contributed to by a federal tax assessed against both the railroads and railroad employees.

> In its modern form, the Act resembles both a private pension program and a social welfare plan. It provides two tiers of benefits. The upper tier, like a private pension, is tied to earnings and career service. An employee, to be eligible for benefits, must work in the industry 10 years. . . . Like a social welfare or insurance scheme, the taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled. Since 1950, the Railroad Retirement Account has received substantial transfers from the social security system, and legislative changes made in 1974 were expected to require a one-time infusion of $7 billion in general tax revenues.
>
> The lower, and larger, tier of benefits corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act. . . . The Act provides special benefits for the children or parent of a worker who dies. . . . It also makes detailed provision for a worker's spouse; the spouse qualifies for an individual benefit if the spouse lives with the employee, and receives regular contributions from the employee for support, or is entitled to support from the employee pursuant to a court order. . . . The benefits terminate, however, when the spouse and the employee are absolutely divorced . . . .[142]

The California Supreme Court had concluded that the fund in which the prospective pensioner had an interest arose in part from his employment and therefore should be treated as a contract right. A Texas court might have said that the interest of the employee arose as a result of his employment and was therefore deemed compensation, regardless of how the fund

1902, writ ref'd); McClelland v. McClelland, 37 S.W. 350, 358 (Tex. Civ. App. 1896, writ ref'd); Monday v. Vance, 32 S.W. 559 (Tex. Civ. App. 1895, no writ); Shepfin v. Small, 23 S.W. 432, 433 (Tex. Civ. App. 1893, no writ). All of these authorities deal with income from a fund as the subject matter of a gift as intended by the transferor.

139. 99 S. Ct. at 804 n.3, 59 L. Ed. 2d at 6 n.3.

140. *Id.*

141. *Id.*

142. *Id.* at 804-05, 59 L. Ed. 2d at 6-7 (footnotes omitted; citations omitted).

was constituted.[143]

In concluding that the employee's interest in the fund amounted to a separate rather than a community interest, the United States Supreme Court put its principal reliance on congressional intent to provide for the railway worker alone:[144] specific provisions are made for the worker's spouse; the spouse is excluded from benefits on divorce (although the Social Security Act benefits the divorced wife of a long marriage);[145] and the anti-assignment provisions of the Act[146] and the enactment of the 1977 amendment to the Act[147] show a congressional intent to benefit the railroad employee only. Specific congressional enactment therefore preempts state law in this area of paramount federal interest under the supremacy doctrine.[148]

What the United States Supreme Court says in *Hisquierdo* concerning railroad retirement fund benefits seems in many respects applicable to social security and other federal benefits,[149] but the Court is careful to point out that "[d]ifferent considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates."[150]

It is not altogether clear, but the Court's opinion may be interpreted as meaning that the federal benefits under discussion are not only separate property but are immune from any disposition by a divorce court and cannot be taken into consideration in dividing other property. "An offsetting award . . . would upset the statutory balance and impair [the prospective pensioner's] economic security just as surely as would a regular deduction

143. Taggart v. Taggart, 552 S.W.2d 422, 423 (Tex. 1977); Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976); Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970); Herring v. Blakeley, 385 S.W.2d 843, 846 (Tex. 1965).

144. 99 S. Ct. at 810, 59 L. Ed. 2d at 13.

145. In 1977 the Social Security Act was amended in a very significant way whereby a divorced wife of an insured person is entitled to independent benefits by virtue of a 10-year marriage terminated by divorce (rather than after a 20-year marriage as was the case before). 42 U.S.C.A. § 416 (Supp. 1978). The failure of Congress to provide for the divorced husband may cast doubt on the validity of this provision. *See* Orr v. Orr, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979).

146. 99 S. Ct. at 809-12, 59 L. Ed. 2d at 12-16. From very modest legislative history of this particular anti-assignment provision the Court infers a legislative intent that the benefits should be the worker's separate property. *Id.* at 805 n.7, 59 L. Ed. 2d at 7 n.7. Here the Court's position is exceptionally weak historically with respect to the purpose of this kind of statute generally. This sort of provision was first enacted after the Mexican War to avoid predatory exploitation of American troops and to free the federal government from harassment by their assignees. Such provisions have been kept in effect and added to new legislation for the same purposes ever since. *See* P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 271-76 (1968).

147. 99 S. Ct. at 811, 59 L. Ed. 2d at 14.

148. *Id.* at 813, 59 L. Ed. 2d at 16.

149. *See* Reppy, *Learning to Live with Hisquierdo*, 6 COMMUNITY PROP. J. 5 (1979), a severe criticism of *Hisquierdo* and its consequences. *See also* Derr v. Derr, — Cal. App. 3d —, — Cal. Rptr. — (1978), *noted in* 6 COMMUNITY PROP. J. 84-85 (1979). *Compare In re* Hillerman, 88 Cal. App. 3d 372, 151 Cal. Rptr. 764 (1979), decided a week before *Hisquierdo. Hillerman* is noted in 6 COMMUNITY PROP. J. 84 (1979).

150. 99 S. Ct. at 813 n.24, 59 L. Ed. 2d at 16 n.24.

from his benefit check."[151]

In California separate property is not divided on divorce and community property is divided equally. But unless the Court was merely commenting on the effect of California law in relation to interests in railway retirement funds, what was said about division has a clear impact on Texas practice in dealing with railroad retirement or analogous funds.[152] A broader perspective of the Court's comment may be gained by considering its effect in common law states that employ discretionary division of separate property.[153] The Court seems to have been mindful of this problem.[154]

Overall, the tone of the United States Supreme Court's opinion in *Hisquierdo* has an unsettlingly familiar ring that echoes the monarchial sentiments of the Spanish commentators when they undertook to discuss acquisitions from a grateful sovereign: treating acquisitions as a separate-property-largesse rather than as aspects of compensation.[155] But the old commentators were not considering pensions, which are an integral part of a salaried compensation system.[156] It is unfortunate that the opinion in *Hisquierdo* takes on this imperial tone when something more in keeping with twentieth century realities is appropriate. It is therefore hoped that the monarchial approach will be limited to the application of the Railroad Retirement Act or that Congress will see fit to alter the federal statutes as the Court suggests might be appropriate.[157]

III. DIVORCE PROCEEDINGS

Jurisdiction and Venue. Challenges to a court's exercise of personal jurisdiction over a nonresident respondent in divorce proceedings most fre-

151. *Id.* at 811, 59 L. Ed. 2d at 15.

152. Eichelberger v. Eichelberger, 557 S.W.2d 587 (Tex. Civ. App.—Waco 1977, writ granted).

153. *See* Freed, *Equitable Distribution in the Common Law States: A "Bird's Eye" View*, in ECONOMICS OF DIVORCE 21 (ABA 1978).

154. 99 S. Ct. at 806 n.11, 59 L. Ed. 2d at 9 n.11.

155. *See* 2 S. LLAMAS Y MOLINA, COMENTARIO CRITICO, JURIDICO, LITERAL, A LAS OCHENTA Y TRES LEYES DE TORO ley 77, gl. 24, at 513 (3d ed. 1856). But when the Spanish commentators spoke of remunerative donations, they took as their point of departure a specific provision of their ancient codes favoring separate characterization when the source of acquisition was the crown. FUERO REAL III.3.2 (1255); NUEVA RECOPILACION V.9.3 (2d ed. 1567); NOVISIMA RECOPILACION X.4.2 (1805). They were therefore forced to conclude that such acquisitions were separate property in spite of the fact that their purpose was primarily remunerative. *See* J. MATIENZO, COMMENTARIA IN LIBRUM QUINTUM RECOLLECTIONIS LEGUM HISPANIAE V.9.3, gl. 5, nos. 1-2, gl. 6, nos. 2-9, & V.9.5, gl. 2, gl. 4, no. 1 (1597); J. LOPEZ DE PALACIOS RUBIOS, COMMENTARIA DE DONATIONIBUS INTER VIRUM ET UXOREM § 65, no. 65 (1503); 2 S. LLAMAS Y MOLINA, COMENTARIO CRITICO, JURIDICO, LITERAL, A LAS OCHENTA Y TRES LEYES DE TORO ley 77, gl. 19-27, at 511-14 (3d ed. 1853). Llamas y Molina made a special point of royal pensions that he seemed to argue should be treated as rewards for personal service and hence as separate property. *Id.* gl. 20, at 512, gl. 25-26, at 513-14.

156. Useful analogies can, however, be drawn from the old analyses of the pay received by public officers executing a public trust. The fruits of office (salary and perquisites) were community. *See* J. MATIENZO, *supra* note 155, at V.9.5, gl. 1-4; A. AZEVEDO, COMMENTARIORUM IURIS CIVILIS IN HISPANIAE REGIAS CONSTITUTIONES V.9.5, gl. 1 (1583-1598).

157. 99 S. Ct. at 813, 59 L. Ed. 2d at 16.

quently arise from the party's concern for the consequences that the exercise of jurisdiction will have on property interests and rights and duties as to children.[158] The acquisition of personal jurisdiction, though not necessary for an adjudication of dissolution of the marriage,[159] nonetheless is desirable[160] to preclude a later collateral attack by the nonresident spouse on the finding of domicile,[161] to give the court power to grant a money judgment against the nonresident spouse,[162] to determine the nonresident spouse's rights with respect to support,[163] or to fix the spouses' conservatorship rights pertaining to their children.[164] The difficulty of acquiring personal jurisdiction over an out-of-state spouse is ameliorated by the long-arm provisions in section 3.26 of the Family Code.[165] Personal jurisdiction for purposes of granting a divorce was achieved under section 3.26[166] over a nonresident spouse in *Geesbreght v. Geesbreght*[167] when it

158. Instances of assertion of a lack of subject matter jurisdiction with respect to the marital res are, of course, rare. The attack on the alleged Texas domicile of the petitioner in Simonsen v. Simonsen, 414 S.W.2d 54, 58 (Tex. Civ. App.—Amarillo 1967, no writ), amounted to a contest of subject matter jurisdiction, though the point was not perceived by the court.

159. A lack of personal jurisdiction was argued unsuccessfully in Scott v. Scott, 554 S.W.2d 274 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ), under the Texas long-arm statute, TEX. FAM. CODE ANN. § 3.26 (Vernon 1975). *See also* Butler v. Butler, 577 S.W.2d 501 (Tex. Civ. App.—Texarkana 1978, no writ).

160. Weintraub, *Texas Long-Arm Jurisdiction in Family Law Cases*, 32 SW. L.J. 956, 967-68 (1978).

161. *Id.*

162. *Id.* at 968-71. Having personal jurisdiction, the court also has an opportunity to order disposition of whatever foreign realty a spouse subject to personal jurisdiction may control. Lopez v. Lopez, No. 15,788 (Tex. Civ. App.—San Antonio Apr. 20, 1977, no writ) (not yet reported). *See also* Estabrook v. Wise, 348 So. 2d 355 (Fla. Dist. Ct. App. 1977), *cert. denied*, 354 So. 2d 980 (Fla.), *cert. denied*, 435 U.S. 971 (1978).

163. Weintraub, *supra* note 160, at 971-72.

164. *Id.* at 972-73.

165. Section 3.26 provides:

> (a) If the petitioner is a resident or a domiciliary of this state at the commencement of a suit for divorce, annulment, or to declare a marriage void, the court may exercise personal jurisdiction over the respondent, or the respondent's personal representative, although the respondent is not a resident or a domiciliary of this state if:
>
> (1) this state is the last state in which marital cohabitation between petitioner and the respondent occurred and the suit is commenced within two years after the date on which cohabitation ended; or
>
> (2) notwithstanding Subdivision (1) above, there is any basis consistent with the constitution of this state or the United States for the exercise of the personal jurisdiction.
>
> (b) A court acquiring jurisdiction under this section also acquires jurisdiction in a suit affecting the parent-child relation if Section 11.051 of this code is applicable.

TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1978-79).

166. *Id.* § 3.26(a)(1). Section 3.26(a)(2) provides that "notwithstanding" the provisions of subsection (a)(1), the court may still maintain personal jurisdiction over the nonresident respondent on "any basis consistent with the constitution of this state or the United States for the exercise of personal jurisdiction." In Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, writ dism'd), the court, by way of obiter dictum, commented that the similar "notwithstanding" clause in § 11.051 means "even where the section might otherwise be deemed inapplicable." 570 S.W.2d at 430. Such an expansive, though literal, reading of § 3.26(a)(2) makes § 3.26(a)(1) little more than an example of a typical situation "in which jurisdiction will be available." Weintraub, *supra* note 160, at 957 & n.62.

was proved that marital cohabitation was maintained in Texas between the parties within two years of the filing of the petition as provided in the statute. When issues pertaining to children of the marriage are involved, section 11.051[168] provides additional grounds for obtaining personal jurisdiction over a nonresident parent largely based on the past or present residence of the child within the state.

When a suit for divorce is brought and the parties are parents of a child not subject to a court's continuing jurisdiction, section 3.55(b)[169] requires that the petitioner for divorce "must include a suit affecting the parent-child relationship." Hence the petitioner files two distinct suits, which may be severed for trial.[170] If the child is subject to another court's continuing jurisdiction, section 3.55(c)[171] provides for compulsory transfer of that suit to the court with jurisdiction of the suit for divorce. In *Brown v. Brown*[172] the husband commenced a proceeding in the county of his residence for divorce and conservatorship of his child, who was not subject to the continuing jurisdiction of another court. His wife, who resided with the child

Compare Geesbreght with Zeisler v. Zeisler, 553 S.W.2d 927 (Tex. Civ. App.—Dallas 1977, writ dism'd), in which the court held (presumably under §§ 11.051(1), (2), (4) of the Family Code) that a Texas court has the power to order an increase in child support payments with respect to a child of parents who had conceived the child, lived with the child, and were divorced in Texas, although all the parties had since moved to other states. *See also* Oubre v. Oubre, 575 S.W.2d 363 (Tex. Civ. App.—San Antonio 1978, no writ), in which the court entertained the father's suit concerning the parent-child relationship after the mother and child had moved to another state. *Compare* Miller v. Miller, 575 S.W.2d 594 (Tex. Civ. App.—El Paso 1978, no writ). In Kulko v. Superior Court, 436 U.S. 84 (1978), the United States Supreme Court made a start at defining federal due process in this family law context. *See* Solender, *Family Law: Parent and Child*, p. 157-59 *infra*. For a federal case dealing with long-arm jurisdiction under TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964), see Grantham v. Aetna Life & Cas., 455 F. Supp. 440 (N.D. Tex. 1978). *See also* U-Anchor Advertising, Inc. v. Burt, 544 S.W.2d 500 (Tex. Civ. App.—Amarillo 1976), *aff'd*, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978), *discussed in* Note, *Due Process Under the Texas Long-Arm Statute*, 15 HOUS. L. REV. 1054 (1978).

167. 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, writ dism'd). The respondent also acceded to the court's jurisdiction by making a general appearance in connection with her plea to be temporarily appointed as managing conservator of her children.

168. Section 11.051 states:

> In a suit affecting the parent-child relationship, the court may exercise personal jurisdiction over a person on whom service of citation is required or over the person's personal representative, although the person is not a resident or domiciliary of this state, if:
>
> (1) the child was conceived in this state and the person on whom service is required is a parent or an alleged or probable father of the child;
>
> (2) the child resides in this state, as defined by Section 11.04 of this code, as a result of the acts or directives or with the approval of the person on whom service is required;
>
> (3) the person on whom service is required has resided with the child in this state;
>
> (4) notwithstanding Subdivisions (1), (2), or (3) above, there is any basis consistent with the constitutions of this state or the United States for the exercise of the personal jurisdiction.

TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1978-79).

169. *Id.* § 3.55(b) (Vernon 1975).

170. TEX. R. CIV. P. 41; *see* McKnight, *Commentary to the Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 332 (1974).

171. TEX. FAM. CODE ANN. § 3.55(c) (Vernon 1975).

172. 566 S.W.2d 378 (Tex. Civ. App.—Corpus Christi 1978, no writ).

in another county, responded with a plea of privilege to be sued in the county of the child's residence pursuant to section 11.04(a) and (c)(3).[173] Reading subsections 3.55(b) and 3.55(c) together, the Corpus Christi court of civil appeals concluded that venue was proper for both suits in the court in which the divorce had been filed in spite of the provision in section 11.04(a)[174] that "a suit affecting the parent-child relationship shall be brought in the county where the child resides." The transfer provisions of section 11.06(a) and (b),[175] relating to transfer of suits affecting the parent-child relationship, were therefore irrelevant.

Voluntary and Involuntary Dismissal. The sole issue in *Gandhi v. Gandhi*[176] was the entitlement of attorneys ad litem to fees when a voluntary nonsuit is taken. The attorneys were appointed to represent the respondent-wife, a resident of India. Despite the fact that the nonsuit was prompted by the petitioner's failure to comply with an order requiring him to make a deposit for costs, the petitioner was not relieved of responsibility. In a brief opinion, the appellate court held that the attorneys were entitled to fees for their services rendered regardless of the fact that the petitioner voluntarily took a nonsuit.[177]

When a suit is dismissed, voluntarily or involuntarily, a party may either seek to reinstate the original suit or file a new suit. In *George v. George*[178] the petitioning wife elected to file a new suit for divorce in another court in the same county of her residence after her original suit was involuntarily dismissed for want of prosecution. Her husband filed an ex parte motion to set aside the order dismissing the original suit, although he was not served with process and had filed no pleadings in the first suit. The husband's motion was granted. The wife responded with a plea in abatement to dismiss the reinstated original suit because the new suit was pending in another court. She argued that her husband was not entitled to seek reinstatement of the earlier suit since he had not been served with process therein and had filed no pleading prior to the suit's dismissal. The court granted the wife's plea, and the husband appealed. The court of appeals affirmed the ultimate disposition of the suit; sustaining the wife's plea in abatement had the same effect as a denial of the husband's motion for reinstatement. The court nevertheless expressed dissatisfaction with the original court's order of reinstatement; the husband lacked standing to seek reinstatement under both rule 165a[179] and the analogous authorities

173. TEX. FAM. CODE ANN. § 11.04 (Vernon 1975 & Supp. 1978-79).
174. *Id.* § 11.04(a) (Vernon 1975).
175. *Id.* § 11.06.
176. Rule 244 states that "[t]he court shall allow such [court-appointed] attorney a reasonable fee for his services, to be taxed as part of the costs." TEX. R. CIV. P. 244.
177. *See also* Poston v. Poston, 572 S.W.2d 800, 802-03 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (fees for a guardian ad litem).
178. 564 S.W.2d 172 (Tex. Civ. App.—Tyler 1978, no writ).
179. TEX. R. CIV. P. 165a.

dealing with a petitioner's voluntary dismissal.[180]

Masters, Receivers, and Auditors. The crowded conditions of the divorce courts have induced judges to appoint masters to hear evidence of disputed facts and to make recommendations to the court.[181] A master, however, cannot be appointed as a substitute for a properly demanded jury trial;[182] litigants are entitled to a trial by the court in every suit unless "exceptional" circumstances are shown. In the absence of special legislation for that purpose,[183] neither court congestion nor potential length of trial time makes a complicated case exceptional in order to justify the appointment of a master.

While the master serves quasi-judicially, a receiver or an auditor serves different functions. Since the receiver has power to administer assets, the appointment of a receiver[184] is acknowledged to be a harsh remedy that should be utilized only in extraordinary circumstances. In *Parness v. Parness*[185] a spouse appealed from an order appointing a receiver to take charge of and sell the home of the parties involved in a divorce action. Since the appellee failed to demonstrate any urgency requiring sale of the house, the court of appeals vacated the order, stating that a receiver should be appointed only in "situations where the property involved is in present danger of being lost, removed or materially injured and should never be ordered if another remedy, less harsh, is available which will afford the needed protection."[186]

An auditor does not judge, nor does he administer. His function is merely to render an account on the basis of facts supplied to him by the parties. He performs this function as an officer of the court, but his role is primarily clerical—neither judicial nor administrative as in the case of master or receiver.

Finality of Judgment. In the third[187] and, it is hoped, the last of the *Garrison* cases,[188] the point was reiterated that the death of a spouse engaged in divorce proceedings abates the entire suit, though the court may have pur-

180. *See* Turman v. Turman, 46 S.W.2d 447, 449 (Tex. Civ. App.—Texarkana 1932), *aff'd on certified question*, 123 Tex. 1, 64 S.W.2d 137 (1933).

181. *See* TEX. R. CIV. P. 171, which states: "The court may, *in exceptional cases, for good cause* appoint a master in chancery . . . ." (Emphasis added).

182. Garrison v. Garrison, 568 S.W.2d 709 (Tex. Civ. App.—Beaumont 1978, no writ).

183. Poston v. Poston, 572 S.W.2d 800 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ). Garrison v. Garrison, 568 S.W.2d 709, 710-11 (Tex. Civ. App.—Beaumont 1978, no writ), is to the same effect. Both courts concluded that since the trial court erred in appointing a master, assessment of costs of the master's hearings against the objecting party was also erroneous. *Id.* at 711; 572 S.W.2d at 802. *See also* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 110 & nn.48 & 49 (1977).

184. Cases on receivership in divorce proceedings are commented on in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 108-10 (1977).

185. 560 S.W.2d 181 (Tex. Civ. App.—Dallas 1978, no writ). This and other recent cases are summarized in Matheny, *Pitfalls to be Avoided by the District Court in the Trial of Family Law Cases*, 42 TEX. B.J. 41 (1979).

186. 560 S.W.2d at 182.

187. Garrison v. Garrison, 568 S.W.2d 709 (Tex. Civ. App.—Beaumont 1978, no writ).

188. *See* Garrison v. Texas Commerce Bank, 560 S.W.2d 451 (Tex. Civ. App.—Houston

ported to grant a divorce, if the court has not completed the process of dividing the estate of the parties. The trial court purported to grant the divorce but reserved judgment on the division of community property. On the spouse's intervening death this issue was rendered moot, and thus no final judgment of divorce could have thereafter been granted.[189] A court may not properly dismiss a cause of action as moot, however, if a final judgment of divorce is rendered, but the court may under rule 329b modify or vacate the judgment within thirty days after the entry of a written order.[190] A judgment of divorce need not necessarily be embodied in a written order to be final; an oral judgment that disposes of all the issues before the court is a final judgment and thus is subject to be vacated or modified under rule 329b. In *Verret v. Verret*[191] the spouse died after an oral judgment, which divided the community property and provided for the minor child; a written decree had not been entered. On appeal, the trial court's dismissal was recognized as inappropriate and the case was remanded for entry of judgment.

In *Polvado v. Polvado*[192] the divorce decree recited that the parties had "accumulated no community property during their marriage," which had subsisted for less than six months. When the husband died after the final decree was entered yet before the thirty-day period had passed, his wife filed a motion to set aside the judgment under rule 329b. The trial court responded by setting aside the judgment for divorce. On appeal the order was vacated. In so ruling, the Austin court of civil appeals said that in a suit for divorce where nothing is affected but marital status, that is, "no community property [was] accumulated during the marriage," the issues involved become moot on the death of the husband; the trial court thus no longer had jurisdiction of the parties and the subject matter of the litigation.[193] The Austin court properly vacated the order of the trial court, but for the wrong reason. The trial court does not lose jurisdiction on the death of a party after rendition of judgment. The trial court might have vacated the judgment for good cause. Further, under rule 369a[194] an appeal may be perfected despite the death of a party. An instance of good cause in vacating a judgment after the death of a party is illustrated by

[1st Dist.] 1977, writ ref'd n.r.e.); Garrison v. Mead, 533 S.W.2d 25 (Tex. Civ. App.— Houston [1st Dist.] 1977, no writ).

189. A purported division of property is ineffective if a divorce is denied. Choate v. Choate, 576 S.W.2d 656 (Tex. Civ. App.—Beaumont 1979, no writ).

190. TEX. R. CIV. P. 329b. If a motion for a new trial is filed, the court has power to modify or vacate the judgment until thirty days after the motion or amended motion has been overruled. Mathes v. Kelton, 569 S.W.2d 876 (Tex. 1978); Poulter v. Poulter, 565 S.W.2d 107, 109-10 (Tex. Civ. App.—Tyler 1978, no writ); Reavley & Orr, *Trial Court's Power to Amend its Judgment*, 25 BAYLOR L. REV. 191 (1973).

In Bellatti v. Bellatti, 564 S.W.2d 168 (Tex. Civ. App.—Beaumont 1978, no writ), the filing of a frivolous appeal from a consent decree prevented a judgment from becoming final for nearly 50 days in addition to 30 days under rule 329b. A penalty of $1,000 was imposed on the appellant in favor of the appellee under TEX. R. CIV. P. 438.

191. 570 S.W.2d 138 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

192. 565 S.W.2d 595 (Tex. Civ. App.—Austin 1978, writ dism'd).

193. *Id.* at 596, 597.

194. TEX. R. CIV. P. 369a. This point was emphasized in *Verret*. 570 S.W.2d at 139.

Powell v. Powell.[195]

In *Powell* the husband had sued the wife for divorce in 1974. The wife, who was served by publication, failed to appear, and a decree was entered for the husband. Almost two years later the wife filed her sworn motion for a new trial pursuant to rule 329[196] alleging that the divorce had been procured by fraud. In the meantime the husband had remarried and had subsequently died. The first wife's motion was contested by the second wife. The appellate court rejected the second wife's argument that the judgment had become final by virtue of the husband's death, because there could be no new trial. The original decree may nonetheless be vacated by an order for a new trial under rule 329.[197]

Motion for New Trial. Motions for new trial that are made on the basis of newly discovered evidence are not favored by the courts. Nevertheless such motions will be granted when it is shown that the movant had no knowledge of the evidence prior to trial and that the new evidence is competent and will materially change the outcome of the litigation. Accordingly, at a hearing on a motion for new trial, a tender of evidence that was admittedly known or available to the movant prior to trial to show that the petitioner had not been a resident in the county of suit for the preceding ninety days was held properly excluded.[198] The excluded evidence merely confirmed temporary absences from the county, and in any case, temporary absences do not defeat an assertion of residence.[199]

Burns v. Burns[200] and *Tresselt v. Tresselt*[201] present an interesting contrast with respect to the consequences a default judgment may have on a subsequent motion for new trial when the defaulting party fails to assert a meritorious defense. In both cases the petitioners had taken a default judgment for divorce because of the movants' failure to respond. While the movant in *Burns*[202] asserted a meritorious defense with respect to a debt owed to the movant by the petitioner, the movant in *Tresselt*[203] offered no meritorious defense. A further contrast between the two cases

195. 572 S.W.2d 66 (Tex. Civ. App.—Dallas 1978, no writ).

196. Rule 329 states in part:

> In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by attorney of his own selection:
>
> (a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was rendered. The parties adversely interested in such judgment shall be cited as in other cases.

TEX. R. CIV. P. 329.

197. Rimbow v. Rimbow, 191 S.W.2d 89, 91 (Tex. Civ. App.—Galveston, writ ref'd), *cert. denied*, 329 U.S. 718 (1945).

198. Posey v. Posey, 561 S.W.2d 602 (Tex. Civ. App.—Waco 1978, writ dism'd).

199. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 107 (1977); McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 69 (1974).

200. 568 S.W.2d 669 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

201. 561 S.W.2d 626 (Tex. Civ. App.—Corpus Christi 1978, no writ).

202. 568 S.W.2d at 671.

203. In *Tresselt* the court stated that the movant's failure to set up a meritorious defense

concerns the movants' excuses for their earlier inattention. The appellate court in *Burns* was prepared to overlook whatever fault might have been attributable to the movant's attorney in misreading the date on the citation. Although fault or negligence of a party's attorney is generally attributed to that party, the error was a result of oversight and not indifference of a conscious sort. Noting that the petitioner would not be inconvenienced by a new trial, the Fort Worth court of civil appeals granted the movant's motion for the new trial.[204] In *Tresselt*, however, the movant herself was guilty of conscious indifference in the face of admonition on the part of the petitioner and her attorney.[205] Both this conscious indifference and the lack of an asserted meritorious defense justified the court's refusal to grant the motion for new trial.

In the last few years[206] the courts have developed a mounting body of precedent concerning the rights of a defaulting party to a new trial when there is no record before the appellate court, that is, neither a verbatim transcript nor a statement of facts, and the omission is not the fault of the complaining party. If a party desires a verbatim transcript, however, he must request the court reporter's presence at the trial.[207] A defaulting party, who may or may not have answered, does not waive his right to a statement of facts for appeal even though he waives his right to a verbatim transcript by his failure to request a reporter. It is clear that these princi-

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in her motion was in itself sufficient to justify a refusal to grant a new trial. 561 S.W.2d at 628.

204. Chief Justice Massey, who spoke for the court, makes it clear that he is following the spirit of his court's decision in General Portland, Inc. v. Collins, 549 S.W.2d 757 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). His dissent in *General Portland* makes it equally clear that he personally would follow a more restrictive policy toward granting motions for new trial. *See id.* at 759-60.

205. For a somewhat similar instance of seeming indifference of a litigant with respect to a setting for trial, see Brooks v. Brooks, 561 S.W.2d 949 (Tex. Civ. App.—Tyler 1978, no writ).

206. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 SW. L.J. 109, 111-12 (1978); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 110 (1977); McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 71 (1975).

207. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1978-79). In *Ex parte* Pappas, 562 S.W.2d 865, 866 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ), the relator does not seem to have complained of the lack of a record but merely of the lack of a reporter. In *Pappas*, TEX. FAM. CODE ANN. § 11.14(d) (Vernon 1975) is read as deriving its meaning from the terms of TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1978-79). The court in Rogers v. Rogers, 561 S.W.2d 172, 173 (Tex. 1978), however, seems to recognize § 11.14(d) as having an independent existence:

> Section 11.14(d) requires that a record be made in all suits affecting the parent-child relationship unless waived by the parties with the consent of the court. This provision places a duty on the court to make a record of the proceedings in the same manner as art. 2324 did before its amendment. Although art. 2324 was amended in 1975 to require the making of a record only on request, § 11.14(d), prescribing that a record be made in the parent-child relationship cases, was not so amended.

The Texarkana court of civil appeals interprets § 11.14(d) and the supreme court's comment in a literal sense. *In re* Goodwin, 562 S.W.2d 532, 534 n.1 (Tex. Civ. App.—Texarkana 1978, no writ).

ples are equally applicable to cases of attack by appeal[208] or by writ of error.[209] An intermediate appellate court, however, has held that these principles do not afford the basis for attack by bill of review.[210] As to the party who was present at the trial but did not request a reporter, the responsibility for a statement of facts is difficult to establish. Arguably the appellant who was present at trial but failed to request a reporter is not at fault if the judge has no recollection of a statement of facts presented by the appellant. If the appellee fails to provide a statement of facts acceptable to the trial court, no blame for the lack of a record should fall on the appellant, and a new trial should be granted.[211] If the appellant or the appellee presents a statement of facts the court certifies, a record is provided and the issue of fault does not arise.[212]

Interlocutory Orders. As a general rule, an appeal may be taken only from a final judgment;[213] therefore, an interlocutory order is not ordinarily appealable.[214] In *Powell v. Powell*[215] a wife who had been served by publication and failed to appeal moved to set aside the judgment as obtained by fraud. The divorce court granted the motion and an appeal was taken. The appellate court held that the order granting a new trial was interlocutory and hence unappealable.

An order that becomes effective upon the occurrence of some future event is said to be interlocutory until that event occurs. In *Mackie v. Mackie*[216] the court held that a divorce decree that orders one party to procure an offer for sale of a particular piece of property by a specific date but allows the other party to submit a higher offer on terms to be approved by the court is not appealable.

Appeal. In the course of trial, care must be taken to protect the record for

208. Miller v. Miller, 569 S.W.2d 592 (Tex. Civ. App.—San Antonio 1978, no writ); Oliver v. Oliver, 567 S.W.2d 914 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

209. Rogers v. Rogers, 561 S.W.2d 172 (Tex. 1978); Smith v. Smith, 544 S.W.2d 121, 122-23 (Tex. 1976); *accord*, Doke v. Doke, 562 S.W.2d 29, 30 (Tex. Civ. App.—Austin 1978, no writ).

210. Oliver v. Oliver, 567 S.W.2d 914, 914 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (citing Clayton v. Clayton, 547 S.W.2d 719 (Tex. Civ. App.—El Paso 1977, writ dism'd), *noted in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 112 n.34 (1978)).

211. The long line of authority that presumes adequate proof of facts to maintain the holding of the trial court *in the absence of a complete record* does not militate against this conclusion. Buchman v. Byrd, 519 S.W.2d 8 (Tex. 1975). In those cases no question was raised with respect to the need for a record. But once the record is demanded, the nature of the dispute has perceptibly changed from one of fact to one of procedure.

212. *See* Glass v. O'Hearn, 553 S.W.2d 15 (Tex. Civ. App.—Fort Worth 1977, no writ).

213. For purposes of contempt the judgment becomes final when the motion for new trial is overruled unless there is an order for suspension of judgment. The fact that the judgment is being appealed does not preclude a motion for contempt. *Ex parte* Swearingen, 574 S.W.2d 785 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

214. TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971).

215. 572 S.W.2d 66 (Tex. Civ. App.—Dallas 1978, no writ).

216. 89 S.W.2d 494, 495 (Tex. Civ. App.—Waco 1933, no writ).

appeal.[217] Two cases illustrate the utility of a bill of exceptions in accomplishing this goal. Denying a party the opportunity to make his bill of exceptions was adjudged reversible error in *In re Goodwin*[218] when the trial judge entered judgment without acting on the appellant's timely request for a bill of exceptions.[219] On the other hand, by failing to make a timely request for additional findings of fact until eleven days[220] after the judge filed his original findings of fact and conclusions of law, the appellant in *Mosolowski v. Mosolowski*[221] lost his opportunity to complete the record for review. Without a bill of exception or some recital by the trial court that a request for findings was presented, error will not be preserved for appeal.[222]

As a general rule, a party who has voluntarily accepted benefits from a decree dividing property on divorce will be precluded from appealing the decree with respect to division of property.[223] In *O'Brien v. Gibbs*[224] a writ of mandamus was sought to allow a wife to appeal from a divorce decree by way of an affidavit of inability to furnish costs.[225] In denying the writ, the court pointed out that the petitioner might use an interest in property awarded under a divorce decree to secure payment of court costs without its constituting a voluntary acceptance of benefits. The value of the property awarded clearly exceeded the amount of expected costs. In the similar decision of *McCartney v. Mead*[226] it was said that pledging an interest awarded by a divorce court in order to procure a loan for costs of appeal did not bar an appeal. When an acceptance of benefits from a divorce judgment is made under circumstances deemed to be involuntary, such as the acceptance of benefits due to financial duress, a party will not be es-

217. *See* Guittard, *Protecting the Record for Appeal*, TRIAL LAW. F., Apr.-June 1978, 1, 3.

218. 562 S.W.2d 532 (Tex. Civ. App.—Texarkana 1978, no writ).

219. In order to obtain a reversal based upon exclusion of a witness's testimony, the aggrieved party must show by a bill of exceptions what the witness's testimony would have been. *Id.* at 533. The court also held that the appellant, by complaining of the exclusion of evidence, did not waive his right to challenge the case on the merits. *Id.*

220. After the trial judge files original findings of fact and conclusions of law, the parties have five days within which to request further, additional or amended findings. TEX. R. CIV. P. 298.

221. 562 S.W.2d 24 (Tex. Civ. App.—Tyler 1978, no writ).

222. The court of appeals pointed out that rule 298 specifically requires that a request for additional findings be made to the judge and that making a request of the clerk of the court is insufficient.

223. Carle v. Carle, 149 Tex. 469, 472, 234 S.W.2d 1002, 1004 (1950). Nor can a party accept some aspect of a property award and appeal as to another. Garner v. Garner, 567 S.W.2d 281 (Tex. Civ. App.—Eastland 1978, no writ).

224. 555 S.W.2d 199 (Tex. Civ. App.—Dallas 1977, no writ).

225. The petitioner argued that she was unable to raise a cash deposit required by the district clerk and the court reporter prior to preparation and delivery of the transcript and statement of facts. *Id.* at 200. Neither official, however, can insist on an advance cash payment when the appeal bond is sufficient to cover preparation of the record. McCartney v. Mead, 541 S.W.2d 202, 205 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ), *commented on in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 111 (1977).

226. 541 S.W.2d 202 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

topped to appeal.[227] Hence the sale of the homestead awarded in a property division to pay the indebtedness against it was not deemed voluntary so as to preclude the wife from appealing her award.[228]

Equitable Bill of Review. The gist of the rule of *Alexander v. Hagedorn*[229] as embellished by later judicial glosses is that to maintain an equitable bill of review a petitioner must show that he was prevented from making a meritorious defense due to the fault of the other party and not to any fault on his own part.[230] The acts of a party's attorney are normally attributed to the party represented. In *Smart v. Carlton*[231] it was asserted that filing a bill of review constituted actionable harassment. There an ex-wife filed an unsuccessful bill of review with respect to the parties' property settlement agreement. Several years later the ex-wife retained another attorney who filed a second bill of review on her behalf, apparently seeking similar relief. The ex-husband filed a motion for summary judgment and further asserted a counterclaim against both his ex-wife and her attorney, alleging that the second proceeding was "malicious and for the purpose of harassment and to gain money."[232] Following the grant of summary judgment and the dismissal of the counterclaim, the ex-husband perfected an appeal against the attorney only, further asserting that the suit against the attorney was one for malpractice. In affirming the judgment of the trial court the appellate court made three points. First, a necessary element in a suit for malicious prosecution is the resolution of the allegedly malicious suit in favor of the claimant. At the date the counterclaim was brought, however, the plaintiff's motion for summary judgment had not yet been granted. Secondly, Texas law requires a showing of damages either to the person or property of a claimant for malicious prosecution,[233] and the ex-husband had alleged no such damage. Finally, the arguments with respect to malpractice were irrelevant in a proceeding for malicious prosecution.

In *Sutherland v. Sutherland*[234] an ex-husband sought by declaratory judgment to avoid an award by a divorce court to his ex-wife of certain property that the husband alleged was incorrectly characterized as community property. The husband had failed to perfect a timely appeal from the original divorce decree. The appellate court rejected the appeal from the denial of declaratory judgment, stating that a bill of review was the

227. Cole v. Cole, 568 S.W.2d 152, 154-55 (Tex. Civ. App.—Dallas 1978, no writ); Trevino v. Trevino, 555 S.W.2d 795, 796 (Tex. Civ. App.—Corpus Christi 1977, no writ); *see* Haggard v. Haggard, 550 S.W.2d 374 (Tex. Civ. App.—Dallas 1977, no writ). *See also* Miller v. Miller, 569 S.W.2d 592 (Tex. Civ. App.—San Antonio 1978, no writ).

228. Cole v. Cole, 568 S.W.2d 152, 155 (Tex. Civ. App.—Dallas 1978, no writ).

229. 148 Tex. 565, 226 S.W.2d 996 (1950).

230. *See* Meyer, *The Equitable Bill of Review in Texas*, 41 TEX. B.J. 699 (1978). *See also* Bucker v. Tate, 572 S.W.2d 562 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); Comment, *Bill of Review: The Requirement of Extrinsic Fraud*, 30 BAYLOR L. REV. 539 (1979).

231. 557 S.W.2d 553 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

232. *Id.* at 554.

233. Pye v. Cardwell, 110 Tex. 572, 222 S.W. 153 (1920).

234. 560 S.W.2d 531 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).

exclusive means of attack available to the complainant.[235]

Post-Judgment Consequences of Waiver of Citations. Article 2249a[236] provides that a party who "participates . . . in the actual trial" of a case shall not be entitled to judicial review by writ of error. In *Blankinship v. Blankinship*[237] a husband sought review by writ of error after he had waived citation and entered an appearance in his wife's suit for divorce. After concluding that the extent of disqualifying participation was a question of degree, the appellate court held that the husband was barred from seeking review by writ of error.[238] *Blankinship* should be contrasted with *Faglie v. Williams*[239] in which a party to a divorce suit waived citation before the suit was filed but later attempted a collateral attack on the judgment. The relevant statute governing this situation is article 2224,[240] which provides that a waiver of citation executed prior to the filing of a suit is void. In *Faglie*, however, the judgment recited that the respondent had filed a waiver of citation and had failed to appear. A jurisdictional recital in a judgment valid on its face imports absolute verity to the judgment and therefore cannot be impeached by a collateral attack.[241]

IV. DIVISION ON DIVORCE

Property Settlement Agreements. Federal tax consequences should be a major consideration in drafting property settlement agreements in anticipation of divorce.[242] The tax liability of each spouse should be carefully delineated, and it should never be assumed that mutual understandings of the spouses will ward off future problems with the Internal Revenue Serv-

235. *Id.* at 533. Two previous attempts to attack the decree by a writ of habeas corpus had also failed. *Ex parte* Sutherland, 526 S.W.2d 536 (Tex. 1975), *commented on in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 30 SW. L.J. 68, 87 n.138 (1976); *Ex parte* Sutherland, 515 S.W.2d 137 (Tex. Civ. App.—Texarkana 1974, writ dism'd), *noted in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 67, 83 nn.127, 129 (1975). *See also* McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 471-72 & n.350 (1976).

236. TEX. REV. CIV. STAT. ANN. art. 2249a (Vernon 1971).

237. 572 S.W.2d 807 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

238. *Id.* at 807-08.

239. 569 S.W.2d 557 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

240. TEX. REV. CIV. STAT. ANN. art. 2224 (Vernon 1971). TEX. R. CIV. P. 119 provides that a "defendant may waive the issuance or service [of process] thereof by a written memorandum signed by him . . . after suit is brought."

241. Empire Gas & Fuel Co. v. Albright, 126 Tex. 485, 495, 87 S.W.2d 1092, 1096 (1935); Jordan v. Texas Pac. Coal & Oil Co., 152 S.W.2d 875, 879 (Tex. Civ. App.—Amarillo 1941, writ ref'd).

242. *See* Vaughan, *What the Property Settlement Should Say About Income Taxes*, 4 COMMUNITY PROP. J. 29 (1977). For a discussion of the liability of an attorney for failure to advise clients of tax consequences of division of marital property on divorce, see Note, *Divorce Lawyer Liable for Failure to Advise Client of Tax Consequences of Division of Marital Property Equal in Value but not in Kind*, 1 AM. FAM. L. TAX REP. 1003 (1978). California courts have recently examined the question of an attorney's liability for malpractice when he overlooks the community interest of a client in a divorce proceeding. Raudebaugh v. Young, — Cal. App. 3d —, 150 Cal. Rptr. 848 (1978), *noted in* 6 COMMUNITY PROP. J. 86 (1979); Lewis v. Superior Court, 77 Cal. App. 3d 844, 144 Cal. Rptr. 1 (1978).

ice.[243] An agreement between the spouses for the payment of alimony is an enforceable obligation, and such payments constituting "alimony" are fully deductible to the obligor spouse.[244] The Internal Revenue Service will likely take the position that any payments made in excess of the specified amount are not part of the enforceable obligation and are, therefore, not deductible.[245] To avoid future disputes, the possibilities of an assessment of a tax deficiency as well as a tax refund should be anticipated.[246] Further, if one spouse is to pay the other's tax liability arising from community income, the precise method of computation should be specified.[247]

Potential disputes concerning the asserted rights of third persons must also be considered when drafting settlement agreements. Divisions of community corporate stock may be subject to the corporation's right of first refusal before those shares may be sold.[248] A change of beneficiary of a life insurance policy may also warrant attention in a settlement of property rights. If designation of the beneficial interest in a policy of insurance on the life of one of the spouses is embodied in the settlement agreement or is made a term of the ultimate decree of the divorce court, the rights so created for children of the insured parent will be given effect on the death of the insured in spite of a later change of beneficiary.[249] These are only examples of some of the problems that must be anticipated when planning for the enforcement and operation of the terms of the agreement.[250]

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243. *See* Adwan v. Adwan, 538 S.W.2d 192 (Tex. Civ. App.—Dallas 1976, no writ); Lifson v. Dorfman, 491 S.W.2d 198 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.); Dauray v. Gaylord, 402 S.W.2d 948 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.); McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 421-25, 421 nn.53 & 54, 422 n.56, 424 n.69 (1976); McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 83 (1975). *See also* Delevett, *Federal Gift and Estate Tax Aspects of Divorce and Separation*, 64 A.B.A.J. 272 (1978).

244. *See* I.R.C. § 215.

245. Moore v. United States, 449 F. Supp. 163 (N.D. Tex. 1978).

246. *See* Adwan v. Adwan, 538 S.W.2d 192, 197 (Tex. Civ. App.—Dallas 1976, no writ).

247. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 422 (1976).

248. *See* Monitor Technology, Inc. v. Hetrick, 76 Cal. App. 3d 912, 141 Cal. Rptr. 711 (1978), *commented on in* 48 CORP. REP. BULL. (P-H) 3-4 (1978).

249. Gutierrez v. Madero, 564 S.W.2d 185 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.). Pursuant to the divorce decree, the minor children acquired an equitable right to the proceeds of the father's insurance policy. The court of appeals found that the father had misappropriated the children's interest in the policy when he redesignated the beneficiary, thereby failing to maintain the children as the beneficiaries. In order to provide relief for the children, the court imposed a constructive trust on the policy proceeds for the benefit of the children. *Compare* Meffert v. Woodruff, 448 S.W.2d 185 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.), in which the court ordered the wife to surrender the policy to the husband for a change of beneficiary to a child of the insured husband. Since the wife was unable to retrieve the policy, the change of beneficiary was treated as accomplished. *See also* Government Personnel Mut. Life Ins. Co. v. Kaye, 584 F.2d 738 (5th Cir. 1978), with respect to a separate policy of life insurance governed by Michigan law following a Michigan divorce. The divorce decree terminated the wife's interest in the husband's insurance policies and transferred the interest to any beneficiary affirmatively designated by the husband. Since the husband failed to redesignate before he died domiciled in Texas, the proceeds went to his estate.

250. *See* McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 424-25 (1976). For the consequences of a subsequent bankruptcy on a party's obligation as a result of divorce, see notes 346-55 *infra* and accompanying text.

Property settlements entered into as contracts are enforceable as contracts.[251] During negotiations each party should require of the other adequate disclosure and documentation of relevant information.[252] In *Anderson v. Anderson*[253] the settlement agreement provided that its efficacy rested on accuracy of the information furnished by the husband, and after the agreement was executed, the husband allegedly promised to supply particular information to the wife. After the divorce the ex-husband failed to supply the additional information. The ex-wife thereupon prayed that he be ordered to supply the information. The wife's petition was denied. Her proper course under the circumstances was to seek relief under the settlement or the decree and then to discover the facts necessary to proceed.[254]

Any oral statements of one spouse relied upon by the other should be reduced to writing, particularly when the property settlement is to be made a part of the divorce court's final judgment. In a suit for payments due under a property settlement agreement[255] the court of appeals stated that the husband could not justifiably rely upon the wife's oral statement made during negotiations that she would not enforce an obligation in the property settlement. Since the settlement was reduced to writing and incorporated into the final judgment, the wife's representation was insufficient to raise an issue of fraud.[256]

A suit seeking to enforce provisions for a minor child's support under a contractual property settlement is not a suit affecting the parent-child relationship but is a suit on the contract[257] and is therefore not within those

251. To be enforced as contractual terms, the child support provisions of a property settlement must so specifically provide, however. TEX. FAM. CODE ANN. § 14.06(d) (Vernon 1975).

252. Garcia v. Flynt, 574 S.W.2d 587, 589 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (relying on Town N. Nat'l Bank v. Broaddus, 569 S.W.2d 489 (Tex. 1978)).

253. 563 S.W.2d 345 (Tex. Civ. App.—Dallas 1978, no writ).

254. *Id.* at 347.

255. Garcia v. Flynt, 574 S.W.2d 587 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

256. *Id.* at 589.

In other circumstances, however, a property settlement may be set aside if fraudulently induced. *See* McFarland v. Reynolds, 513 S.W.2d 620 (Tex. Civ. App.—Corpus Christi 1974, no writ); Myers v. Myers, 503 S.W.2d 404 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ dism'd w.o.j.); Bell v. Bell, 434 S.W.2d 699 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.); Eldridge v. Eldridge, 259 S.W. 209 (Tex. Civ. App.—San Antonio 1924, no writ); Swearingen v. Swearingen, 193 S.W. 442 (Tex. Civ. App.—San Antonio 1917, no writ).

257. Carson v. Korus, 575 S.W.2d 326, 328 (Tex. Civ. App.—San Antonio 1978, no writ); Adwan v. Adwan, 538 S.W.2d 192 (Tex. Civ. App.—Dallas 1976, no writ). It is sometimes said that the entire law of contracts, therefore, applies to property settlement agreements that are contractual in nature. In Stegall v. Stegall, 571 S.W.2d 564 (Tex. Civ. App.—Fort Worth 1978, no writ), the court allowed the wife, as the promisee of a third-party beneficiary contract, to recover when the promisor-husband defaulted on a provision of the settlement agreement that required him to pay the tuition expenses of his adult son's college education.

If one chooses to sue for enforcement of a contractual settlement in the county court, the jurisdictional limits must be borne in mind from the start. An amendment seeking recovery beyond those limits will not bootstrap the court's jurisdiction to greater heights. Garcia v. Flynt, 574 S.W.2d 587 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ); *cf.* Smith v. Texas Improvement Co., 570 S.W.2d 90 (Tex. Civ. App.—Dallas 1978, no writ) (amended petition alleging damages in an amount greater than the jurisdictional limit of county court

provisions of the Family Code[258] that provide for continuing jurisdiction in suits affecting the parent-child relationship. The agreement must specifically provide, however, that the terms are enforceable as contract terms.[259]

In *Peddicord v. Peddicord*[260] the Beaumont court of civil appeals expressed the opinion that if a contractual settlement is embodied in a decree of divorce, the rules of collateral attack on a judgment apply if any attack is mounted on terms of the settlement agreement. The Amarillo court of civil appeals adopted this conclusion in *Atkinson v. Atkinson*,[261] and the El Paso court has followed suit.[262] The argument is most difficult to accept when the court lacks jurisdiction to order what has been contracted, as in the case of permanent alimony. In that situation if the contestant's subsequent suit would constitute a collateral attack on a prior agreed judgment, the contestant would be denied recourse to extrinsic evidence in raising contractual defenses to the contractual terms of the settlement. Hence, the ex-spouse who benefits by the terms of the contractual settlement could rely defensively on the judgment or offensively on the contract, unless the contract merges into the judgment.[263] The collateral attack argument may also be employed by the other party, however, if the party to whom the benefits of the settlement run, attempts to set it aside.[264]

Drafting the ultimate judgment requires the same specificity and attention to future contingencies as does drafting the property settlement.[265] If resort to enforcement by contempt is anticipated, appropriate extracts of the property settlement agreement may be included in the decree.[266] A

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did not deprive the court of jurisdiction it acquired when original petition was filed). *See also* Richardson v. First Nat'l Life Ins. Co., 419 S.W.2d 836 (Tex. 1967); Cook v. Jaynes, 366 S.W.2d 646 (Tex. Civ. App.—Dallas 1963, no writ).

258. The Texas Family Code provides:

> [W]hen a court acquires jurisdiction of a suit affecting the parent-child relationship, that court retains continuing jurisdiction of all matters provided for under this subtitle in connection with the child, and no other court has jurisdiction of a suit affecting the parent-child relationship with regard to that child except on transfer as provided in Section 11.06 of this code.

TEX. FAM. CODE ANN. § 11.05(a) (Vernon Supp. 1978-79).

259. *Id.* § 14.06(d) (Vernon 1975).

260. 522 S.W.2d 266 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (the defendant pled lack of consideration, failure of consideration, lack of mental capacity and duress), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 68, 86 (1976). *See also* McCray v. McCray, 576 S.W.2d 669 (Tex. Civ. App.—Beaumont 1978, no writ).

261. Atkinson v. Atkinson, 560 S.W.2d 200 (Tex. Civ. App.—Amarillo 1977, no writ) (the defendant pleaded failure of consideration and unconscionability). *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 SW. L.J. 132-33 (1978).

262. Soto v. Soto, No. 6753 (Tex. Civ. App.—El Paso Sept. 6, 1978, no writ) (appellant asserted ambiguity of the contract and absence of consideration).

263. In the view of the Beaumont court of civil appeals, the contract merges into the judgment, but its terms must be clearly expressed to achieve enforcement. *See* McCray v. McCray, 576 S.W.2d 669 (Tex. Civ. App.—Beaumont 1978, no writ).

264. Spiller v. Spiller, — S.W.2d — (Tex. Civ. App.—San Antonio 1978, no writ), the sequel of Spiller v. Spiller, 535 S.W.2d 683 (Tex. Civ. App.—Tyler 1976, writ dism'd), and Spiller v. Sherrill, 518 S.W.2d 268 (Tex. Civ. App.—San Antonio 1974, no writ).

265. *See* Fullenweider & Feldman, *Domestic Relations Judgments in Texas: Draftsmanship and Enforceability*, 18 S. TEX. L.J. 1 (1976).

266. For examples of occasions on which enforcement by contempt was prevented by the

provision in the decree for temporary alimony is also necessary to keep that order in effect pending appeal.[267]

Power to Divide Separate Personalty. In *Eggemeyer v. Eggemeyer*[268] the Supreme Court of Texas held that the constitution[269] and statutes[270] of Texas forbid an award of one spouse's separate real property to the other on divorce.[271] Much of the reasoning employed by the court in reaching this conclusion—and all of it from the constitutional point of view—is as fully applicable to the disposition of separate personalty as it is to separate realty, a point that none of the leading commentators has missed.[272] The courts of civil appeals, however, have continued to emphasize the pre-*Eggemeyer* rationale, approving the award of one spouse's separate personalty in the other spouse's favor.[273]

A Dallas court of civil appeals case, *Muns v. Muns*,[274] suggested that a distinction may be drawn between separate property of Texas origin and separate property brought to Texas from another state, if it was subject to division on divorce in the state from whence it came or if an award of alimony in lieu of division could have been made there.[275] The notion is a

presence of ambiguous and equivocal language, see *Ex parte* Padron, 565 S.W.2d 921 (Tex. 1978); *Ex parte* Trick, 576 S.W.2d 437 (Tex. Civ. App.—San Antonio 1978, no writ).

267. Trevino v. Trevino, 555 S.W.2d 792, 800 (Tex. Civ. App.—Corpus Christi 1977, no writ).

268. 554 S.W.2d 137 (Tex. 1977), *discussed in* Note, *Eggemeyer v. Eggemeyer: An Exercise in Judicial Legislation?*, 14 HOUS. L. REV. 1104 (1977); 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, *Division of Separate Real Property in Divorce Action: Eggemeyer v. Eggemeyer*, 31 SW. L.J. 934 (1977).

269. TEX. CONST. art. I, § 19, art. XVI, § 15.

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

271. It can be administered for the benefit of the owner's minor children, however. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 142 (Tex. 1977). Though the spouse's share of community realty may be divested in favor of the other spouse under pre-*Eggemeyer* authorities, it has recently been said that community property of the spouses cannot be divested from them to their children. Treadway v. Treadway, 576 S.W.2d 12 (Tex. Civ. App.—Texarkana 1978, no writ) (dictum).

272. Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37 (1978); McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 444-49 (1976); Prewett & Smith, *Domestic Relations*, 15 HOUS. LAW., Spring 1978, at 37; Sampson, *Common Law Property in a Texas Divorce: After Eggemeyer, the Deluge?*, 42 TEX. B.J. 131 (1979).

273. Word of the *Eggemeyer* decision did not appear to have reached the Fort Worth and Tyler courts of civil appeals when they decided Campbell v. Campbell, 554 S.W.2d 10 (Tex. Civ. App.—Fort Worth 1977, no writ), and Musslewhite v. Musslewhite, 555 S.W.2d 894 (Tex. Civ. App.—Tyler 1977, writ dism'd). The Waco and Dallas courts distinguished *Eggemeyer* as dealing only with separate realty. Eichelberger v. Eichelberger, 557 S.W.2d 587 (Tex. Civ. App.—Waco 1977, writ granted); Muns v. Muns, 567 S.W.2d 563 (Tex. Civ. App.—Dallas 1978, no writ). In *Muns* the Dallas court evidently had some difficulty in reaching its conclusion. The trial court had made no finding as to which part of the retirement benefits earned by the husband was separate and which part was community. The court does not comment on the evidence offered to show the existence of the separate interest.

274. 567 S.W.2d 563 (Tex. Civ. App.—Dallas 1978, no writ).

275. *Id.* at 566. The argument is developed and refined in Sampson, *supra* note 272. The author cites authorities from other community property jurisdictions (Arizona, Nevada, and Idaho) where similar results were reached in judicial decision. 567 S.W.2d at 138 n.31.

development of the vested rights doctrine, which may be illustrated by the hypothetical disposition of property subject to common law or statutory dower rights on the death of the husband. Suppose that a portfolio of corporate securities is brought to Texas by a retired couple who have accumulated the securities in a state where the wife acquired a vested right to take a fixed fractional share of the personalty on the death of the husband. When the husband dies, the wife will assert her interest in the securities as a right vested in her by the law of the place of acquisition and former domicile.[276] In *Muns* the husband asserted that his military retirement benefits were generated by service in non-community-property states. The Dallas court of civil appeals apparently used this fact to justify division of benefits in favor of the wife.[277] It was assumed that in those states of earlier domicile a similar disposition or an award of alimony on divorce could have been achieved.

Pension Benefits. In divorce proceedings involving a division of pension benefits[278] (as distinguished from their characterization) it may be desirable, or even necessary, to join the pension trustee as a party.[279] In a recent federal case[280] the third-party, private pension fund trustees sought removal to federal court of what they termed a separate and independent

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The New Mexico Supreme Court has recently reached the same conclusion. Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978).

276. Such a claim was unsuccessfully asserted in *In re* O'Connor's Estate, 218 Cal. 518, 23 P.2d 1031 (1933), in which the wife's right was termed "a mere expectancy." *Id.* at 526, 23 P.2d at 1034. It is criticized as being incorrectly decided in H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 226-33 (1952). The worst consequence of this erroneous decision was the invention of the California doctrine of quasi-community property to meet the injustice done. *See also* Latterner v. Latterner, 121 Cal. App. 298, 8 P.2d 870 (1932). FLA. STAT. ANN. § 732.205 (West 1976) provides that "[n]o elective share or dower right in Florida property of a decedent not domiciled in Florida shall exist." A fortiori such rights would be lost in property that had once been in Florida if the owner changes his Florida domicile.

277. 567 S.W.2d at 566 (quoting Whittenburg v. Whittenburg, 523 S.W.2d 797 (Tex. Civ. App.—Austin 1975, no writ), in which a somewhat similar result was reached)). *See also* Gaulding v. Gaulding, 503 S.W.2d 617 (Tex. Civ. App.—Eastland 1973, no writ).

278. For a thorough study of the computation of pension benefits, see Sampson, *Disposition of Retirement Benefits on Divorce*, in MARRIAGE DISSOLUTION IN TEXAS ch. D (State Bar of Texas 1978). *See also* Durham, *Estimating the Economic Value of Pension Funds in Community Property Determination*, TRIAL LAW. F., July-Sept. 1978, at 26. In McKibben v. McKibben, 567 S.W.2d 538 (Tex. Civ. App.—San Antonio 1978, no writ), the court took judicial notice of life expectancy in mortality tables in considering the value of a pensioner's interest.

For developments elsewhere, see Foster & Freed, *Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. L. 187 (1978); Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans*, 5 PEPPERDINE L. REV. 191 (1978).

279. *See* Collida v. Collida, 546 S.W.2d 708 (Tex. Civ. App.—Beaumont 1977, writ dism'd) (public pension fund), *discussed in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 SW. L.J. 109, 131 (1978); Note, *Marital Property—Direct Payment of Vested Firemen's Relief and Retirement Fund Benefits to Non-Member Spouse on Division of Community Property Pursuant to Divorce is Permissible*, 9 TEX. TECH L. REV. 173 (1977); Keith, *Judicial Enforcement of Interspousal Rights in and to Statutory Pension Plans* (paper presented to the Judicial Conference, State Bar of Texas, El Paso, Texas, Sept. 28, 1977). *See also* Thibodeaux v. Thibodeaux, 546 S.W.2d 662 (Tex. Civ. App.—Beaumont 1977, no writ) (private pension fund).

280. *In re* Thompson, 450 F. Supp. 197 (W.D. Tex. 1978).

federal question concerning rights to future benefits under the Employment Retirement Income Security Act of 1974 (ERISA).[281] The federal court rejected this contention but indicated that removal would be available if an action against a pension trustee for an accounting were brought alone rather than as an incident to a divorce proceeding.[282] The court went on to say that ERISA[283] does not allow a divorce court to order the trustee to pay a pensioner's share to the pensioner's ex-spouse directly.[284] In *Thibodeaux v. Thibodeaux*,[285] however, the court indicated that the shares of ex-spouses might be adjudicated with respect to their prior community interest without necessity of joinder of the trustee when a suit arises between them after divorce.[286] The trustee would be obligated to make appropriate division after receiving notice under article 5221(d).[287]

Subsequent to the ruling of the El Paso court of civil appeals in *United States v. Stelter*[288] that the 1974 amendment to the Social Security Act[289] allowed garnishment of federal pension sources to enforce awards to a pensioner's spouse on divorce,[290] the Congress passed legislation to clarify the prior law by making it clear that the remedy was not available for enforcement of a division of community property.[291] The Supreme Court of Texas therefore reversed the holding of the court below.[292] Hence, with

281. The third-party defendants cited 28 U.S.C. § 1441(c) (1976) as the basis for removal jurisdiction.

282. In contrast, the court in Kerbow v. Kerbow, 421 F. Supp. 1253 (N.D. Tex. 1976), seemed to construe the act as not giving a beneficiary's spouse standing to sue.

283. Pub. L. No. 93-406, 88 Stat. 852 (codified in scattered sections of 5, 18, 26, 29, 31, 42 U.S.C.).

284. 450 F. Supp. at 199-200. The court may be alluding to the pensioner's spouse's lack of standing as a participant or beneficiary of the pension scheme under the Act. *See* Kerbow v. Kerbow, 421 F. Supp. 1253 (N.D. Tex. 1976).

285. 546 S.W.2d 662 (Tex. Civ. App.—Beaumont 1977, no writ).

286. At the divorce trial, the husband omitted the pension fund benefits from his list of community property because he had not yet received any benefits, and he was unaware that the interest had already vested.

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

288. 553 S.W.2d 227 (Tex. Civ. App.—El Paso 1977), *rev'd*, 567 S.W.2d 797 (Tex. 1978), *discussed in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 SW. L.J. 109, 131-32 (1978); Note, *Community Property—Garnishment—Ex-wife May Bring Garnishment Proceedings to Secure Her Share of Ex-husband's Military Retirement Pay Under the Federal Consent Statute*, 9 ST. MARY'S L.J. 581 (1978).

289. 42 U.S.C. § 659 (1976).

290. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 SW. L.J. 109, 131-32 (1978).

291. 42 U.S.C. § 462(c) (1976). Section 659 gives consent to garnishment for legal obligations to make child support or alimony payments. Section 662(c) states that "alimony" excludes "any payment or transfer of property or its value . . . in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." This amendment is discussed in Hisquierdo v. Hisquierdo, 99 S. Ct. 802, 811 n.20, 817 n.4, 59 L. Ed. 2d 1, 14 n.20, 22 n.4 (1979).

292. United States v. Stelter, 567 S.W.2d 797 (Tex. 1978), *rev'g* 553 S.W.2d 227 (Tex. Civ. App.—El Paso 1977). *See also* United States v. Wakefield, 572 S.W.2d 569 (Tex. Civ. App.—Fort Worth 1978, no writ); United States v. Fleming, 565 S.W.2d 87 (Tex. Civ. App.—El Paso 1978, no writ). In both *Wakefield* and *Fleming* the courts held that pension benefits were not exempt from seizure as "current wages." *See generally* Corrigan, *Garnishment of Federal Income for Child Support and Alimony Obligations in Texas*, 41 TEX. B.J. 245 (1978), *commented on in* letter from C.L. Salamon to the editor of the *Texas Bar Journal*,

respect to community property awards of federal retirement benefits, no relief is available against the United States directly except as a result of one further congressional enactment. In late 1978 the Civil Service Act was amended[293] to effect compliance with a divorce decree or "court-approved property settlement agreement incident to any court decree of divorce" with respect to payments made from the Civil Service Retirement and Disability Fund. Direct enforcement has also been allowed against a state pension trust when an ex-wife was awarded the corpus of the ex-husband's account.[294]

Separately Owned Corporation. When *Goetz v. Goetz*[295] was first tried, the characterization of certain corporate assets as separate or community property[296] caused difficulties of determination that required the case to be remanded for a new trial. After the case was retried, problems of division remained.[297] The husband was the sole owner of an oil company as his separate property. As a means of making an equitable division of community property, the trial court ordered that the husband pay the wife a sum received from the repayment of a debt owed to the oil company by a third person. In response to the husband's contention that the debt payable to the corporation was an indivisible separate property asset, the wife asserted that the corporate ownership of the debt was not an impediment to the order because the corporation was the alter ego of the husband. The Dallas court of civil appeals held that a mere finding of separate ownership was not enough to justify disregarding the corporate entity and treating corporate assets as community property for purposes of division on divorce.[298]

> [T]here was no finding that . . . [the husband] employed the corporate form . . . for an improper purpose or that he used it to deprive . . . [the wife] of her community property rights . . . . The only evidence adduced at trial was that . . . [the husband] was the sole shareholder and president of . . . [the corporation], and that there had been indiscriminate transfers of funds between . . . [the husband, the oil company, and another separate corporate entity solely owned by the husband] which were not properly documented in the corporate

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reprinted in 41 TEX. B.J. 402 (1978); letter from Brian Corrigan to the editor of the *Texas Bar Journal*, *reprinted in* 41 TEX. B.J. 492 (1978).

293. Act of Sept. 15, 1978, Pub. L. No. 95-366, 92 Stat. 600 (to be codified at 5 U.S.C. § 8345(j)).

294. Teachers Retirement Sys. v. Neill, 563 S.W.2d 873 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.); *cf.* Addison v. Addison, 530 S.W.2d 920 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (writ of garnishment against state university quashed); Prewitt v. Smith, 528 S.W.2d 893 (Tex. Civ. App.—Austin 1975, no writ) (garnishment not applicable to funds of public retirement system held by state officials for benefit of members of the system).

295. 534 S.W.2d 716 (Tex. Civ. App.—Dallas 1976, no writ).

296. *See* McKnight, *Matrimonial Property Acquired Through Spouses' Business Activities*, in TEXAS FAMILY LAW AND COMMUNITY PROPERTY ch. I (J. McKnight ed. 1978).

297. 567 S.W.2d 892 (Tex. Civ. App.—Dallas 1978, no writ). For a similar conclusion with respect to an indebtedness to a partnership in which a spouse was a partner, see *In re* Higley, 575 S.W.2d 432, 435 (Tex. Civ. App.—Amarillo 1978, no writ).

298. *See also In re* Higley, 575 S.W.2d 432, 435 (Tex. Civ. App.—Amarillo 1978, no writ), with respect to a debt owed a partnership in which a spouse owned a separate interest.

> records. This evidence does not justify an implied finding of improper use of the corporate form to . . . [the wife's] detriment. Sole ownership and control does not justify disregarding the corporate entity . . . .[299]

Spousal Debts. The proper means of dealing with debts owed by the spouses at divorce is frequently in dispute. In *Delaney v. Delaney*[300] the Houston court of civil appeals disapproved of the trial court's order that unsecured debts should be paid from the proceeds of a court-ordered sale of the family homestead.[301] In *Southard v. Southard*[302] the Tyler court of civil appeals doubted that a divorce court could alter the terms of a loan between the spouses and a third person who was not a party to the proceedings.[303] But even if the creditor is a party, the terms of the contract cannot be altered for causes that would not justify relief from contractual liability generally.[304]

With respect to debts incurred in winding up the marriage, a disproportionate or significantly large sum awarded to the wife does not in itself justify denial of her attorneys' fees.[305] In *Delaney* the comment was made that the trial judge is not bound by opinion evidence offered with respect to the amount of a reasonable attorneys' fee. The trial judge may not arbitrarily ignore such evidence, but he may also consider his own experience in this regard.[306]

Reimbursement. With respect to reimbursement for discharge of encumbrances on property of one marital estate by the expenditure of funds belonging to the other,[307] the measure of reimbursement is clearly cost.[308] In

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299. 567 S.W.2d at 895-96. The appellate court was able to avoid further remand by reforming the decree to order the husband to make periodic payments from future income from other properties awarded to him rather than from the corporate funds.

It was elsewhere argued unsuccessfully that an order to pay a specific monthly sum to achieve a property division is an order to pay permanent alimony. Cole v. Cole, 568 S.W.2d 152, 154 (Tex. Civ. App.—Dallas 1978, no writ). A similar argument was also rejected in Firestone v. Firestone, 567 S.W.2d 889, 891 (Tex. Civ. App.—Dallas 1978, no writ), with respect to the terms of a contractual property settlement. In Wisdom v. Wisdom, 575 S.W.2d 124 (Tex. Civ. App.—Fort Worth 1978, no writ), the court rejected the argument that a money judgment constituted a divestiture of separate realty if a levy could be made thereon for its satisfaction.

300. 562 S.W.2d 494 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd) (Brown, C.J., dissenting).

301. *Id.* at 495. The court stated that the order violated the exempt status given homesteads and the proceeds from their sale. *See* TEX. REV. CIV. STAT. ANN. art. 3834 (Vernon 1966).

302. 567 S.W.2d 570, 573 (Tex. Civ. App.—Tyler 1978, no writ).

303. *Id.* (dictum). The husband contended that the trial court erred in dividing the community property without relieving him of responsibility for indebtedness against properties awarded to the wife. The husband further argued that he should have been provided security that the wife would satisfy the indebtedness. Since the court lacked a full statement of facts, it could not weigh the merits of these arguments.

304. *See* Broadway Drug Store, Inc. v. Trowbridge, 435 S.W.2d 268, 270 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

305. Walsh v. Walsh, 562 S.W.2d 501 (Tex. Civ. App.—San Antonio 1978, no writ).

306. 562 S.W.2d at 496. *See* McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 460-61 (1976).

307. In distinguishing between reimbursement for payment of "prenuptial debts or taxes

Trevino v. Trevino[309] community funds were used for improvements on the family home, which was the separate property of the husband. The court said that the "proper rule for reimbursement where funds are expended for improvements on a spouse's separate property is either the amount of the enhanced value of the separate property by virtue of the improvements or the amount of community funds expended for the improvements, whichever is less."[310] This test is based on the assertion in *Dakan v. Dakan*[311] that "in case of reimbursement for improvements, the amount of recovery is limited to the amount of enhancement of the property at the time of partition by virtue of the improvement placed thereon."[312] This interpretation of the *Dakan* holding, however, has been questioned,[313] especially in the light of what is said in *Lindsay v. Clayman*[314] relying specifically on *Dakan*: "[T]he amount of reimbursement is not determined by the cost [of] the improvements made, but by the enhancement in value of the estate improved by virtue of the improvements made by the other estate."[315] It is therefore deduced that the measure of reimbursement for improvement of

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on separate property" and those debts which arise from improvement of separate property, the court in Trevino v. Trevino, 555 S.W.2d 792, 799 (Tex. Civ. App.—Corpus Christi 1977, no writ), said that reimbursement is limited in the former instance by the inquiry whether "the community expenditures were greater than the benefits received from such expenditures." But with respect to enhancement of one marital estate by another there may also be an inquiry whether the claimant of reimbursement has received or will receive by virtue of the use of the enhanced property a set-off for the reimbursement claimed so that the right of reimbursement may be reduced or even denied. Dakan v. Dakan, 125 Tex. 305, 319, 83 S.W.2d 620, 628 (1935). *See* McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 450, 452-53 (1976). Enhancement is irrelevant in cases of reimbursement not involving improvements. Poulter v. Poulter, 565 S.W.2d 107, 111 (Tex. Civ. App.—Tyler 1978, no writ).

In *Trevino* the court also held that community funds used by the husband to pay his separate debts unrelated to property were held properly reimburseable to the community. 555 S.W.2d at 798.

308. Poulter v. Poulter, 565 S.W.2d 107, 111 (Tex. Civ. App.—Tyler 1978, no writ). *See also* Wisdom v. Wisdom, 575 S.W.2d 124, 125 (Tex. Civ. App.—Fort Worth 1978, no writ); Lindsey v. Lindsey, 564 S.W.2d 143, 146 (Tex. Civ. App.—Austin 1978, no writ).

309. 555 S.W.2d 792 (Tex. Civ. App.—Corpus Christi 1977, no writ).

310. *Id.* at 799. This formula may be differently expressed: (1) enhancement but not to exceed cost or (2) cost limited by enhancement.

311. 125 Tex. 305, 83 S.W.2d 620 (1935). *See also* Childers v. Johnson & Smith, 6 La. Ann. 635, 635 (1851); Depas v. Riez, 2 La. Ann. 30, 44 (1847). The formula as expressed in the text is also enunciated in Hale v. Hale, 557 S.W.2d 614, 615 (Tex. Civ. App.—Texarkana 1977, no writ); Girard v. Girard, 521 S.W.2d 714, 718 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). Harris v. Royal, 446 S.W.2d 351, 352 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.), has been cited as an application of this rule, but it may also be regarded as an instance of the application of two competing formulations of the proper rule: either (1) that reimbursement is measured by enhancement whether more or less than cost, or (2) that enhancement is the measure of recovery unless enhancement is greater than cost, in which case cost is the measure. The first formula is clearly different from that stated in *Trevino*. The second formulation is in reality merely a different way of stating the principle enunciated in *Trevino*.

312. 125 Tex. at 320, 83 S.W.2d at 628.

313. Baker, *Reimbursement Between Marital Estates in Texas*, in ADVANCED FAMILY LAW COURSE ch. I, at 45-51 (State Bar of Texas 1978).

314. 151 Tex. 593, 254 S.W.2d 777 (1952).

315. *Id.* at 600, 254 S.W.2d at 781 (citing Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935)).

one marital estate at the expense of another is enhancement in value, regardless of whether the amount is greater or less than the cost.[316] But this approach also conflicts with earlier Texas Supreme Court cases that hold that cost alone is the measure of reimbursement for improvement.[317] To further complicate the matter these cases were not only cited in *Dakan* but their holding was quoted there with apparent approval.[318] Moreover, some trial and appellate courts have continued to apply the cost rule of reimbursement for improvements.[319] A recent example is *In re Higley*.[320] Though this approach seems contrary to *Lindsay* and to some of the statements in *Dakan*, it has two solid arguments in its favor. First, this is the same rule as for other situations involving reimbursement between spouses, and, hence, a uniform rule of reimbursement would be provided by its acceptance. Secondly, it is by far the easiest rule to apply since proof of enhancement is not required.

Trevino also restates the rule that reimbursement is not available for separate funds expended for family living expenses.[321] Though the rule is amply supported by judicial precedent,[322] it may seem unreasonable that the separate estate of a spouse is not reimbursable for what are primarily community obligations[323] when the community is reimbursed for payment of what are solely separate obligations in other contexts.[324] Further, by enacting that "[a] spouse who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed,"[325] the legislature has provided authority for reimbursement of a spouse who pays for family support otherwise unprovided. Hence, by ap-

316. *See* Logan v. Barge, 568 S.W.2d 863, 869 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.); Poulter v. Poulter, 565 S.W.2d 107, 111 (Tex. Civ. App.—Tyler 1978, no writ). It is not clear whether the result reached in *Trevino* is consistent with this statement of the rule.

317. Furrh v. Winston, 66 Tex. 522, 524, 1 S.W. 527, 529 (1886); Rice v. Rice, 21 Tex. 58, 66-67 (1858). The cost-rule was that of Spanish law which the court cited in *Rice*. A. AYERVE DE AYORA, TRACTATUS DE PARTITIONIBUS BONORUM COMMUNIUM INTRA MARTIUM ET UXOREM ET FILIOS AC HAEREDUS CORUM pt. I.10.2 (1586). In discussing the cost-rule of reimbursement for improvements, Ayora pointedly takes an example of an improvement that more than doubled in value during marriage and during a time of inflation. *See also* 6 FEBRERO NOVISIMO 151-52 (E. de Tapia ed. 1829); 1 I. ASSO & M. MANUEL, INSTITUCIONES DEL DERECHO CIVIL DE CASTILLA 57-58 (7th ed. J. Palacios ed. 1806). An English translation by L. Johnston of the latter work is reprinted in J. WHITE, NEW COLLECTION OF LAWS (1839). The relevant passage, as cited in *Rice*, is at p. 62. In *Rice* the court also cited G. SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO 13 (1851), with respect to the rule that expenditures for improvements give no interest in this land itself.

The ultimate source of the rule of reimbursement relied on by all the Spanish authorities is FUERO REAL III.4.9 (1255).

318. 125 Tex. at 320, 83 S.W.2d at 628.

319. *See, e.g.*, Collins v. Collins, 540 S.W.2d 497 (Tex. Civ. App.—Tyler 1976, no writ); Williams v. Williams, 537 S.W.2d 107, 110 (Tex. Civ. App.—Tyler 1976, no writ) (semble).

320. 575 S.W.2d 432, 434 (Tex. Civ. App.—Amarillo 1978, no writ).

321. 555 S.W.2d 792, 802 (Tex. Civ. App.—Corpus Christi 1977, no writ).

322. Norris v. Vaughan, 152 Tex. 491, 503, 260 S.W.2d 676, 683 (1953).

323. Of course, in contracting liability for support, a spouse normally contracts separate as well as community obligations to pay.

324. *See* note 309 *supra* and accompanying text. *See also* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 138 (1978).

325. TEX. FAM. CODE ANN. § 4.02 (Vernon 1975).

plication of this statute, a spouse who discharges obligations for family support with separate property should be reimbursed either by the community, on the basis of the principle of primary community liability, or by the community or separate property of the other spouse as to half because of that other spouse's correlative duty to support the family under section 4.02.[326]

All claims for reimbursement may be approached in three distinct stages: (1) defining the factual basis for the claim; (2) determining the measure of reimbursement for the claim shown; and (3) reducing the amount of reimbursement on equitable grounds. There has been little discussion of the first point. In that regard the issue that must be ultimately resolved is the degree of specificity required in the findings of fact with respect to the benefit bestowed upon one marital estate by the other.

Exercise of Discretion. Rarely is a successful challenge made to the trial court's exercise of discretion in dividing community assets.[327] In two recent instances,[328] however, abuses of discretion were found. In both cases the disparity of division was regarded as too extreme to constitute a fair disposition.[329]

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326. *Id.* A bill is before the 1979 regular session of the Texas Legislature on the recommendation of the State Bar of Texas to equalize duties of support of the spouses for each other under TEX. FAM. CODE ANN. §§ 3.59, 4.02 (Vernon 1975).

327. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 118 (1977); McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 435-36 (1976). Unsuccessful challenges were mounted in Maben v. Maben, 574 S.W.2d 229 (Tex. Civ. App.—Fort Worth 1978, no writ) (unequal division of property in favor of wife to compensate for her negligible earning capacity); Smith v. Smith, 569 S.W.2d 629 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (presumption of proper exercise of discretion by trial court); Verbal v. Verbal, 567 S.W.2d 898 (Tex. Civ. App.—San Antonio 1978, no writ) (division of military retirement benefits earned during marriage); Harris v. Harris, 562 S.W.2d 953, 955 (Tex. Civ. App.—Waco 1978, writ dism'd) (trial court's refusal to divide land secured by lien); Walsh v. Walsh, 562 S.W.2d 501 (Tex. Civ. App.—San Antonio 1978, no writ) (award of homestead consisting of dwelling and four and one-half acres of land); Brooks v. Brooks, 561 S.W.2d 949 (Tex. Civ. App.—Tyler 1978, no writ) (unequal division of property); Trevino v. Trevino, 555 S.W.2d 792, 802 (Tex. Civ. App.—Corpus Christi 1977, no writ) (apportioning indebtedness between spouses). In Wisdom v. Wisdom, 575 S.W.2d 124 (Tex. Civ. App.—Fort Worth 1978, no writ), the wife's addiction to alcohol justified a disparate division of property.

It was twice reiterated that a prayer for general relief is a sufficient basis for the exercise of the court's discretionary powers of division, Lindsey v. Lindsey, 564 S.W.2d 143, 145 (Tex. Civ. App.—Austin 1978, no writ), and to award reimbursement. Poulter v. Poulter, 565 S.W.2d 107, 111 (Tex. Civ. App.—Tyler 1978, no writ).

Attorneys' fees may be awarded as part of the discretionary division of property, but the award must be supported by evidence as to amount—both with respect to judgment and for the appeal. Mills v. Mills, 559 S.W.2d 687 (Tex. Civ. App.—Fort Worth 1977, no writ).

328. McMaster v. McMaster, 574 S.W.2d 594 (Tex. Civ. App.—San Antonio 1978, writ dism'd); McKibben v. McKibben, 567 S.W.2d 538 (Tex. Civ. App.—San Antonio 1978, no writ).

329. In *McMaster* the trial court awarded the wife assets worth $138,000 and the husband assets worth $132,000. The husband was then required to pay community debts of $96,000 and to pay to the wife $132,000, the gross value of the assets he received from the award.

In *McKibben* the court of appeals reversed the trial court's award to the husband of 90% of his military retirement benefits.

No Texas appellate court has commented upon the weight to be accorded the efforts of one spouse in contributing to the other spouse's acquisition of professional skills during marriage. Nevertheless, in reaching a settlement agreement on the division of marital property, the parties themselves sometimes seek to evaluate such contributions.[330] Courts in other jurisdictions have given consideration to this factor in making a division.[331] The disparity in earning power produced by the acquisition of such skills, however, is a factor frequently considered by Texas courts.

Texas courts have consistently held that a spouse may not complain of an abuse of discretion in the division of community property or of a mistaken characterization of marital property if the trial court awarded the complainant more than half of the community[332] or if the court awarded the complainant property claimed as the claimant's separate property though it may have been designated as community property.[333] It is sometimes argued that the trial court would have awarded a claimant more of the community property if the court had realized that some of the property awarded to a claimant as a share of the community was actually the claimant's separate property. Such arguments, however, tend to fall on the deaf ears of appellate judges.[334]

Division After Divorce: Statutes of Limitation. When a community asset is not divided between spouses in the divorce proceeding, the parties become tenants in common as to that asset after the divorce. Once the failure to divide a community asset is discovered, a question is posed with respect to when statutes of limitation begin to run against the right to assert an interest in the property. The tolling of the statutes of limitation was recently discussed by two appellate courts in the context of a divorce court's failure to divide retirement benefits. In *Shaw v. Corcoran*[335] no disposition was made of the husband's military retirement benefits upon the couple's divorce in 1967. Although the benefits were partially earned during marriage, the right to the benefits accrued (vested) after the divorce decree became final and matured upon the husband's retirement in 1970. Immediately thereafter, when the husband refused a request for a share of the benefits, his former wife commenced a suit for their partition, which suit

330. *See* Gregory v. Gregory, 404 S.W.2d 657 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.) (husband supported by wife during his enrollment in dental school).

331. *See In re* Horstmann, 263 N.W.2d 885 (Iowa 1978) (husband's law degree); *In re* Graham, 574 P.2d 75 (Colo. 1978) (en banc) (husband's master's degree in business administration), *noted in* 11 CONN. L. REV. 62 (1978); Inman v. Inman, 578 S.W.2d 266 (Ky. 1979) (husband's dental license), in which the court concluded that the professional skills actually constituted marital property. *Contra, In re* Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (husband's law degree), *noted in* 6 COMMUNITY PROP. J. 91 (1979).

332. Grost v. Grost, 561 S.W.2d 223, 229 (Tex. Civ. App.—Tyler 1977, writ dism'd).

333. In Southard v. Southard, 567 S.W.2d 570 (Tex. Civ. App.—Tyler 1978, no writ), the trial court found that certain realty was the husband's separate property and awarded it to him though the judgment erroneously recited that it was community property. *See also* Posey v. Posey, 561 S.W.2d 602, 605-06 (Tex. Civ. App.—Waco 1978, writ dism'd).

334. *See* Spiller v. Spiller, 535 S.W.2d 683 (Tex. Civ. App.—Tyler 1976, writ dism'd).

335. 570 S.W.2d 96 (Tex. Civ. App.—Austin 1978, no writ).

was dismissed in 1975 for want of prosecution. When she filed a new suit for partition in 1977, the ex-husband's defense was the two- or four-year statute of limitation. The appellate court held that the repudiation of the former wife's claim in 1970 caused the statute of limitation to begin to run.[336] Though the filing of suit soon thereafter tolled the running of the statute, the dismissal of the suit lifted the suspension of the statute ab initio. The court appears to have regarded all benefits as barred, including those recently received by the pensioner and those not yet received. In *Cruse v. Cruse*,[337] in early 1971, the divorce court awarded to the wife an interest in the husband's accrued military retirement benefits, although at that time there were no accrued benefits; accrual did not occur until later that year. Thereafter the ex-wife filed a motion for contempt for the ex-husband's failure to pay her a portion of the benefits that he had received. The motion for contempt was dismissed, as was a motion for judgment nunc pro tunc filed the following year. In defending a new suit filed in 1977, the pensioner relied on the two-year statute of limitation. Reversing the trial court's denial of the ex-wife's claim to those benefits received by the pensioner more than two years prior to the filings of the wife's suit, the appellate court concluded that the statute of limitation had never begun to run against the cotenant-wife since no overt evidence of repudiation had been presented.[338] Neither the motion for contempt nor the motion for judgment nunc pro tunc implied repudiation of her claim. *Shaw* was distinguished on the factual grounds that the ex-husband's refusal to acknowledge his former wife's claim followed by her suit for partition amply evidenced his repudiation of her cotenancy.[339] In *Cruse* the court also regarded as significant the fact that *Shaw* involved repudiation of rights that were vested whereas the rights in *Cruse* were contingent. The rights in *Cruse* were indeed contingent when the decree was entered, but they were vested when the alleged repudiation was said to have occurred. The principal distinction between the cases is a factual one. In *Shaw* repudiation was shown. In *Cruse* no repudiation occurred; it could not be inferred from the ex-wife's acts.

These decisions may also suggest that repudiation of undivided retirement rights accrued at judgment causes the statute of limitation to run from the earliest date that evidence of overt repudiation is adduced with respect to benefits received and to be received.[340] But with respect to future retirement benefits dealt with in the decree that the pensioner fails to divide on receipt as directed, it would seem that the statute would begin to run on each benefit as it is received because the right has already been divided.

336. *Id.* at 98.
337. 572 S.W.2d 68 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).
338. *Id.* at 70-71.
339. *Id.*
340. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 127 n.192 (1977).

Foreign Divorce Decrees. An award of alimony by a final divorce decree of a sister state is worthy of full faith and credit in the same sense as any other final sister state decree to pay money.[341] A suit on the judgment may therefore be maintained for arrears.[342]

A foreign decree that leaves property undivided on divorce requires an inquiry into the foreign law with respect to the effect of the foreign decree on such property. In *Elmer v. Elmer*[343] the divorce judgment rendered by a Kansas court incorporated an agreement that the husband pay the wife a fixed monthly sum as alimony until either party should die or the wife should remarry. Nothing was said in the decree of the husband's military retirement benefits, some of which were earned while the couple resided in Texas. After the divorce the wife brought suit in Texas for a share of the retirement benefits left undisposed by the Kansas decree. The Kansas decree was held worthy of the credit it would be accorded in Kansas: to dispose of all property interests of the parties whether mentioned in the decree or not.[344] *Welsch v. Gerhardt*[345] presented a somewhat similar dispute involving a Washington divorce decree in which no division of retirement benefits was alleged to have been made. The Supreme Court of Texas held that a proper application of the foreign law did not allow division.

Effect of Bankruptcy on Property Division. In *Matthews v. Matthews*[346] during marriage a husband and wife had bought furniture on their joint credit. In anticipation of divorce they entered into an agreement that the husband would pay the debt or indemnify his wife if she should pay the debt; the divorce court approved the agreement. The husband was later discharged of his debts in bankruptcy without paying for the furniture, but the ex-wife was not listed as a creditor in his bankruptcy proceeding. When the seller sued both the former spouses, the husband plead his discharge and judgment was taken against the ex-wife. Basing her suit on the previous settlement agreement, the wife sued for indemnity should she be called upon to pay the judgment. In finding for the ex-wife the court treated the decree as creating a nondischargeable debt in the nature of a child support obligation in that the furniture was used to provide a home for the child.[347] Among those debts that are not subject to discharge under the Bankruptcy Act are those "for alimony due or to become due, or for maintenance or support of wife or child."[348]

341. The point has long been decided. Rumpf v. Rumpf, 150 Tex. 475, 478, 242 S.W.2d 416, 417 (1951).
342. Whitwood v. Whitwood, 560 S.W.2d 776 (Tex. Civ. App.—Waco 1977, no writ).
343. 567 S.W.2d 18 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).
344. *Id.* at 19-20.
345. 22 Tex. Sup. Ct. J. 317 (Apr. 25, 1979).
346. 561 S.W.2d 531 (Tex. Civ. App.—Beaumont 1977, no writ).
347. *Id.* at 533.
348. Bankruptcy Act § 17(a), 11 U.S.C. § 35(a)(7) (1976).

In *In re Nunnally*[349] the Fifth Circuit held that a money judgment awarded by a divorce court to an ex-wife for reimbursement or repayment of a loan constituted "alimony." Although Texas courts do not award alimony in the sense of an order for periodic support as that term is used in many states, the court reasoned that a Texas property division contains "a substantial element of alimony-substitute, support or maintenance, however termed."[350] While Texas courts and federal courts sitting in Texas continue to apply the rationale of *Nunnally*,[351] other federal courts have distinguished between nondischargeable obligations to pay alimony in the strict sense of support payments and dischargeable debts to an ex-spouse on account of property division.[352] The Bankruptcy Reform Act of 1978,[353] which becomes effective on October 1, 1979, does not resolve this issue. The terms of the new Act are merely neutral in gender[354] and state that a discharge will not be allowed "from any debt . . . to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child."[355] The conflict between federal circuits seems ripe for resolution by the Supreme Court of the United States.

V. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

Interspousal Gifts. In order to impose a heavier estate tax on interspousal gifts in those three states in which income from separate property is normally characterized as community, the Internal Revenue Service enunciated Revenue Ruling 75-504.[356] This ruling provides that an inter vivos gift of separate property from one spouse to another is not complete to the extent that income is retained by the donor. Hence that part of the gift that produces lifetime income on behalf of the donor is included in his gross estate under section 2036 of the Internal Revenue Code.[357] In *Castleberry v. Commissioner*[358] the Internal Revenue Service took the same position

349. 506 F.2d 1024 (5th Cir. 1975), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 92 (1975).

350. 506 F.2d at 1027.

351. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 133 (1978); McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 89 (1976).

352. *See* Barth v. Barth, 448 F. Supp. 710 (E.D. Mo. 1978). *See also* Melichar v. Ost, 445 F. Supp. 1162 (D. Md. 1977). *But see In re* Albin, 591 F.2d 94 (9th Cir. 1979); *In re* Liverman, 463 F. Supp. 906 (E.D. Va. 1978).

353. Pub. L. No. 95-598, 92 Stat. 2549 (to be codified in 11 U.S.C. §§ 101-1501).

354. This formulation, therefore, avoids invalidity on ground of sex discrimination as found in *In re* Wasserman, [1977] 2 BANKR. L. REP. (CCH) ¶ 66,471, *commented on in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 133 n.216 (1978). For a result contrary to that expressed in *Wasserman*, see *In re* Stephens, 465 F. Supp. 52 (W.D. Va. 1979).

355. 11 U.S.C.A. § 523(a)(5) (Pam. Supp. 1979).

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

357. I.R.C. § 2036. One-half of the accrued income from the property transferred is also includible in the donor's gross estate. *Id.*

358. 68 T.C. 682 (1977), *discussed in* Campfield, *The Castleberry Case and Its Progeny*, 17 NEWSLETTER OF THE REAL ESTATE, PROBATE AND TRUST LAW SECTION 41 (1978); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 134-35 (1978); Comment, *Section 2036 Inclusions in Community Property States: Complete Inter-*

with respect to an inter vivos interspousal gift of community property, and the Tax Court held that one-half of the value of the gift was includable in the donor's estate.[359] The court reasoned that the donee had received the income as community property. As community property, the donor also received half the income and thus retained an interest in half of the gift. *Castleberry* was followed in quick succession by three Texas cases and one Louisiana case in which the Commissioner took a similar position: *Estate of McKee v. Commissioner*,[360] *Frankel v. United States*,[361] *Estate of Wyly v. Commissioner*,[362] and *Estate of Deobald v. United States*.[363] In *McKee* the decedent gave community cash to his wife. The Tax Court included one-half of husband's community share of the gift in the decedent's estate, reasoning that the decedent had made a transfer of his one-half of community funds, thereby retaining an interest by operation of law in one-fourth of the transferred property.[364] The court stated that actual production of income is not essential for a retained interest to arise; the donor need only have a right to income produced.[365] In *Wyly* the husband and wife, using community assets, acted together to create an irrevocable trust from which all the income was to be paid to the wife for life and thereafter to their grandchildren. The Tax Court again held that the husband had retained an interest in the transferred property.[366] In *Frankel* the husband gave the wife community cash and bonds and in *Deobald*, separate securities. The federal district courts sitting in Texas and Louisiana, respectively, held that section 2036 was inapplicable to these situations, and, therefore, the donor had not retained interest in the property.[367] All three Texas cases have been consolidated for appeal. Though the Louisiana decision was not appealed, the Louisiana legislature has taken the precaution of amending the Louisiana statute whereby a gift by one spouse to another is deemed to include the income of the property transferred.[368]

Disposition of Solely Managed Community Property. The spouse who generates community property has the power of sole management, control, and disposition of that property on behalf of the community.[369] By virtue

spousal Gifts Could be Impossible, 15 HOUS. L. REV. 632 (1978); Note, 16 NEWSLETTER OF THE REAL ESTATE, PROBATE AND TRUST LAW SECTION 10 (1977). *See also* Comment, *Gift Tax Liability Resulting from Marriage in Texas*, 55 TEXAS L. REV. 1427 (1978).

359. 68 T.C. at 70.

360. 1978 TAX CT. MEM. DEC. (P-H) ¶ 78,108.

361. No. 75-H-1806 (S.D. Tex. Apr. 7, 1977).

362. 69 T.C. 227 (1977).

363. 444 F. Supp. 374 (E.D. La. 1977).

364. 1978 TAX. CT. MEM. DEC. (P-H) at 78—488.

365. *Id.* at 78—489.

366. 69 T.C. at 233.

367. In *Deobald* the court added that § 2036 applied exclusively to situations in which the donor *intended* to retain an interest and not to situations in which income is retained by operation of law. 444 F. Supp. at 382-83.

368. 1978 La. Sess. Law Serv. Act No. 627, § 2839(4) (West), effective Jan. 1, 1980. *See generally* Pascal, *Louisiana's 1978 Matrimonial Regimes Legislation*, 53 TUL. L. REV. 105 (1978).

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

of the federal Civil Service Retirement Act, the wife in *Valdez v. Ramirez*[370] had established an interest under a pension scheme and therefore could exercise an option under the plan to provide an annuity for herself only or an annuity for her and her surviving spouse. She had chosen the latter. When the husband died intestate, his children of a former marriage asserted a community interest in the pension benefits. The Supreme Court of Texas held that the wife's exercise of the option pursuant to her employment contract was a proper exercise of her dispositive power under Texas law.

It is worthy of note that the Texas court treated the terms of the federal civil service statute and the federal preemption doctrine as having a significant bearing on the *Valdez* case prior to the decision of the United States Supreme Court in *Hisquierdo*.[371] After a review of the legislative history of the statute, the court concluded that the annuity rights under the contract were community property.[372] Hence, if the pensioner had failed to exercise the option, the court intimated that the benefits would have been treated as community property. But when it was argued that the exercise of the option constituted an invalid creation of a joint tenancy under *Hilley v. Hilley*,[373] the court resorted to reliance on the preemption doctrine.[374]

Since the choice of the survivorship option caused the pensioner-wife's lifetime annuity payments to be half of what they would have been had she not chosen the survivorship option, there was no suggestion that the wife's management of the pension interest constituted actual fraud. The husband's heirs' claim of a right to a community share in the pension benefits amounted in effect to an assertion of constructive fraud by the wife in her handling of the community interest. Even if the constructive fraud argument actually had been advanced, however, it would have been rebutted by the fact that the surviving spouse was provided for by the exercise of the survivorship option.[375]

An assertion of actual or constructive fraud is usually made by a living spouse with respect to the acts of an estranged[376] or deceased spouse.[377] In

370. 574 S.W.2d 748 (Tex. 1978).

371. *See* the discussion of *Hisquierdo*, notes 135-57 *supra* and accompanying text. The court did not, however, attempt to deal with the situation when the pensioner fails to exercise the option provided by the pension scheme.

372. 574 S.W.2d at 752. Compare the handling of this civil service pension plan with that of a railroad retirement plan (and inferentially a social security pension) under *Hisquierdo*, discussed at notes 135-57 *supra* and accompanying text.

373. 161 Tex. 569, 342 S.W.2d 565 (1961).

374. *Id.* at 753. The court relied on Free v. Bland, 369 U.S. 663 (1962). *But see* Bowman v. Simpson, 546 S.W.2d 99 (Tex. Civ. App.—Beaumont 1977, writ ref'd), *discussed in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 137 (1978). *But see* note 293 *supra*.

375. As a general proposition the constructive fraud doctrine has thus far been allowed to be asserted only by a spouse, but in a proper case there seems to be no reason why it might not be asserted on behalf of a deceased spouse by that spouse's heirs.

376. *See, e.g.*, Hutcherson v. Hinson, 557 S.W.2d 814 (Tex. Civ. App.—Tyler 1977, no writ).

377. Davis v. Tennessee Life Ins. Co., 562 S.W.2d 868 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.), is the sequel to Davis v. Davis, 521 S.W.2d 603 (Tex. 1975),

Logan v. Barge[378] a widow brought an action against her deceased husband's children of prior marriages. The widow asserted and proved an actual conspiracy between her deceased husband and the children to defraud her of her community interest in specific properties by transferring them to the children. Instances of constructive fraud were also shown with respect to gifts to the children of large sums of community money.[379] While the doctrine of actual and constructive fraud may be used to protect spouses and their privies from the consequences of excessive gifts to third persons by the sole manager of community property, section 5.24 of the Family Code protects the title of a bona fide purchaser from attack by the other spouse.[380] In *Bradley v. Bradley*[381] the husband had made a community purchase of land through the Veterans Land Board, a transaction in which legal title is retained by the Board until the full purchase price is paid, although formal indicia of title are held in the interim in the name of the purchaser in the form of a recordable contract of sale.[382] After their divorce the husband and wife held the property as tenants in common since the property interest was not divided by the divorce court. Hence, the transfer of the property to the ex-husband's parents, who were fully cognizant of the ex-wife's claim to an undivided one-half interest in the land, conveyed no more than the undivided half-interest which that spouse held as a tenant in common.[383] The court did not even suggest that section 5.24 would be applicable to a transaction such as this one, which occurred after dissolution of the marriage.

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discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 67-68 (1975). There a putative wife asserted constructive fraud without sufficient pleading and proof to establish the claim. *See also* Annot., *Estoppel or Laches Precluding Lawful Spouse from Asserting Rights in Decedent's Estate as Against Putative Spouse*, 81 A.L.R.3d 110 (1977); Annot., *Rights in Decedent's Estate as Between Lawful and Putative Spouse*, 81 A.L.R.3d 6 (1977).

For efforts to extend protection of the Bankruptcy Act to putative spouses, see Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act*, 25 U.C.L.A. L. REV. 96 (1977).

378. 568 S.W.2d 863 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

379. The large exemplary damage awards made against the children were found excessive, however, under the circumstances, which showed that the subject matter of the gifts could have been separate property. *Id.* at 871. From the court's general discussion of principles of reimbursement, *id.* at 869, and the use of the term "reimbursement," *id.* at 871, in its comments on exemplary damages as related to gifts fraudulent as to the widow, it is evident that the court views reimbursement as a discretionary tool for the adjustment of equities which may be employed in settlement of estates as well as property division on divorce. The difference is that only in the latter case is the exercise of discretion authorized by statute. TEX. FAM. CODE ANN. § 3.63 (Vernon 1975). The court's reliance on Fulwiler v. Fulwiler, 419 S.W.2d 251 (Tex. Civ. App.—Eastland 1965, no writ), and Horlock v. Horlock, 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd), makes this point abundantly clear. *See also* McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 453-54 (1976).

380. TEX. FAM. CODE ANN. § 5.24 (Vernon 1975).

381. 540 S.W.2d 504 (Tex. Civ. App.—Fort Worth 1976, no writ), *discussed in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 116-17 (1978).

382. *See* TEX. NATURAL RES. CODE ANN. §§ 161.221, .224, .226, .229 (1978) (formerly TEX. REV. CIV. STAT. ANN. art. 5421m, § 17). *See also* TEX. CONST. art. III, § 49-b.

383. 540 S.W.2d at 512-13.

It is therefore surprising to see *Bradley* cited as authority for the proposition that a spouse who holds title in his sole name could give good title to no more than his individual share if his title is merely *equitable* in that it emanates from an executory contract of sale. In *Collora v Navarro*,[384] where reliance was put on *Bradley*, the court should have looked to section 5.24, which would seem controlling unless the purchaser from the husband was aware of his lack of authority. The state of the purchaser's awareness is not apparent from the opinion though it may have been very obvious from the record. If the purchaser was not bona fide, however, recourse to this rationale is beside the point.[385]

Tortious Liability of Spouses. Although section 5.61 of the Family Code unequivocally provides that all the community estate is answerable for tortious liability of either spouse,[386] doubts have been entertained with respect to the proper mode of enforcing that liability.[387] The point has been made that if the husband is sued for tortious liability, it is nonetheless necessary to join the wife as a party to the suit for the limited purpose of enforcement so that the judgment will run against both spouses and may be enforced against jointly managed community property or that subject to the wife's sole management.[388] In *de Anda v. Blake*[389] the trial court entered judgment against a mother and daughter when both were sued for the daughter's negligence in operating her mother's automobile as her agent. In response to the wife's appeal with respect to a counterclaim she had brought unsuccessfully against her estranged husband, the San Antonio court of civil appeals merely remarked that section 5.61 does not require rendition of a judgment for negligence against both parents.[390] The plaintiffs had evidently not sought any relief against the husband. In *Lawrence v. Harvey*,[391] however, the same court said that the husband might be sued alone for his wife's tort, but his separate property would not be subject to liability unless principles of agency or joint enterprise were operative.[392] The peculiar alignment of parties in *Lawrence* resulted be-

384. 574 S.W.2d 65, 70-71 (Tex. 1978).

385. For situations involving the consequences of reservations of title in a vendor and the impact of this fact on oral agreements between the vendee-spouse and third persons with respect to the land, see Johnson v. Smith, 115 Tex. 192, 280 S.W. 158 (1926); Walkup v. Stone, 73 S.W.2d 912 (Tex. Civ. App.—Texarkana 1934, writ dism'd) (agreement with the other spouse); W. HUIE, TEXAS CASES AND MATERIALS ON THE LAW OF MARITAL PROPERTY RIGHTS 245-46 (1966).

386. TEX. FAM. CODE ANN. § 5.61 (Vernon 1975).

387. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 78-79 (1974).

388. *See* Maness v. Reese, 489 S.W.2d 660 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.). *But see* Grace v. Rahlfs, 508 S.W.2d 158 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.). *Grace* involved a suit for breach of contract entered into by the husband to insure property that was the subject matter of a business in which the spouses were jointly engaged. The court said the wife was not the "proper defendant" perhaps because the plaintiff had chosen not to sue her.

389. 562 S.W.2d 497 (Tex. Civ. App.—San Antonio 1978, no writ).

390. *Id.* at 501.

391. No. 15984 (Tex. Civ. App.—San Antonio, Nov. 22, 1978, no writ) (not yet reported).

392. In Casterline v. Burden, 560 S.W.2d 499 (Tex. Civ. App.—Dallas 1977, no writ), an

cause the husband, without his wife's joinder, commenced an action for negligence against the defendant involved in an automobile collision with the plaintiff's wife. Although it is not clear from the opinion, the husband may have merely sought to recover damages for injury to the community car subject to his sole management. Without raising any issues as to the lack of a proper party-plaintiff, the defendant counterclaimed against the husband for the wife's tort. The trial court denied the husband's motion for summary judgment on the counterclaim, and his suit for damages was defeated by the court's finding that his wife's negligence was the proximate cause of the collision. Though the appellate court speaks clearly to the point that the husband's separate property is not liable in such an instance for the wife's tort, nothing is said of the wording of the judgment so that a writ of execution might not issue for satisfaction against the husband's separate property.

Although the arguments advanced by the husband are not clearly indicated in the opinion, it appears that he asserted that the car was community property subject to his sole management and that his wife was merely his bailee in operating it. The husband's choice of the term "bailee" was inappropriate.[393] If the car was subject to the husband's sole management, his wife should be said to be operating it with his permission. On balance it would therefore seem that her acts in operating the car were analogous to those of an agent (for whose negligence he would ordinarily be liable) rather than those of a bailee (for whose negligence he would not be liable).

The sovereign's confiscation of a community automobile engaged in criminal activity is somewhat analogous to the sovereign's foreclosure of a tax lien against community property held in the name of one spouse only. In either case the sovereign might seek to rely on section 5.24,[394] though the argument might seem more tenuous in the latter case.[395] In *Amrani-Khaldi v. State*[396] the state brought suit against both spouses for the forfei-

ex-husband moved for reduction of his child support obligation. In the course of the trial the ex-wife's new husband was excluded from the courtroom under TEX. R. CIV. P. 267. Though the new husband was not a party in interest in the sense that he was joined by the pleadings, the liability of the community estate of the new husband and his wife was affected by the ex-husband's motion for reduction of his support obligation. The appellate court nevertheless held that the error in excluding the new husband from the courtroom was harmless, since no prejudice was shown and there was ample evidence to support the reduction of the ex-husband's obligation without considering the new husband's testimony as to his contribution to community income.

393. The court seems to have overreacted to his use of the term by responding that the wife was "operating the vehicle as a co-owner, not as a bailee." Lawrence v. Harvey, No. 15984 (Tex. Civ. App.—San Antonio, Nov. 22, 1978, no writ) (not yet reported).

394. TEX. FAM. CODE ANN. § 5.24 (Vernon 1975).

395. Allen v. Linam, 551 S.W.2d 448, 451 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.). There the land was held in the wife's name and in 1928 foreclosure was against the deceased wife's heirs pursuant to TEX. REV. CIV. STAT. art. 2040 (Vernon 1925). Though the court commented on the point, no discussion was addressed to the validity of the foreclosure of the husband's community interest. Under current law the issue is resolved by TEX. FAM. CODE ANN. § 5.24 (Vernon 1975) provided that the sovereign-creditor whose lien has attached to the land can be deemed to be covered by that section's provisions.

396. 575 S.W.2d 667 (Tex. Civ. App.—Corpus Christi 1978, no writ).

ture of their community car used by the husband in illicit drug trade.[397] The court, however, relied on section 5.61[398] in treating the automobile as forfeited to the state because of the husband's tortious liability. This seems a sounder argument than analogizing the state's position to that of a lienholder by operation of law.

Exempt Property. A properly perfected lien on property that subsequently becomes a homestead is nevertheless valid against the property,[399] but one who asserts a lien on property already a homestead must show proper perfection of the lien.[400] Hence a purchase money lien acquired on a mobile home as a chattel prior to its being affixed to realty may be subsequently foreclosed after it is put in place upon land.[401] The fixing of the initial lien on the chattel does not require joinder of the owner's spouse nor does renewal or readjustment of such a lien require joinder after the chattel is affixed to realty as a homestead.[402] Whether the seller knew that the buyer intended to affix the chattel to realty and use it as a home is irrelevant.[403]

One of the hallmarks of Texas homestead law is the rule that a mortgage of homestead property for purposes other than purchase money, improvement, or taxes is constitutionally void.[404] Since the rule tends to curtail the borrowing potential of homeowners who may want to utilize the equity in a home as security for a loan for other purposes, certain dodges have been developed in an effort to circumvent the rule. One of these involves the sale of the homestead to a corporation controlled by the homeowner so that the corporation may use the home as security for a loan. The corporation then either leases the home to the former owner or allows him to live there as a tenant at will. A more opaque ruse is to disguise the mortgage as a sale to the lender directly, but use of this device is imperiled by the specific constitutional provision invalidating "pretended sales of the homestead involving any condition of defeasance."[405] The pitfalls of this approach are well illustrated by *Sudderth v. Howard*[406] where the mortgagors were able to undo their mortgage. This constitutional provision was also utilized in *McGahey v. Ford*[407] to attack a conveyance to a controlled

397. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.03(a)(5) (Vernon 1976).

398. TEX. FAM. CODE ANN. § 5.61 (Vernon 1975).

399. First Realty Bank & Trust v. Younkin, 568 S.W.2d 428 (Tex. Civ. App.—Eastland 1978, no writ). Here a judgment lien was perfected against realty while the owner was single and before a single owner could assert a homestead under the constitutional amendment of 1973. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 84-85 (1974).

400. *See* Rose v. Carney's Lumber Co., 565 S.W.2d 571 (Tex. Civ. App.—Tyler 1978, no writ).

401. Minnehoma Financial Co. v. Ditto, 566 S.W.2d 354 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

402. Uvalde Rock Asphalt Co. v. Hightower, 140 Tex. 200, 166 S.W.2d 681 (1943).

403. 566 S.W.2d at 358.

404. *See* Young, *1978 Annual Argument: The Constitutionality of "Thou Shalt Not Convey Non-Purchase Money Security Interests in Exempt Property,"* 32 PERSONAL FINANCE L.Q. REP., No. 2, Spring 1978, at 28.

405. TEX. CONST. art. XVI, § 50.

406. 560 S.W.2d 511 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

407. 563 S.W.2d 857 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

corporation when the purpose of the "sale" was to allow the corporation to mortgage the property. Although a bona fide mortgagee taking from the corporation may nevertheless successfully resist an attack on his security,[408] the mortgagee in *McGahey* was unable to show his good faith because he had not given present consideration.[409]

A significant consequence of an effort to circumvent the constitutional prohibition by conveyance to a controlled corporation is an inability to assert invalidity of any encumbrances put on the property by the corporation. *Shepler v. Kubena*[410] illustrates this point though the case is not one of circumvention but merely one of occupation of corporate property as a home. The husband and his first wife conveyed nonhomestead property to a corporation apparently owned by the husband. After the husband's divorce from his first wife, the corporation continued to own the land. Upon the husband's remarriage, he and his new wife made their home on the property. The corporation then gave a lien on the property in exchange for a loan and later sold the property to the husband, who in turn conveyed it to his wife and disappeared. Though the wife had maintained a home on the property prior to its mortgage by the corporation, she could not resist foreclosure of the lien. Her occupancy was merely that of a tenant at will.[411]

If a judgment debtor seeks injunctive relief from seizure of the nonexempt excess in value over the exempt value of his homestead, and a temporary injunction is granted, the judgment creditor is ill-advised in seeking an appeal on the order, even if the trial court's action appears to be a flagrant abuse of discretion. In the light of *Bank of Texas v. Laguarta*[412] the creditor is better advised to devote his efforts to discharge his burden of showing how much the debtor's property exceeds the exempt amount.

Every student of Texas marital law is familiar with the consequences of accelerated urban sprawl upon suburban rural homesteads.[413] When a rural plot is enveloped by urban expansion and thereby becomes an urban homestead, the definition of the homestead exemption is transformed from one of acreage to one of value.[414] *In re Lee*[415] provides current authority

408. National Bond & Mortgage Corp. v. Davis, 60 S.W.2d 429 (Tex. Comm'n App. 1933, judgmt adopted).

409. The trustee argued that agreements not to sue, recited in the deed of trust, provide sufficient present consideration. The court, however, found that the consideration for the deed of trust was pre-existing debt. 563 S.W.2d at 863. *See also* Walter Connally & Co. v. Gaston, 295 S.W. 953 (Tex. Civ. App.—Texarkana 1927, writ dism'd).

410. 563 S.W.2d 382 (Tex. Civ. App.—Austin 1978, no writ).

411. Nevertheless, the second wife's occupancy was secure until the tenancy at will was terminated. *Id.* at 386.

412. 565 S.W.2d 363 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ). *See also* Irving Bank & Trust Co. v. Second Land Corp., 544 S.W.2d 684 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

413. *See* Comment, *The Changing Homestead: When the City Meets the Farm*, 18 S. TEX. L.J. 145 (1976).

414. *See* Lauchheimer & Sons v. Saunders, 97 Tex. 137, 141, 76 S.W. 750, 752 (1903). *See also* Comment, *supra* note 413, at 152-53.

415. 570 F.2d 1301 (5th Cir. 1978). *See In re* Levens, 563 F.2d 1223 (5th Cir. 1977), with respect to timely notice to creditors concerning property set aside to a bankrupt as exempt.

for the opposite situation of the deserted village—the conversion of an urban homestead to a rural one. In the mid-thirties the property was situated in a village community. By the 1970s, however, its urban character had significantly deteriorated. The 1934-town consisted of a railway station, two stores, a school with two teachers and seventy-five students, two service stations, a gristmill, a bus station, a post office, a blacksmith shop, and a dozen homes with three to six inhabitants in each. By the mid-seventies within a radius of two-tenths of a mile where a county road intersected a highway there were eleven houses, a small store where food and gasoline might be purchased, and an abandoned church. Six-tenths of a mile beyond the intersection there were two sawmills and two more houses, one of which was the residence of the bankrupt. The Court of Appeals for the Fifth Circuit concluded that "the crossroads collection of buildings" could not constitute a village under Texas law. Hence the bankrupt's home and less than two hundred acres of land qualified as a rural homestead.

Without alluding to *In re Perwein*[416] where the court gave article 3836(a)(3)[417] a literal interpretation in defining exempt means of transportation, in *In re Sismore*[418] another bankruptcy court interpreted the same article to allow a bankrupt to claim two automobiles as exempt means of travel rather than one as the statute clearly specifies. Nevertheless, considering the types of vehicles that qualify for exemption under the statute and the values of these individual vehicles, which, in some instances, are greater than that of an additional automobile, it would seem that a statutory amendment allowing two exempt automobiles would be in order.

Another bankruptcy court in *In re Gavin*[419] had earlier interpreted the enumeration of specific types of exempt means of travel in article 3836(a)(3) as precluding a claim to exemption of similar means of travel as tools of trade under article 3836(a)(2). Whereas the statutory interpretation of *Sismore* seems too broad, that of *Gavin* seems too narrow. The draftsmen of article 3836 intended that a particular item of personalty might qualify as exempt under one of several subdivisions of article 3836(a). If an item failed to achieve exemption under one subdivision, it might qualify under another. For example, the draftsmen indicated that if a certain item of property cannot qualify as a household furnishing under subdivision (1), it might qualify as a tool of trade under subdivision (2).[420] In the commentary to subdivision (3),[421] however, it is pointed out that a boat and an aircraft may be tools of trade, but they were not meant to be

416. Bk. No. A75-167 (Bk. Ct. W.D. Tex. Sept. 3, 1976), *aff'd*, (W.D. Tex. Apr. 28, 1977), *noted in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 140 (1978).

417. TEX. REV. CIV. STAT. ANN. art. 3836(a)(3) (Vernon Supp. 1978-79).

418. Bk. No. 4-77-146 (Bk. Ct. N.D. Tex. May 25, 1978).

419. Bk. No. 74-G-27 (Bk. Ct. S.D. Tex. July 7, 1975).

420. The draftsmen's commentary is printed as McKnight, *Modernization of Texas Debtor-Exemption Statutes Short of Constitutional Reform*, 35 TEX. B.J. 1137 (1972). The point is alluded to in the second paragraph of the commentary to art. 3836(a)(1) at p. 1138.

421. *Id.* at 1139-40.

included as exempt means of transportation since neither is enumerated in subdivision (3). The draftsmen did not mean to provide that items that are not claimable as exempt modes of transportation could not be claimed as tools of trade or as household furnishings. A child's bicycle might fall into the latter category.

Further amendment of the personal property exemption statute should be considered. Whereas it might be appropriate that all personal property exemptions be collected under the roof of a single statute[422] or group of statutes, the present structure of our personal property exemption law requires omission of any reference to current wages within the value limitations of article 3836(a). When this article was drafted current wages for personal services were included because they were mentioned in the existing article 3832 and because the draftsmen assumed that the legislature would not enact the proposed value ceiling. With the ceiling, however, the inclusion of current wages in article 3826 is clearly inappropriate since they are absolutely exempt under the constitution[423] and article 4099.[424]

422. There are, for example, other statutory exemptions that are not included in TEX. REV. CIV. STAT. ANN. art. 3836 (Vernon Supp. 1978-79). For example, TEX. REV. CIV. STAT. ANN. art. 3806, § 3 (Vernon 1967) exempts recoveries under the Workmen's Compensation Act. Highland Park State Bank v. Salazar, 555 S.W.2d 484 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.). *See also* Olds & Palmer, *Exempt Property*, in CREDITORS' RIGHTS IN TEXAS 23, 58-59 (J. McKnight ed. 1963).

423. TEX. CONST. art. XVI, § 28.

424. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 85-86 (1974).