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Joseph W. McKnight

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FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight*

I. STATUS

Entering into Marriage. In *Claveria v. Estate of Claveria*¹ the husband contested the validity of his wife's will. His contest was met by an assertion that he had previously entered into an informal marriage that was undissolved at the date of his ceremonial marriage to the testatrix and the later marriage was therefore invalid. In spite of the "vehement assertions" of both principals to the informal marriage that they had not agreed to be married, the trial court decided that an informal marriage had been contracted between them. Apparently, this conclusion was arrived at by ignoring the lack of evidence of any marital agreement and by relying instead on the evidence of their living together and holding themselves out as husband and wife. The trial court, therefore, must have put its ultimate reliance on the provision of section 1.91(b) of the Family Code² that the agreement to marry "may be inferred if it is proved that they lived together as husband and wife and represented to others that they were married." But this provision must mean that the court may infer the fact of agreement in the *absence* of evidence on the matter. If either or both parties testify concerning their agreement to marry, the court should not entertain an inference but should merely make a finding on the basis of the evidence presented. If the evidence offered tends to disprove the existence of the agreement, there is no room to infer it. *Claveria* appears to have been a situation that would have justified reversal on that ground alone. The appellate court, however, evaluated the evidence in relation to the statutory text in a somewhat more subtle way to achieve the same result. Both witnesses testified that they had "lived together," that is, that they had cohabitated under the same roof. But living together *as husband and wife*, as required by the statute, is especially difficult to demonstrate in the absence of any agreement to be married. Thus, the court concluded that the evidence was not sufficient as a matter of law to comply with the terms of the statute.

The only Texas legislative development during 1979 concerning entry into the marital relationship was the statutory expansion of the list of authorized celebrants to include retired judges, including retired justices of the peace.³ Hence the only group of judicial officers lacking authority to

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

1. No. 20048 (Tex. Civ. App.—Dallas Sept. 21, 1979).

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

3. *Id.* § 1.83 (Vernon Supp. 1980).

marry are municipal judges, whose authority to perform marriages has been generally opposed by justices of the peace.

It has sometimes been suggested that there should be some sort of legislative restraint on the right to remarry when children of a prior marriage are unprovided for.⁴ Following the lead of the United States Supreme Court,⁵ the Supreme Court of Indiana held that a statute denying the right to marry to anyone who is unable to prove that dependent children have been adequately supported is unconstitutional.⁶

Section 2.44 of the Family Code⁷ provides that a marriage is voidable and subject to annulment if the petitioner was fraudulently induced to enter into the marriage. The Supreme Court of Illinois recently interpreted a similar statute⁸ and found that fraud existed when a divorced woman induced a man to marry her by falsely representing herself as a widow, knowing that the man's religious beliefs would have prevented him from marrying her if he had known she was divorced.⁹ Over fifty years ago, however, the Amarillo court of civil appeals in an obiter dictum seemed to cast some doubt on concealed divorce as a ground for annulment.¹⁰ Nevertheless, concealment made with the deliberate intention of deceiving a person with strong religious convictions against remarriage after civil divorce would seem to be the sort of fraud with which section 2.44 was designed to deal.¹¹

Privileged Testimony. There were several cases decided in other jurisdictions in which one spouse sought to invoke the marital privilege to bar testimony of the other spouse in a suit in which the first spouse was involved. Overruling earlier cases that would have allowed invocation of the privilege,¹² the Missouri Supreme Court held that the testimony of an ex-

4. See *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978); *State v. Mueller*, 44 Wis. 2d 387, 171 N.W.2d 414, 418 (1969); Foster, *Marriage: A "Basic Civil Right of Man,"* 37 *FORDHAM L. REV.* 50, 70-71 (1968).

5. See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Wisconsin statute struck down).

6. *Miller v. Morris*, 386 N.E.2d 1203 (Ind. 1979).

7. *TEX. FAM. CODE ANN.* § 2.44 (Vernon 1975).

8. *ILL. ANN. STAT.* ch. 40, § 301(1) (Smith-Hurd Supp. 1979) provides:

The court shall enter its judgment declaring the invalidity of a marriage (formerly known as annulment) entered into under the following circumstances:

(1) a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs or other incapacitating substances, or a party was induced to enter into a marriage by force or duress or by fraud involving the essentials of marriage

9. *Wolfe v. Wolfe*, 76 Ill. 2d 92, 389 N.E.2d 1143 (1979).

10. *Stephens v. Stephens*, 281 S.W. 1096, 1099 (Tex. Civ. App.—Amarillo 1926, no writ).

11. The limited scope of *TEX. FAM. CODE ANN.* § 2.46 (Vernon 1975) (concealment of a divorce granted within 30 days of subsequent marriage) was not meant to suggest that concealment of a more venerable divorce is condoned. The object of § 2.46, as well as § 1.03(b)(4), is to support the principle underlying § 3.66. See McKnight, *Commentary to the Texas Family Code, Title 1*, 5 *TEX. TECH L. REV.* 281, 318-19, 343 (1974).

12. *State v. Kodat*, 158 Mo. 125, 59 S.W. 73 (1900); *State v. Frazier*, 550 S.W.2d 590 (Mo. App. 1977).

spouse, not involving a confidential communication, was admissible in a criminal prosecution.¹³ Although California has recently recognized the enforceability of property contracts between unmarried cohabitants,¹⁴ it has shown no inclination to extend the marital privilege to them.¹⁵

Alienation of Affection. In 1975 section 4.05 was added to the Family Code.¹⁶ The text of the section abolished the tort of criminal conversation, while its title referred to abolition of the action for alienation of affection as well. In spite of renewed attempts to abolish recovery for alienation of affection in 1979, the Texas Legislature merely removed the misleading reference to alienation of affection in the title.¹⁷ At about the same time, the Texarkana court of civil appeals turned back an attempt to curtail a recovery for alienation of affection.

In *Williford v. Sharpe*¹⁸ a wife had sued another woman for alienation of the husband's affection. The jury rendered a verdict for actual damages of \$25,000 and exemplary damages of \$10,000. The trial court overruled the defendant's motion for a new trial, conditioned on a remittitur of \$10,000 of actual damages by the plaintiff. The defendant appealed on the basis of an excessive award of damages, and the plaintiff complained of the remittitur. The appellate court restored the jury's award and set aside the remittitur. "[T]he law requires that mortals determine the amount of damages suffered for the loss of a spouse's affection when those affections have been alienated by another person. . . . [T]he loss of the attendant benefits of a good marriage in this case is worth \$25,000.00."¹⁹

Spousal Support. On the advice of the Family Law Section of the State Bar of Texas the legislature enacted amendments equalizing the standard of mutual support between the spouses.²⁰

13. *State v. Euell*, 583 S.W.2d 173 (Mo. 1979) (en banc).

14. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), commented on in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 116-19 (1978).

15. See *People v. Delph*, 94 Cal. App. 3d 411, 156 Cal. Rptr. 422 (1979). Unmarried cohabitants fared somewhat better in their effort to be treated as married for purposes of obtaining credit under the Equal Credit Opportunity Act. *Markham v. Colonial Mortgage Serv. Co.*, 605 F.2d 566 (D.C. Cir. 1979).

16. 1975 Tex. Gen. Laws, ch. 637, § 1, at 1942.

17. 1979 Tex. Gen. Laws, ch. 193, § 4, at 422. As recommended by the Family Law Section of the State Bar of Texas, S.B. 131 proposed removal of the reference to alienation of affection in the title of Family Code § 4.05. The senate adopted an amendment to retain the title as enacted in 1975 and to amend the text to abolish the tort of alienation of affection in conformity with the title. In the House of Representatives, however, an amendment was adopted to limit the abolition of the tort of criminal conversation to instances of voluntary intercourse, thereby authorizing suit for criminal conversation in instances of rape. As finally passed, S.B. 131 gave effect to the recommendation of the Family Law Section. See TEX. FAM. CODE ANN. § 4.05 (Vernon Supp. 1980).

18. 578 S.W.2d 498 (Tex. Civ. App.—Texarkana 1979, no writ).

19. *Id.* at 500-01. In *Turner v. Unification Church*, 473 F. Supp. 367, 378 (D.R.I. 1978), the court held that the cause of action for alienation of affection was inapplicable to the parent-child relationship.

20. TEX. FAM. CODE ANN. §§ 3.59, 4.02 (Vernon Supp. 1980).

Interspousal Immunity. In 1977 Texas recognized that the doctrine of interspousal immunity as applied to intentional torts had lost its validity.²¹ In both Nebraska²² and Iowa²³ the courts have gone a step further to abolish the doctrine in wrongful death actions founded on negligence. In the ordinary negligence situation, however, both Texas²⁴ and Ohio²⁵ have resisted the argument to carry abolition further. Although Texas has been unwilling to allow a cause of action in interspousal negligence, the 1979 Texas Legislature implemented a procedure to protect family members from the infliction of intentional torts within the household. Despite its non-compensatory purpose, the passage of title 4²⁶ of the Family Code is a modest start toward dealing with family violence.²⁷

II. CHARACTERIZATION OF MARITAL PROPERTY

Antenuptial Agreements. Most states other than Texas have had a long experience with premarital agreements that affect marital property interests. One of the lessons that can be drawn from the cases in those jurisdictions with respect to the validity of such agreements is that a full disclosure of the extent of the property of a prospective spouse should be made to one who would renounce a claim to that property or to income or other property that might be generated by it. This point is well illustrated by a recent decision of the Supreme Court of Arkansas.²⁸

The Dallas court of civil appeals recently addressed a novel point with respect to an antenuptial agreement.²⁹ The agreement had provided that in case of divorce the wife would not seek temporary alimony. In his appeal from a decree of divorce, the husband took a number of points of error. In one of these he asserted that the trial court had erred in failing to credit him in the final settlement for the amount of temporary alimony that he had actually paid. The appellate court upheld the trial court, reasoning that since the trial court had recognized the validity of the agreement, it was deemed to have considered the amount of temporary alimony

21. *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977), discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 110 (1978); see Korman, *To Love, Honor and Do Violence*, 2 FAMILY ADVOCATE, Fall 1979, at 3. The author's thesis is that interspousal immunity is too often the shield of spousal brutality.

22. *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979).

23. *Shook v. Crabb*, 281 N.W.2d 616 (Iowa 1979).

24. *Bruno v. Bruno*, 589 S.W.2d 179 (Tex. Civ. App.—Waco 1979, no writ) (following *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964)).

25. *Varholla v. Varholla*, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978).

26. TEX. FAM. CODE ANN. §§ 71.01-.19 (Vernon Supp. 1980).

27. Title 4 defines family violence as "the intentional use or threat of physical force by a member of a family or household against another member of the family or household, but does not include the reasonable discipline of a child by a person having that duty." TEX. FAM. CODE ANN. § 71.01(b)(2) (Vernon Supp. 1980). See Solender, *Family Law: Parent and Child, infra*, p. 159.

28. *Faver v. Faver*, 266 Ark. 262, 583 S.W.2d 44 (1979) (antenuptial agreement set aside); see MARITAL AND NON-MARITAL CONTRACTS: PREVENTIVE LAW FOR THE FAMILY (J. Krauskopf ed. 1979). See also *Rosenberg v. Lipnick*, 389 N.E.2d 385 (Mass. 1979) (new rule enunciated requiring full disclosure).

29. *Schecter v. Schecter*, 579 S.W.2d 502 (Tex. Civ. App.—Dallas 1978, no writ).

paid in making its division, especially since the husband was awarded the larger share of the community.³⁰ Although it seems that the court regarded the agreement as valid in making the ultimate property division, the terms of the agreement did not preclude the trial court's allowance to the wife in the nature of temporary alimony.

The amended version of section 59A of the Probate Code³¹ requires a new formality that must be complied with before a marriage contract constitutes a valid contract to make a will. A contract to make a will, or not to revoke a will, entered into after September 1, 1979, must have all the formal attributes of a will.³²

Proposed Constitutional Amendment Affecting Premarital Agreements and Marital Partitions. On November 4, 1980, a constitutional amendment will be submitted to the people of Texas, which, if adopted, will clarify some murky points of law with respect to premarital agreements.³³ The immediate occasion for the amendment is a need to provide that no part of the gift made by one spouse to the other will be included in the donor's estate for federal estate tax purposes.³⁴ Since an amendment of article XVI, section 15 of the Texas Constitution was deemed advisable, it seemed appropriate to offer other provisions long needed to clarify the law concerning premarital agreements and marital partitions.

The amendment would clarify the law of premarital agreements in two important respects. First, it provides that

[P]ersons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument . . . partition between themselves all or part of their property, then existing or to be acquired or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired³⁵

This provision would thus allow prospective spouses to partition prospective community property prior to marriage so that an agreed *undertaking* to make future partitions of such interests would be unnecessary and the future execution of the undertaking would also be unnecessary.³⁶ Secondly, the proposed amendment clarifies the standing of preexisting creditors with respect to premarital agreements. Their position would be the same as in other instances with respect to transfers made without an intention to defraud them.³⁷ Upon the adoption of the amendment, modest

30. *Id.* at 506.

31. TEX. PROB. CODE ANN. § 59A (Vernon Supp. 1980).

32. *See id.* § 59 for the requisites of a will.

33. 1979 Tex. Sess. Law Serv., H.J.R. 54, at A-55 (Vernon).

34. *See* notes 86-94 *infra* and accompanying text.

35. 1979 Tex. Sess. Law Serv., H.J.R. 54, at A-55 (Vernon).

36. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 105-08 (1979).

37. *See* McKnight, *Management, Control and Liability of Marital Property*, in TEXAS FAMILY LAW & COMMUNITY PROPERTY 159, 180-82 (J. McKnight ed. 1975).

revisions of section 5.41³⁸ would be required to conform it to the constitutional language. Thus, the proposed amendments would significantly clarify the law with respect to premarital agreements. The present rule that premarital agreements cannot cause separate property to take on community character during marriage³⁹ would not be altered, however.

The proposed amendment would also clarify the law of marital partitions, both as to the position of preexisting creditors and as to the longstanding split in judicial decisions regarding the validity of partitions of future acquisitions, most commonly encountered in property settlement agreements made in anticipation of divorce.⁴⁰ As in the case of premarital agreements, a present partition could validly include future acquisitions. The breadth of the language of the amendment would also supply authority,⁴¹ if authority is needed, for spouses to partition their joint tenancies⁴² as well as the income from joint tenancies. But the amendment does not provide a new mode of creating joint tenancies⁴³ or a means of creating rights of survivorship in community property.⁴⁴ Finally, the proposed amendment would dispose of the present language of the constitution, added in 1948, that did not authorize a partition between spouses of *unequal*, undivided shares.⁴⁵

Reconciliation Following Partition in Anticipation of Divorce. Texas normally does not look to Anglo-American law for guidance in determining the incidents of our legal institutions rooted in Spanish law. But the old Spanish commentators are silent on the effects of reconciliation on partitions made on separation (*divorcio*).⁴⁶ Hence Texas courts have looked to

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

39. *Tittle v. Tittle*, 148 Tex. 102, 220 S.W.2d 637 (1949); *Kellett v. Trice*, 95 Tex. 160, 66 S.W. 51 (1902).

40. See McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 418-20 (1976).

41. "[S]pouses . . . may by written instrument from time to time partition between themselves *all or part of their property*, then existing or to be acquired . . ." 1979 Tex. Sess. Law Serv., H.J.R. 54, at A-55 (Vernon) (emphasis added).

42. *Id.*, with emphasis on the phrase "*or to be acquired.*" For an analysis of some federal tax problems arising from joint tenancies of spouses, see Joy, *Joint Ownership of Real Property by Spouses: Estate and Gift Tax Consequences*, 65 A.B.A.J. 1856 (1979). See also IRS Ltr. Rul. 7911005, 1979 PRIVATE LETTER RULINGS (P-H) 307.

43. *Williams v. McKnight*, 402 S.W.2d 505 (Tex. 1966); *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961); see McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 Sw. L.J. 39, 42-45 (1967).

44. In creating or seeking to create joint tenancies, most spouses attempt to achieve a right of survivorship in community property. This result is easily accomplished by will, but it cannot be achieved by agreement or contract except by creation of a joint tenancy, which involves a present estate unwanted in most instances. See J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 98-102 (2d ed. 1975).

45. TEX. CONST. art. XVI, § 15: "husband and wife . . . may . . . partition between themselves in severality or into *equal* undivided interests . . ." (Emphasis added.)

46. For the effects of separation itself, see J. MATIENZO, *COMMENTARIA IN LIBRUM QUINTUM RECOLLECTIONIS LEGUM HISPANIAE V.9.2.*, gl.1, nos. 47-57 (2d ed. 1597); A. AZEVEDO, *COMMENTARIORUM JURIS CIVILIS IN HISPANIAE REGIAS CONSTITUTIONES V.9.2.*, no. 14 (1583-1598). A brief summary of these points is given in Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 34-37 (1969).

Anglo-American decisions on this point.

Prior to the 1948 constitutional amendment allowing partitions of existing community property, partitions in anticipation of divorce had long been recognized.⁴⁷ Following Anglo-American precedent, Texas courts had also concluded that reconciliation nullified such agreed divisions of property⁴⁸ unless the parties agreed otherwise.⁴⁹ The opposite rule applies in cases of remarriage after divorce, however, as recently illustrated in *Spencer v. Spencer*.⁵⁰

Neither present law nor the proposed constitutional amendment precludes a couple from contracting to undo a partition or a premarital agreement. Prior to 1968 the terms of a premarital agreement were not subject to alteration once the marriage had been entered into. Now such an agreement or contract may be undone by a contract entered into any time during marriage⁵¹ or on reconciliation following divorce.

Separate Incidents of Employment Contract. Several recent cases involve instances in which a contract of employment entered into during marriage may produce separate property. It has been established that property rights arising from pension provisions of an employment contract are characterized as separate or community in proportion to the time that the benefits were earned while the employee was single or married within the period of employment.⁵² This characterization results regardless of whether the contract of employment was entered into prior to, or during, marriage. For example, an employment contract providing for retirement after twenty years of service is entered into while the employee is single, and he is employed for three years prior to his marriage. The employee's marriage ends in divorce after five years. Thereafter, as a single man, he completes the twenty-year term of the contract and retires. The employee was single during fifteen of the total number of years worked, three before his marriage and twelve after it was dissolved. Hence, for purposes of division on divorce, only one-fourth of the pension is characterized as community property, with three-fourths as separate property. The retirement pay is treated as a form of deferred compensation for services previously rendered and as such, is apportioned according to the marital status when earned. In *Sprott v. Sprott*⁵³ the court concluded that statutory cost-of-living increases attributable to such fractional interests should be similarly

47. *Rains v. Wheeler*, 76 Tex. 390, 13 S.W. 324 (1890); *Callicoatte v. Callicoatte*, 417 S.W.2d 618 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.).

48. *Hornsby v. Hornsby*, 127 Tex. 474, 93 S.W.2d 379 (1936); *Ellis v. Ellis*, 225 S.W.2d 216, 219 (Tex. Civ. App.—San Antonio 1948, no writ); *Standard v. Standard*, 199 S.W.2d 180, 181-82 (Tex. Civ. App.—Austin 1947, no writ).

49. *Speckels v. Kneip*, 170 S.W.2d 255, 261 (Tex. Civ. App.—El Paso 1942, writ ref'd).

50. 589 S.W.2d 174 (Tex. Civ. App.—El Paso 1979, no writ).

51. See McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 376 (1974).

52. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 115 (1978).

53. 576 S.W.2d 653 (Tex. Civ. App.—Beaumont 1978, writ dism'd).

apportioned.⁵⁴ On the other hand, Fleet Reserve pay, which is received for the rendering of current services, is the separate property of the seaman insofar as it is received for services rendered after dissolution of the marriage.⁵⁵ This compensation is no more related to employment during marriage than any other type of employment compensation extending over a period of years when the employee is single. The same conclusion had been reached by the Corpus Christi court of civil appeals in *Taggart v. Taggart*,⁵⁶ but the Texas Supreme Court's handling of that case may have been somewhat misleading.⁵⁷

The decision of the United States Supreme Court in *Hisquierdo v. Hisquierdo*⁵⁸ received immediate application in *Eichelberger v. Eichelberger*,⁵⁹ which also involved disposition of federal Railroad Retirement benefits on divorce. The Supreme Court of Texas concluded that it had implied authority to correct the decision of a court of civil appeals when contrary to a decision of the United States Supreme Court even though the Texas Constitution and statutes do not provide any express power to do so.⁶⁰ Although the trial court had awarded the wife forty percent of the benefits in issue, the Texas Supreme Court concluded that to remand the case for a complete redistribution of the estate of the parties would accomplish nothing because the United States Supreme Court forbade state courts from awarding other property to compensate for the Railroad Retirement benefits, which are not to be considered in making a division.⁶¹ Such federal benefits must therefore be characterized by the divorce court not as separate property, which should be considered in making a division,⁶² but as something that the court must put out of its consideration entirely.⁶³

The impact of *Hisquierdo* was felt again in *Ex parte Johnson*,⁶⁴ in which the Supreme Court of Texas concluded that Veterans' Administration disability benefits, for the receipt of which a retired serviceman waived his military retirement benefits, was not an earned property right and therefore was not subject to division by a divorce court.⁶⁵ The court reached

54. *Id.* at 655-56. The somewhat related problem of characterizing a life insurance agent's renewal commissions received after divorce was addressed inconclusively in *Bray v. Bray*, 576 S.W.2d 664 (Tex. Civ. App.—Beaumont 1978, no writ). See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 114-15 (1978).

55. 576 S.W.2d at 655.

56. 540 S.W.2d 823 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 552 S.W.2d 422 (Tex. 1977).

57. *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977), *commented on in Sampson, Texas Supreme Court Family Law Decisions: 1976-77 Term*, in STATE BAR SECTION REPORT: FAMILY LAW 25, 25-26 (1977). See also *Ex parte Sutherland*, 526 S.W.2d 536 (Tex. 1975).

58. 439 U.S. 572 (1979), *noted in* 11 ST. MARY'S L.J. 535 (1979); see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 115-18 (1979).

59. 582 S.W.2d 395 (Tex. 1979).

60. *Id.* at 400.

61. *Id.* at 401.

62. *Bell v. Bell*, 513 S.W.2d 20 (Tex. 1974).

63. For a general overview of the availability of pension and retirement benefits for division on divorce, see Marvel, *Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3d 176 (1979).

64. 591 S.W.2d 453 (Tex. 1979).

65. *Id.* at 455-56.

the same conclusion with respect to "military readjustment pay." Depending on length of service as to amount, a federal military reservist is entitled to a sum, not to exceed \$15,000, as readjustment pay on release from the military service. The San Antonio court of civil appeals concluded that this readjustment pay is community property because "the right [to receive it] rests on services rendered during coverture."⁶⁶ But the Texas Supreme Court, relying on *Hisquierdo* and the legislative history of the act, concluded that readjustment pay is an unearned gratuity and hence separate property.⁶⁷

In *Lack v. Lack*⁶⁸ a Dallas court of civil appeals construed the Texas statute⁶⁹ which provides that the widow of a fireman receives benefits in case of the fireman's death. In this instance, the court concluded that the "widow," as designated by statute, should receive the entire award despite the fact that her status to receive it is a partial consequence of the fireman's employment during a prior marriage.⁷⁰ The court specifically limited its holding to the situation before it and expressed no view with respect to a private plan with like provisions or the nature of the fireman's pension rights on retirement.⁷¹ All considered, a better conclusion would have been an apportionment of the death benefits between the fireman's wives, unless recourse is had to the principle of sovereign largesse, which tended to contaminate the reasoning of Spanish commentators and the Supreme Court of the United States.⁷² The reasoning of the Texas Supreme Court in *Valdez v. Ramirez*,⁷³ however, is inapplicable to this situation. In that case, emphasis was put on the management powers of the employee-spouse and, alternatively, on the federal supremacy doctrine. In *Lack* the decision turned on the legislative intent underlying the Texas statute.

Commingling and Tracing. A lump sum award for loss of earning power during marriage and during a period after a marriage has been dissolved presents an entirely different problem. Whether the award is made by judgment⁷⁴ or by the settlement of a worker's compensation claim,⁷⁵ the

66. *Perez v. Perez*, 576 S.W.2d 447, 449 (Tex. Civ. App.—San Antonio 1978).

67. *Perez v. Perez*, 587 S.W.2d 671, 673 (Tex. 1979). A California appellate court has held that, in general, military retirement pay is separate property. *Milhan v. Milhan*, 97 Cal. App. 3d 41, 158 Cal. Rptr. 523 (1979). This conclusion, however, is contrary to the pre-*Hisquierdo* view of the California Supreme Court, *Milhan v. Milhan*, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974), *cert. denied*, 421 U.S. 976 (1976), and the conclusion of another California appellate court, *Gorman v. Gorman*, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (1979) (post-*Hisquierdo*).

68. 584 S.W.2d 896 (Tex. Civ. App.—Dallas 1979, no writ).

69. TEX. REV. CIV. STAT. ANN. art. 6243a, § 10 (Vernon Supp. 1980).

70. 584 S.W.2d at 898.

71. *Id.* at 900.

72. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 118 (1979).

73. 574 S.W.2d 748 (Tex. 1978), *commented on in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 115, 145-46 (1979); see Note, *A New Element to Consider in Determining Community Property Rights in Retirement Benefits*, 19 S. TEX. L.J. 729 (1979).

74. A means of avoiding commingling by judgment is suggested in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 71-72 (1974).

situation is one of commingled community and separate elements. Unless these can be *unmixed* by tracing, the community presumption with respect to acquisitions during marriage must prevail.⁷⁶ The technique of tracing is similar to that applied in segregating separate elements from community elements in a commingled bank account. The persistence of that problem, however, has allowed the courts to fashion guidelines for extricating separate funds from the commingled mass. In *Harris v. Ventura*,⁷⁷ for example, the husband's heirs were able to trace a specific amount of the husband's separate funds into a bank account containing community funds. Applying the rule that community property is deemed to be withdrawn prior to separate property when the withdrawal is made for the purpose of meeting family needs,⁷⁸ the court concluded that the separate deposit could be recovered from the residue of the account.⁷⁹ With respect to an inactive savings account in which nothing more than the wife's separate property had been deposited to draw interest, in the absence of a showing of how much interest had accumulated, the appellate court remanded the case to the trial court for a finding on this fact so that the separate and community elements in the account could be distinguished.⁸⁰

In *Harris* the court also applied tracing techniques to another transaction involving the husband's separate property. Prior to marriage the husband sold certain land and took in payment therefor a promissory note with a deed of trust lien to secure its repayment. Subsequently, but still prior to the marriage, the husband assigned the note and lien to a bank. Though the assignment was absolute in form, it was made as collateral for a loan. During the marriage the bank reassigned the note and lien to the husband, presumably on repayment of the loan. Thereafter the husband foreclosed the lien through a trustee's sale. Repurchase of the land was achieved by cancellation of *part* of the outstanding *separate* note without any addition of community funds. Hence the land was the husband's separate property and the proceeds of its later sale were traced to a certificate of deposit and a promissory note that were therefore also the husband's separate property. The link in this tracing chain that most concerned the court was the absolute assignment of the note and lien to the bank. The court was satisfied, however, that the transaction was not meant as anything more than a security device.⁸¹ As such, which the assignment clearly was, even if the separate indebtedness had been paid with community funds, the redemption of the security would not take the character of the debt, repayment of which the assignment secured. Therefore, if the debt

75. *York v. York*, 579 S.W.2d 24 (Tex. Civ. App.—Beaumont 1979, no writ); *cf. Hicks v. Hicks*, 546 S.W.2d 71 (Tex. Civ. App.—Dallas 1976, no writ) (dealing with a worker's compensation award made after dissolution of marriage), *commented on in McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 113 (1978).

76. See TEX. FAM. CODE ANN. § 5.02 (Vernon 1975).

77. 582 S.W.2d 853 (Tex. Civ. App.—Beaumont 1979, no writ).

78. *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.—Dallas 1975, writ *dism'd*).

79. 582 S.W.2d at 855-56.

80. *Id.* at 856.

81. *Id.* at 857.

had been paid with community funds, the community was entitled to a claim for reimbursement.

Acquisitions Related to Separate Property Interests. In *Goodridge v. Goodridge*⁸² the husband had established a business proprietorship prior to marriage, which he continued to use as a vehicle for making real estate acquisitions during marriage. Title to the realty was taken in the name of the proprietorship-company and purchase money was paid from the proprietorship account. The unpaid balance due on the purchases was represented by assumption of existing indebtedness of the seller and notes executed by the company. The husband argued that particular realty purchased by the company was separate property because in the year in which it was purchased costs of maintaining the company's properties had exceeded rents collected by the company. Hence the company account from which purchase money had been paid represented separate funds. In the previous year, however, the rents had substantially exceeded company costs. But the husband's showing that company costs consistently exceeded profits during the marriage would not have discharged the husband's burden of tracing separate funds into the real estate investment. The proprietorship was merely the alter ego of the husband and not a separate entity. Furthermore, a substantial share of the purchase price of the realty was rooted in a community indebtedness, and no effort was made to segregate separate funds in the company account at the date of marriage or to trace their subsequent disposition.

A spouse's lending his credit to a corporation not owned by either spouse⁸³ (that is, when the spouse is signatory on a note to borrow funds for corporate use) does not cause the community to acquire any interest in the corporate enterprise. This conclusion is not altered by the fact that both spouses are employed by the corporation as salaried employees, or by the further fact that one of the spouses later acquires some of the shares of the corporation.⁸⁴ On the other hand, a court recently concluded that the joinder of a nonowner spouse in leasing separate realty owned by the other spouse does not cause the joining spouse to have a "property interest" in the leased premises, but nonetheless causes a protective covenant in the lease to violate the Texas antitrust statutes.⁸⁵ Such arguments as these would go unnoted except for the considerable attention given them by the appellate courts. It is nonetheless useful for the courts to put such argu-

82. 591 S.W.2d 571 (Tex. Civ. App.—Dallas 1979, no writ).

83. For an analysis of the situation of a business entity owned by a spouse as separate property, see Comment, *Community Property Rights and the Business Partnership*, 57 TEXAS L. REV. 1018 (1979).

84. *Faulkner v. Faulkner*, 582 S.W.2d 639, 641 (Tex. Civ. App.—Dallas 1979, no writ).

85. See *Berman v. City Prods. Corp.*, 579 S.W.2d 313, 318 (Tex. Civ. App.—Eastland 1979, writ granted). One is reminded of *Ryan v. Fort Worth Nat'l Bank*, 433 S.W.2d 2 (Tex. Civ. App.—Austin 1968, no writ), in which the court rejected the argument that a spouse of an owner of land acquired an interest therein when she joined in the conveyance of the land held in her husband's name and a reversion of a mineral interest was retained in the names of both spouses.

ments to rest so that they will not be made again. But when the Internal Revenue Service rules that a donor-spouse retains an interest in property given to the other spouse because community income may be produced therefrom,⁸⁶ there is a characterization problem that must be given serious attention.⁸⁷ To meet the resulting estate tax impact of this situation the Sixty-sixth Legislature has proposed an amendment to the Texas Constitution.⁸⁸ The proposed amendment provides that a donor-spouse is deemed to give the donee-spouse the right to all income from the property given to that spouse. Whereas it has long been understood that a donor-spouse⁸⁹ or other donor⁹⁰ may make such an express⁹¹ or implied⁹² gift to include all future income from the donated property, the proposed amendment puts the burden of showing a contrary intent upon the person who would make that assertion. As to the other community property states, only in Louisiana and Idaho is all income from separate property normally community property in accordance with the model of old Spanish law.⁹³ In Louisiana a legislative provision similar to the proposed constitutional amendment has already been enacted to meet the ruling of the Internal Revenue Service,⁹⁴ but no such legislation has been passed in Idaho.

Names of Grantee and Recitals in Deeds. It is fundamental that acquisitions made prior to marriage are separate property,⁹⁵ whereas those made during marriage are presumed to be community.⁹⁶ If one spouse during

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

87. Estate tax cases arising under this ruling are discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 144-45 (1979), and in the text accompanying notes 124-33 *infra*.

88. 1979 Tex. Sess. Law Serv., H.J.R. 54, at A-55 (Vernon); see notes 34-45 *supra* and 135-36 *infra* and accompanying text.

89. *Strickland v. Wester*, 131 Tex. 23, 26, 112 S.W.2d 1047, 1048 (1938) (continuing outright gift of wife's earnings made to her by husband); *Cauble v. Beaver-Electra Ref. Co.*, 115 Tex. 1, 6, 274 S.W. 120, 121 (1925) (continuing outright gift by husband to wife of income from her property); *Hutchinson v. Mitchell*, 39 Tex. 488 (1873) (gift by husband in trust for wife); *Sheffin v. Small*, 23 S.W. 432, 433 (Tex. Civ. App. 1893, no writ) (husband's joining with wife to create trust of wife's separate property for wife).

90. *Sullivan v. Skinner*, 66 S.W. 680, 681-82 (Tex. Civ. App. 1902, writ ref'd); *McClelland v. McClelland*, 37 S.W. 350, 359 (Tex. Civ. App. 1896, writ ref'd); *Monday v. Vance*, 32 S.W. 559 (Tex. Civ. App. 1895, no writ) (semble).

91. *Cauble v. Beaver-Electra Ref. Co.*, 115 Tex. 1, 6, 274 S.W. 120, 121 (1925) (husband to wife); *Sullivan v. Skinner*, 66 S.W. 680, 681-82 (Tex. Civ. App. 1902, writ ref'd) (wife's father to wife).

92. *Strickland v. Wester*, 131 Tex. 23, 26, 112 S.W.2d 1047, 1048 (1938) (husband to wife); *McClelland v. McClelland*, 37 S.W. 350, 359 (Tex. Civ. App. 1896, writ ref'd) (husband's father to husband).

93. See W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 161 (1971). In the other community property states, however, *some* community property income may be produced from separate property. *Id.* 162, 165-68. See *Cockrill v. Cockrill*, 601 P.2d 1334 (Ariz. 1979).

94. 1979 La. Sess. Law Serv., Act No. 709, § 1, at 1352 (West), effective Jan. 1, 1980, repealing 1978 La. Sess. Law Serv., Act No. 627, § 2839 (4) (West), effective Jan. 1, 1980. See generally Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83 (1979); Spaht, *Interim Study Year*, 39 LA. L. REV. 551 (1979).

95. TEX. FAM. CODE ANN. § 5.01(a)(1) (Vernon 1975).

96. *Id.* § 5.02. For a general overview of interfamilial gifts, see Marvel, *Unexplained*

marriage uses separate property to purchase property to which title is taken in the name of the other spouse, it is presumed that a gift to the grantee is intended.⁹⁷ If separate property is conveyed by one spouse to the other, a gift is also presumed.⁹⁸ In *Johnson v. Johnson*⁹⁹ the husband contracted prior to marriage to buy land, which was then conveyed to *both* spouses during marriage. The entire purchase price was paid with the husband's separate funds. The transaction could be thus analogized to a purchase with separate property or to a conveyance of an undivided one-half interest in separate property. The evidence offered by both spouses nonetheless supported the trial court's conclusion that no gift was intended.¹⁰⁰ Similarly, when a third person conveys land to both spouses, the absence of valuable consideration will rebut the presumption of community character of the property conveyed, and other facts may demonstrate that no beneficial interest was intended to pass to one of the spouses. In *Cedotal v. Cedotal*¹⁰¹ the wife's parents made such a grant to both spouses, reciting a valuable consideration that was subsequently proved to be fictitious. Further facts demonstrated that the donors did not intend the husband to take any beneficial interest.¹⁰² The gift was, therefore, the wife's separate property. If the donors had intended that both spouses take a beneficial interest, each would have a one-half interest in the tenancy in common as his or her *separate* property.¹⁰³

Acquisition of property by a spouse with a recital of separate ownership presents a different situation.¹⁰⁴ In *Holcembach v. Holcembach*¹⁰⁵ a conveyance was made to the husband "as his separate property and estate" by his mother, with the recital that the consideration was paid from "his separate funds and estate."¹⁰⁶ The wife was in no sense a party to the transaction. There was evidence of part-payment of the purchase price with the husband's separate funds, with payment of the rest of the purchase price with other separate property of the husband shortly after the convey-

Gratuitous Transfer of Property from One Relative to Another as Raising Presumption of Gift, 94 A.L.R.3d 608 (1979).

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

98. *Powell v. Jackson*, 320 S.W.2d 20, 23 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.).

99. 584 S.W.2d 307 (Tex. Civ. App.—Texarkana 1979, no writ).

100. *Id.* at 309. Similar characterization cases are discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 33 (1973); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 48 (1969). The court in *Brock v. Brock*, 586 S.W.2d 927, 931 (Tex. Civ. App.—El Paso 1979, no writ), stated that acquisition of property in the names of both spouses established *prima facie* that the property is community. Rather, the presumption of community arises from acquisition *during marriage*, regardless of the name of the spouse in which title is taken. *See also Cedotal v. Cedotal*, 586 S.W.2d 159, 161 (Tex. Civ. App.—Waco 1979, no writ) (homestead property).

101. 586 S.W.2d 159 (Tex. Civ. App.—Waco 1979, no writ) (rent houses).

102. *Id.* at 160-61.

103. *White v. White*, 590 S.W.2d 587 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

104. For a recent foreign example, see *In re Gaites*, 466 F. Supp. 248 (M.D. Ga. 1979). *See also Jackson v. Hernandez*, 155 Tex. 249, 285 S.W.2d 184 (1955).

105. 580 S.W.2d 877 (Tex. Civ. App.—Eastland 1979, no writ).

106. *Id.* at 878.

ance.¹⁰⁷ There was also evidence that the property was purchased with community funds. The appellate court sustained the trial court's conclusion that the presumption of community acquisition had not been factually rebutted.¹⁰⁸ In *Contreras v. Contreras*,¹⁰⁹ on the other hand, a conveyance was made to the wife "as her separate property." The property had been previously owned by tenants in common, one of whom had recently died. The other tenant in common, joined by the husband as executor of the estate of the decedent, made the conveyance to the wife. Because of the husband's involvement in the conveyance, the husband and his heirs were barred from contesting the validity of the recital of the wife's separate interest.¹¹⁰

Marital Debts and Credit Acquisitions. Debts incurred by either spouse during marriage are recoverable from community property subject to the debtor-spouse's sole or joint management.¹¹¹ Such a debt is not recoverable from community property subject to the sole management of the other spouse unless the spouses acted jointly in incurring the debt, or the spouse incurring the debt acted as agent of the other spouse, or some other rule of law, such as a provision of the Internal Revenue Code,¹¹² so provides. In short, a creditor's inquiry as to the nature of a debt contracted by a spouse usually concerns its collection, that is, what property may be reached for its satisfaction. Therefore, from the creditor's point of view such debts are both "community" and "separate," although it is customary to describe them as "community debts"¹¹³ since the creditors will normally look to community property for their satisfaction; they are not precluded from doing so even if the debtor-spouse has substantial separate assets.¹¹⁴ A creditor may agree with a debtor-spouse, however, to look only to that spouse's separate property for satisfaction. If such an arrangement is made, the debt is termed a "separate debt."¹¹⁵ Such agreements rarely occur. On the other hand, if he wishes to do so, the creditor may bind himself to look only to community assets for satisfaction.

107. Cf. *Rath v. Rath*, 218 S.W.2d 217 (Tex. Civ. App.—Galveston 1949, no writ) (down payment on homestead temporarily made with community funds).

108. 580 S.W.2d at 879.

109. 590 S.W.2d 218 (Tex. Civ. App.—Tyler 1979, no writ).

110. *Id.* at 222; see *Messer v. Johnson*, 422 S.W.2d 908, 912 (Tex. 1968); *Hodge v. Ellis*, 154 Tex. 341, 348, 277 S.W.2d 900, 904 (1955). In *Contreras* the immediate purpose for the conveyance was to give the wife sufficient collateral to borrow money to pay for the decedent's funeral expenses. That purpose, however, was irrelevant in establishing the character of the property conveyed.

111. TEX. FAM. CODE ANN. § 5.61(c) (Vernon 1975); see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 138-39 (1978); McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 90-92 (1976).

112. See McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 42 (1972).

113. See McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 81 (1974); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 29 (1973).

114. The nondebtor spouse, however, may interpose the provisions of TEX. FAM. CODE ANN. § 5.62 (1975).

115. See McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 76 (1975).

The concept of "community debts" and "separate debts" is used in computing the net worth of marital assets for purposes of division on divorce and in determining the extent of the estates of decedents.¹¹⁶ The use of these notions in a credit context also assists us in characterizing property bought on credit. Hence, unless the seller agrees to look only to separate property for payment, a purchase on credit during marriage is construed as being made on "community credit,"¹¹⁷ and the property is therefore characterized as community property.¹¹⁸ If the indebtedness is subsequently paid with separate property, the character of the property is not thereby altered.¹¹⁹

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

Interspousal Gifts and Agreements. The law concerning the taxation of interspousal gifts in Texas has been in a confused state for several years. Section 2036 of the Internal Revenue Code provides that the value of all property transferred by a decedent in which he has "retained . . . the right to the income" therefrom for his lifetime will be included in the decedent's estate.¹²⁰ In a series of Texas and Louisiana cases¹²¹ the Internal Revenue Service has argued that a gift from one spouse to another is only partially effective for estate tax purposes because the separate property of the donee produces community income in which the donor shares. Having achieved success at the trial level in three cases before the Tax Court,¹²² the Service went on to rule that a decedent retained a one-half interest in community insurance policies on his life, which he had transferred absolutely to his wife.¹²³ In *Castleberry v. Commissioner*¹²⁴ the Tax Court had held that a husband-donor had retained a one-fourth interest in income producing community securities¹²⁵ that he had given his wife. The Service's ruling,

116. See *First Nat'l Bank v. Kinabrew*, 589 S.W.2d 137, 149-50 (Tex. Civ. App.—Tyler 1979, no writ) (concerning the estates of deceased spouses who died in 1961 and 1974). See also TEX. PROB. CODE ANN. § 177(b) (Vernon Supp. 1980).

117. See *Siewert v. Commissioner*, 72 T.C. 326, 333 (1979), discussed in note 279 *infra*.

118. *Contreras v. Contreras*, 590 S.W.2d 218, 220 (Tex. Civ. App.—Tyler 1979, no writ).

119. *Id.* at 220-21.

120. I.R.C. § 2036; see 3 J. MERTENS, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION ch. 24 (1959).

121. *Frankel v. United States*, No. 75-H-1806 (S.D. Tex. Apr. 7, 1977); *Estate of Deobald v. United States*, 444 F. Supp. 374 (E.D. La. 1977); *Estate of Wyly v. Commissioner*, 69 T.C. 227 (1977); *Estate of Castleberry v. Commissioner*, 68 T.C. 682 (1977); *Estate of McKee v. Commissioner*, 37 T.C.M. (CCH) Dec. 35,049 (1978).

122. *Estate of Wyly v. Commissioner*, 69 T.C. 227 (1977); *Estate of Castleberry v. Commissioner*, 68 T.C. 682 (1977); *Estate of McKee v. Commissioner*, 37 T.C.M. (CCH) Dec. 35,049 (1978).

123. IRS Ltr. Rul. 7907011, 1979 PRIVATE LETTER RULINGS (P-H) 195.

124. 68 T.C. 682 (1977), *nonacq.* 1979-1 I.R.B. 7, analyzed in *Campfield, Interspousal Transfers*, 32 Sw. L.J. 1091 (1979), and discussed in *McKnight, Family Law: Husband & Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 144-45 (1979).

125. The husband-donor had given his wife his one-half community interest in the securities. Since the income from that one-half interest was community property, the husband was entitled to one-half of the income from the one-half interest transferred, *i.e.*, one-quarter of the income from the whole property. Hence, one-quarter of the value of the securities was included in the donor's gross estate.

however, asserted that one-half of the entire value of the policies, rather than one-half of the transferred half, was the retained interest. This conclusion harks back to *Estate of Bomash v. Commissioner*,¹²⁶ in which the court concluded that one-half of a gift of community property was includable in the donor's estate, since the transfer did not alter the donor spouse's position as regards community income from what previously had been community property. Under section 2036, however, we are concerned with only the subject matter of the gift, *i.e.*, the donor's community half and *its* income. The income from the donee's one-half community interest is irrelevant, much like that of a decedent's life estate that terminates on the death of the life tenant and has no consequences with respect to his taxable estate.¹²⁷ With respect to the circumstance that the property in *Castleberry* was not in fact income producing, the Service took the view, sustained in *Estate of McKee v. Commissioner*,¹²⁸ that actual income production is not essential to the retention of an income interest.¹²⁹

In *Estate of Wily v. Commissioner*¹³⁰ the Fifth Circuit Court of Appeals reversed two of the decisions of the Tax Court favoring the position of the Service. The court concluded that the donor-spouse's community participation in the income produced from the property given to the other spouse does not constitute a "right to the income" under section 2036(a)(1),¹³¹ since the donee "may dispose of the principal in any way he or she sees fit, or convert it to uses which do not produce income."¹³² Although the court somewhat understated the remedies of the donor-spouse for the sole manager's disposition of such community income as should be produced,¹³³ the court's focus was on the "right to income," which the court characterized as "neither 'significant', [n]or 'substantial'."¹³⁴ It is nonetheless appropriate for a donor-spouse to make a specific provision for the inclusion of all income in future gifts of principal.

In response to the decisions sustaining the position of the Internal Revenue Service the Texas Legislature has proposed a constitutional amendment¹³⁵ to be submitted to the people on November 4, 1980. The

126. 432 F.2d 308 (9th Cir. 1970).

127. If the Service's argument is applied to a gift of separate property from one spouse to the other, there is no gift for estate tax purposes, because the income status of the property is not altered.

128. 1978 T.C.M. (P-H) 484.

129. *Id.* at 489.

130. 610 F.2d 1282 (5th Cir. 1980). *Wily, Castleberry, and Frankel v. United States*, No. 75-H-1806 (S.D. Tex. Apr. 7, 1977), were all consolidated for appeal.

131. I.R.C. § 2036(a)(1). The majority of the court also held that the donor-spouse's interest created by operation of law was not "retained" within the meaning of the statute. 601 F.2d at 1294. One judge dissented on this point.

The court appeared oblivious of much of the literature on the operation of § 2036 in community property states. The court seemed wholly unaware of *Campfield*, *supra* note 124.

132. 610 F.2d at 1292.

133. *Id.* at 1291; *see* note 141 *infra*.

134. *Id.* at 1294.

135. 1979 Tex. Sess. Law. Serv., H.J.R. No. 54, at A-55 (Vernon). For the Louisiana response, *see* note 94 *supra*. Louisiana's equal management reform came none too soon. In

amendment restates article XVI, section 15 of the Texas Constitution to provide, in part: "if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property."¹³⁶ The amendment also allows spouses to provide, by an agreement in writing, that future income from any separate property shall be the separate property of the owner of the property producing it. Hence that income would be subject to the sole management of the owner as any other separate property.

An interspousal renunciation or disclaimer was attempted in *Campbell v. Campbell*.¹³⁷ There the court was called upon to construe an instrument executed by the wife in favor of the husband, purporting to disclaim any interest in a joint venture in which the husband participated. This disclaimer, which was admittedly made without consideration, also stated that it was *not* a gift. The court was therefore left with no other recourse than to treat the instrument as a nullity.¹³⁸ Instead of the disclaimer, the wife's sworn statement that she had never had any property interest in the venture would have been prima facie evidence to that effect. The couple might then have proceeded to partition any community interest that there might have been and the wife could then have given the husband whatever interest was partitioned to her. These instruments might then have been put aside for whatever use the future might suggest.

Disposition of Solely Managed Community Property. On two significant occasions the legislature of Texas has rejected proposals to define powers of gratuitous disposition of community property. In its first effort to define marital property and its incidents, the Senate rejected the rule that if the husband had disposed of community property "with the intention to defraud his wife," he or his heirs would reimburse her for one-half the disposition on dissolution of the marriage.¹³⁹ In 1967 the only section of the proposed Matrimonial Property Act that was wholly deleted by the legislature was the provision for joinder of the spouses in making gifts.¹⁴⁰ Meanwhile, however, the rule had been clearly enunciated by the courts that if

Kirchberg v. Feenstra, 609 F.2d 727, 735 (5th Cir. 1979), Louisiana's old rule by which the husband was "head and master of the community" was said to constitute an impermissible gender-based discrimination under the fourteenth amendment to the United States Constitution.

136. 1979 Tex. Sess. Law Serv., H.J.R. No. 54, at A-55 (Vernon). By using the language "income *or property*" in the amendment, the draftsmen were evidently adverting to the old dispute as to whether, for example, stock dividends are income or part of the property interest from which the dividends were generated.

137. 587 S.W.2d 513 (Tex. Civ. App.—Dallas 1979, no writ).

138. *Id.* at 514.

139. JOURNALS OF THE FOURTH CONGRESS OF THE REPUBLIC OF TEXAS (House Journal) 185, (Senate Journal) 242 (H. Smither ed. 1931).

140. Proposed section 4623 of S.B. 33 (60th Legislature, 1967) provided:

Gifts to third persons.

The spouses shall join in, or the non-joining spouse shall consent to, disposition of community property to a third person when the disposition is without substantial consideration and is not in discharge of a legal, moral or civic obligation.

the husband made a gift of community property with actual intent to defraud his wife, she would be allowed relief.¹⁴¹ The mere deprivation of the wife of her community share as a result of a gratuitous transfer did not constitute fraud, however. Actual subjective intent to defraud had to be proved. In the last decade, however, the courts have developed and refined the principle of constructive fraud. The burden of proof is put upon the person, either the donor-spouse or the donee, who seeks to sustain the gift to show that a gratuitous transfer of community property by either spouse was reasonable under the circumstances in which it was made.¹⁴²

The better approach for handling the final disposition of assets of a deceased donor is to allow the gift to stand and to allow the defrauded spouse reimbursement if there are other assets from which reimbursement may be made.¹⁴³ This approach honors the capacity of the donor to make the transfer within the management powers defined by statute,¹⁴⁴ which causes the transfer to be valid when made.¹⁴⁵ But the subject matter of the transfer is frequently such a significant part of the community estate that reimbursement from other assets is not possible. Hence disposition of the non-donor-spouse's community share is treated as constructively fraudulent and therefore presumptively void as to the other spouse.¹⁴⁶ The subject matter of such gratuitous dispositions is often a community life insurance policy in which someone other than the surviving spouse is named as a beneficiary.¹⁴⁷ In the most recent instance¹⁴⁸ of asserted constructive fraud, the donor's widow complained of the decedent's naming their six-year-old son as the beneficiary of the lion's share of the community assets, which consisted almost wholly of life insurance policies. Several months before the husband's death, the wife abandoned her husband and the child to live with another man. The husband promptly changed the beneficiary

141. Relief inter vivos: *Mahoney v. Snyder*, 93 S.W.2d 1219 (Tex. Civ. App.—Amarillo 1936, no writ); *Coss v. Coss*, 207 S.W. 127 (Tex. Civ. App.—San Antonio 1918, no writ). Relief post mortem: *Martin v. McAllister*, 94 Tex. 567, 63 S.W. 624 (1901); *Stramler v. Coe*, 15 Tex. 211 (1855) (dictum); *Krenz v. Strohmeir*, 177 S.W. 178 (Tex. Civ. App.—Austin 1915, writ ref'd).

142. See McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 79-80 (1974); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 36 (1973). See also McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 136 (1978).

143. *Cohrs v. Scott*, 161 Tex. 111, 121, 338 S.W.2d 127, 133 (1960); *Carnes v. Meador*, 533 S.W.2d 365, 372 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); see *Kemp v. Metropolitan Life Ins. Co.*, 205 F.2d 857, 864 (5th Cir. 1953). For a recent instance of application of reimbursement principles in this context, see *Logan v. Barge*, 568 S.W.2d 863 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

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

145. When there are other assets from which reimbursements may be made, the testamentary or intestate estate must reimburse the defrauded spouse, and the shares of other takers must be reduced pro rata.

146. Under this doctrine of marital constructive fraud the transfer is not actually void. Cf. TEX. BUS. & COM. CODE ANN. § 24.02 (Vernon 1968) (transfer is not void unless an actual intent to defraud is shown).

147. *Murphy v. Metropolitan Life Ins. Co.*, 498 S.W.2d 278 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *Givens v. Girard Life Ins. Co.*, 480 S.W.2d 421 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

148. *Redfeare v. Ford*, 579 S.W.2d 295 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

of the community life insurance policies in the amount of \$73,000 from his wife to his son, while leaving his wife as beneficiary of the remaining community policies totaling \$25,000. The appellate court affirmed the decree of the probate court in favor of the son on the grounds that the widow was healthy and capable of supporting herself, in spite of her lacking any significant education or skills, and that the widow was relieved of providing for the child, who was adequately provided for by the insurance proceeds. This is the only Texas appellate case in which a court has found that a gift of considerably more than half the community estate was reasonable under the circumstances.

Another striking instance of community management and its consequences is exemplified by a pair of Louisiana tax cases considered together by the Fifth Circuit Court of Appeals.¹⁴⁹ As "innocent spouses,"¹⁵⁰ two wives had appealed from decisions of the Tax Court holding them responsible for their share of their husbands' community earnings during years when the couples filed no federal income tax returns. In both instances the wives were living apart from their husbands and had no control of the husbands' income nor knowledge of its amount or disposition. Both cases were remanded to the trial court to determine whether the wives were entitled to theft-loss deductions,¹⁵¹ although the husbands might not be subject to prosecution for theft under Louisiana law. In the court's view, "a taxpayer-wife who owns income that is appropriated by her husband-manager for his own use should be permitted to claim" a theft loss just as victims of embezzlement have in several instances.¹⁵²

And just as this state "exemption" of the owner-wife from liability out of her separate income for community debts does not defeat the federal collector in his suit for the taxes on her share of the community income, the state "exemption" of the manager-husband from prosecution for theft should not defeat the federal taxpayer's claim for a theft loss deduction. . . . [A]n intent to deprive a wife permanently of her share of the community income may be inferred from a husband's wanton appropriation of community assets in pursuit of his own pleasure or needs.¹⁵³

If Judge Wisdom's approach is allowed to stand, the severe injustice of federal tax law in its application to innocent spouses in community property states will be somewhat alleviated.

Since the enactment of the first divorce act in 1841,¹⁵⁴ Texas law has

149. *Bagur v. Commissioner*, 603 F.2d 491 (5th Cir. 1979).

150. *See also Johnson v. Commissioner*, 1979 T.C.M. (P-H) 1337, 1341.

151. I.R.C. § 165(c)(3). Theft losses are deductible in the year in which the theft is discovered.

152. 603 F.2d at 501. The court cited *Vincent v. Commissioner*, 219 F.2d 228, 231 (9th Cir. 1955); *Earle v. Commissioner*, 72 F.2d 366 (2d Cir. 1934); *Weingarten v. Commissioner*, 38 T.C. 75 (1962). For a discussion of whether ill-gotten gains of a Texas couple are community or separate property for income tax purposes, see *Johnson v. Commissioner*, 72 T.C. 340 (1979).

153. 603 F.2d at 502.

154. 1841 Tex. Gen. Laws 19, An Act Concerning Divorce and Alimony, § 9, at 21, 2 H. GAMMEL, LAWS OF TEXAS 483, 485 (1898).

included a provision allowing the court to restrain transfers of community property and prevent the incurring of debts in anticipation of divorce. Because the 1969 recodification of the 1841 statute as section 3.57¹⁵⁵ of the Family Code was not altogether clear, that section was recodified in 1979.¹⁵⁶ With an abundance of caution the legislature specifically provided: "In an action to void any transfer or debt the spouse seeking to void said transfer or debt shall have the burden of proving that the person dealing with the transferor or debtor spouse had notice of the intent to injure the rights of the other spouse."

The earnings of an unemancipated child are solely or jointly managed depending on whether a managing conservator has been appointed for the child. As enacted in 1969¹⁵⁷ section 5.23 of the Family Code provided that "the parent or parents having custody of the minor" were vested with management of the minor's earnings. In 1975¹⁵⁸ that provision was repealed as inharmonious with the terminology of title 2 of the Code. In 1979¹⁵⁹ the section was restored with new language. Under present law¹⁶⁰ if no managing conservator has been appointed for the child and its parents are married, the child's earnings are subject to the parents' joint management unless "otherwise provided by agreement of the parents or by judicial order."¹⁶¹ If a managing conservator has been appointed, however, that person has "the right to the . . . earnings of the child,"¹⁶² which carries with it the right of management. The child's earnings, however, are not to be confused with the profits of the child's estate, which are nonetheless subject to the management of the child's parents or parental managing conservator, "except when a guardian of the [child's] estate has been appointed."¹⁶³ But distinguishing between what is the parents' and what is the child's property in cases of judicial recovery for injuries to the child presents significant problems.¹⁶⁴

Spousal Support. In order to achieve complete parity of the duty of support between the marital partners, sections 3.59 and 4.02 of the Family Code were amended in 1979 to remove the double standard of spouse-support that had earlier prevailed.¹⁶⁵ Section 3.59¹⁶⁶ deals with temporary

155. 1969 Tex. Gen. Laws, ch. 888, § 3.57, at 2724.

156. 1979 Tex. Gen. Laws, ch. 193, § 1, at 421.

157. 1969 Tex. Gen. Laws, ch. 888, § 1, at 2727.

158. 1975 Tex. Gen. Laws, ch. 254, § 12, at 624; see McKnight, *Supplemental Commentary to the Texas Family Code, Title 1*, 8 TEX. TECH L. REV. 1, 17 (1976), in which the author recommends new language for the section.

159. 1979 Tex. Gen. Laws, ch. 193, § 5, at 422.

160. TEX. FAM. CODE ANN. § 5.23 (Vernon Supp. 1980).

161. *Id.*

162. The rights of a parent as a managing conservator are defined by TEX. FAM. CODE ANN. §§ 12.04(4), 14.02(a) (Vernon Supp. 1980), whereas a nonparent's rights are defined by TEX. FAM. CODE ANN. § 14.02(b)(4) (Vernon Supp. 1980).

163. TEX. FAM. CODE ANN. § 12.04(4) (Vernon Supp. 1980).

164. See TEX. REV. CIV. STAT. ANN. § 1994 (Vernon Supp. 1980).

165. 1979 Tex. Gen. Laws, ch. 193, §§ 2-3, at 421.

166. As amended, the statute reads: "After a petition for divorce or annulment is filed, the judge, after due notice may order payments for the support of the wife, or for the support

spousal support pending divorce or annulment. Although the section still does not specifically mention attorney's fees, its terms are broad enough to allow an order for the payment of the attorney's fees for either spouse, pending divorce or annulment, as an element of support.¹⁶⁷ An obstacle to that end is the 1961 opinion of the Texas Supreme Court in *Wallace v. Briggs*.¹⁶⁸ That case is distinguishable, however, because the court was there interpreting the provisions of what is now section 3.58¹⁶⁹ on temporary orders respecting property. Furthermore, other developments and modifications of the law of spousal capacity have so changed the general setting of the subject¹⁷⁰ that the underlying rationale of that holding is now inapplicable to a proper interpretation of section 3.59, if indeed it was ever applicable to that section. In 1969 the legislature replaced the term "temporary alimony"¹⁷¹ with "temporary support." This modernization of the statute comports with the principles of the 1963 legislative reform by which married women were given full contractual capacity.¹⁷² Prior to that enactment the wife had no contractual capacity except in those few instances specifically authorized by statutes or judicial interpretation;¹⁷³ in contracting for necessities she acted merely as her husband's agent.¹⁷⁴ Thereafter, the wife's contract was her own. In the pre-1963 context the wife's contract for an attorney's services was one for necessities and hence the husband's contract.¹⁷⁵ Thus, in the pre-1963 context in which *Wallace v. Briggs* was decided, the husband's contractual liability to the wife's attorney was not a current expense of the wife but simply a factor to be considered in making a division of property under what is now section 3.63.¹⁷⁶ *Wallace v. Briggs* was solely concerned with former article 4638, the predecessor of section 3.58. The court viewed that statute as authorizing the trial court to make temporary orders concerning the use, possession, and preservation of property, but not as authorizing an interlocutory partial division of the estate of the parties.¹⁷⁷ Because the husband's contractual liability for the wife's attorney's fees was a factor to be considered in the *final division of the estate*, it was premature and hence impermissible to

of the husband until a final decree is entered." TEX. FAM. CODE ANN. § 3.59 (Vernon Supp. 1980).

167. See, e.g., *Prewitt v. Prewitt*, 459 S.W.2d 720, 722 (Tex. Civ. App.—Tyler 1970, no writ).

168. 162 Tex. 485, 348 S.W.2d 523 (1961).

169. TEX. FAM. CODE ANN. § 3.58 (Vernon 1975) (formerly Tex. Rev. Civ. Stat. art. 4636 (1925)).

170. See *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977).

171. Tex. Rev. Civ. Stat. art. 4637 (1925).

172. 1963 Tex. Gen. Laws, ch. 472, § 6, at 1189.

173. *Tolbert v. Standard Accident Ins. Co.*, 148 Tex. 235, 223 S.W.2d 617 (1949); *Red River Nat'l Bank v. Ferguson*, 109 Tex. 287, 206 S.W. 923 (1918).

174. *Walling v. Hannig*, 73 Tex. 580, 11 S.W. 547 (1889); *Davenport v. Rutledge*, 187 S.W. 988, 990 (Tex. Civ. App.—Amarillo 1916, no writ).

175. *Wallace v. Briggs*, 162 Tex. 485, 491, 348 S.W.2d 523, 527 (1961); *Moore v. Moore*, 192 S.W.2d 929, 933-34 (Tex. Civ. App.—Fort Worth 1946, no writ).

176. TEX. FAM. CODE ANN. § 3.63 (Vernon 1975) (derived from Tex. Rev. Civ. Stat. art. 4638 (1925)); see *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002 (1950).

177. 162 Tex. at 488, 348 S.W.2d at 525.

deal with that liability prior to the final decree. The court clearly distinguished between a permissible interlocutory allowance of temporary support and an impermissible interlocutory division of property.¹⁷⁸ The court viewed an interim award of attorney's fees as an improper interlocutory property division in the context of pre-1963 law. The 1963 statute giving married women full contractual capacity and the 1969 enactment of section 3.59 in terms of temporary spousal support completely changes the factors underlying the *Wallace* decision and leaves that decision without any rational underpinning. Today, attorney's fees pendente lite are commonly looked upon as an incident of support.¹⁷⁹ As the supreme court recognized in *Bounds v. Caudle*¹⁸⁰ in a closely related context: major statutory changes have invalidated the rationale for the old doctrine.

With respect to the general provisions concerning spousal support in section 4.02,¹⁸¹ the 1979 amendment removes the double standard, but the provision with respect to necessities is unchanged. A recent federal decision applying Pennsylvania law¹⁸² points the way to a significant reinterpretation of that section with respect to necessities. There the court interprets the equal rights amendment to the Pennsylvania constitution as effectively redefining the concept of necessities to include the wife's duty to provide for the husband.¹⁸³ The Pennsylvania amendment is substantially identical to that of Texas,¹⁸⁴ and this approach would achieve complete parity in all aspects of section 4.02.

Spousal Liabilities. In *Cooper v. Dalton*¹⁸⁵ a husband and wife were jointly indebted to a department store. In their property settlement prior to divorce it was agreed that the husband would discharge this obligation. On his failure to do so, the store recovered a judgment against the ex-wife, who subsequently brought suit against the husband for his breach of the agreement. Judgment was entered for the ex-wife, and the husband appealed. The husband argued that if the wife's judgment against him were allowed to stand, he might thereby be required to pay twice, since he was still liable to the store. The appellate court concluded that the ex-husband could protect himself against any double obligation by making the ex-wife and the department store joint payees of his check to satisfy the judg-

178. *Id.* at 489, 348 S.W.2d at 526. The court cited *Hendry v. Hendry*, 238 S.W.2d 821 (Tex. Civ. App.—Austin 1951, no writ), a case involving an award in the nature of temporary alimony for both spouses.

179. *See, e.g.*, *Robertson v. Robertson*, 217 S.W.2d 132 (Tex. Civ. App.—Fort Worth 1949, no writ).

180. 560 S.W.2d 925, 927 (Tex. 1978).

181. Section 4.02 now reads:

Each spouse has the duty to support the other spouse, and each parent has the duty to support his or her minor child. A spouse or parent who fails to discharge the duty of support is liable to any person who provides necessities to those to whom support is owed.

TEX. FAM. CODE ANN. § 4.02 (Vernon Supp. 1980).

182. *United States v. O'Neill*, 478 F. Supp. 852 (E.D. Pa. 1979).

183. *Id.* at 854.

184. TEX. CONST. art. I, § 3a.

185. 581 S.W.2d 219 (Tex. Civ. App.—Corpus Christi 1979, no writ).

ment.¹⁸⁶

Exempt Property. In *In re Sisemore*¹⁸⁷ the Fort Worth Bankruptcy Court construed the personal property exemption statute liberally to include a jeep as well as an ordinary passenger automobile in favor of a bankrupt. This decision was sustained by the federal district court and the Fifth Circuit Court of Appeals. Taking this cue, the legislature amended article 3836(a)(3)¹⁸⁸ to exempt *all* passenger cars and light trucks,¹⁸⁹ provided that these vehicles "are not held or used for production of income."¹⁹⁰ The amendment then provides that the debtor may alternatively select any two of the exempt categories of means of travel previously provided in article 3836(a)(3),¹⁹¹ "whether held or used for production of income or not."¹⁹² This legislative interjection of the concept of tools of trade into the alternative available under article 3836(a)(3) may preclude a claim of an additional vehicle as a tool of trade under article 3836(a)(2), as draftsmen of that article originally intended.¹⁹³

In individual bankruptcy proceedings under the former bankruptcy law a Colorado husband and wife were each allowed to claim exempt personal property up to the maximum value allowed for "the head of a family."¹⁹⁴ Although the same reasoning is inapplicable to the provisions of article 3836(a),¹⁹⁵ some of the same results are available to a Texas husband and wife in bankruptcy. Each might claim up to \$30,000 of solely managed community personalty "for a family."¹⁹⁶ Although the Colorado Constitution and the Colorado Supreme Court *require* liberal construction of exemption statutes,¹⁹⁷ the Texas judicial tradition is equally strong in this regard.¹⁹⁸

In spite of the liberality of Texas law in favor of a *homestead* claimant, it is a fundamental principle that a homestead claim cannot be first asserted

186. *Id.* at 221-22.

187. Bk. No. 4-77-146 (Bk. Ct. N.D. Tex. May 25, 1978), *aff'd*, 602 F.2d 742 (5th Cir. 1979), *discussed in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 152 (1979) (suggesting a statutory amendment to exempt two automobiles).

188. TEX. REV. CIV. STAT. ANN. art. 3836(a)(3) (Vernon Supp. 1980).

189. The definition of "light trucks" and "passenger cars" in *id.* art. 6701d, §§ 2(b), (h), (j), 4(a) (Vernon 1977) is controlling.

190. *Id.* art. 3836(a)(3) (Vernon Supp. 1980).

191. 1973 Tex. Gen. Laws, ch. 588, § 3, at 1628.

192. TEX. REV. STAT. ANN. art. 3836(a)(3) (Vernon Supp. 1980).

193. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 152-53 (1979). In *Sun Ltd. v. Casey*, 96 Cal. App. 3d 38, 157 Cal. Rptr. 576 (1979), the court held that an automobile used by a real estate agent to transport herself and prospective buyers was an exempt "tool or an implement."

194. *In re Hellman*, 474 F. Supp. 348, 350, 351 (D. Colo. 1979).

195. TEX. REV. CIV. STAT. ANN. art. 3836(a) (Vernon Supp. 1980).

196. *See* Pedlar, *Community Property and the Bankruptcy Reform Act of 1978*, 11 ST. MARY'S L.J. 349, 352-57, 360 (1979).

197. *See* Sandberg v. Borstadt, 48 Colo. 96, 109 P. 419 (1910).

198. *See* Gaddy v. First Nat'l Bank, 115 Tex. 393, 399, 283 S.W. 472, 474 (1926). *See also* Cities Serv. Oil Co. v. North River Ins. Co., 130 Tex. 186, 107 S.W.2d 994 (1937); *Rodgers v. Ferguson*, 32 Tex. 533 (1870).

on appeal in a dispute concerning wrongful seizure.¹⁹⁹ Further, although the federal Bankruptcy Act recognizes state homestead exemptions for bankruptcy purposes, it is equally fundamental that a state exemption law, homestead or otherwise, will not protect the owner from enforcement of debts owed to the federal sovereign.²⁰⁰ In *Sears v. United States*,²⁰¹ after a debtor's discharge in bankruptcy, a federal tax lien was fixed on his homestead in mid-1976 for pre-bankruptcy taxes. Since neither the bankruptcy nor the discharge affects exempt property,²⁰² the bankruptcy was irrelevant to the validity of the tax lien on the homestead.

The constitutional prohibition against mortgaging a homestead to borrow money²⁰³ is often circumvented by selling the homestead to a controlled corporation, which, in turn, will mortgage the property but will allow the seller to occupy the premises at little or no expense. When the property is about to be foreclosed, the seller sometimes seeks the protection of the further constitutional provision which provides that "pretended sales of the homestead involving any condition of defeasance shall be void."²⁰⁴ But no success can be expected from this argument unless there is some showing of a "condition of defeasance."²⁰⁵ Further, a third party creditor who seeks to avoid a purported sale by his debtor by asserting that it was an invalid mortgage and not a sale of the homestead has an equally difficult case.²⁰⁶ It may also occasionally happen that the mortgagor of his home will attempt to enforce his *mortgage* contract without asserting any pretense of sale though the transaction was made as an apparent *absolute conveyance*. In *Scott v. Bishop*²⁰⁷ a homeowner was successful in proving an oral option to repurchase property upon repayment of an alleged loan and argued, *inter alia*, that this method of borrowing money on a homestead had been prevalent since the early days of the Republic.²⁰⁸ He thereby turned historical reality to good account.

IV. DIVORCE PROCEEDINGS

Jurisdiction and Venue. Both the courts²⁰⁹ and the legislature²¹⁰ focused

199. *Geiser v. Lawson*, 584 S.W.2d 347 (Tex. Civ. App.—Eastland 1979, no writ).

200. *See Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963).

201. 474 F. Supp. 988 (S.D. Tex. 1979).

202. *Id.* at 990. Bankruptcy Act of July 5, 1966, § 2, 80 Stat. 270.

203. TEX. CONST. art. XVI, § 50.

204. *Id.*

205. *See Eckard v. Citizens Nat'l Bank*, 588 S.W.2d 861, 862 (Tex. Civ. App.—Eastland 1979, no writ).

206. *See H.D. Snow Housemoving, Inc. v. Moyers*, 581 S.W.2d 809 (Tex. Civ. App.—Fort Worth 1979, no writ).

207. 581 S.W.2d 206 (Tex. Civ. App.—Waco 1979, writ *ref'd n.r.e.*).

208. *Id.* at 207.

209. *Crockett v. Crockett*, 589 S.W.2d 759 (Tex. Civ. App.—Dallas 1979, writ filed); *Butler v. Butler*, 577 S.W.2d 501 (Tex. Civ. App.—Texarkana 1978, writ *dism'd*); *Thornlow v. Thornlow*, 576 S.W.2d 697 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Johnston v. Johnston*, 575 S.W.2d 610 (Tex. Civ. App.—San Antonio 1978, no writ); *Oubre v. Oubre*, 575 S.W.2d 363 (Tex. Civ. App.—San Antonio 1978, no writ).

210. During the 1979 session the Texas Legislature passed three amendments to TEX.

attention on solving jurisdictional problems affecting disputes within the parent-child relationship. No dispute at the appellate level called for judicial analysis of the similar jurisdictional problems regarding adjudication of title to, or division of, property that was subject to the control of a spouse but not subject to the personal jurisdiction of a Texas divorce court. In *Fox v. Fox*²¹¹ it was said that a court without in personam jurisdiction has the power to divide property of a nondomiciliary within, but not outside, Texas.²¹² Furthermore, judicial seizure of property within the state will not subject the nondomiciliary to jurisdiction so that property located elsewhere is also subject to the court's power.²¹³ It has always been assumed that seizure of property within the state is unnecessary to adjudication of its character or to its division. Without seizing the property, however, the court would seem powerless to restrain the removal or disposition of moveables, if the person having control of the property is beyond the power of the court.

The appeal in *Skubal v. Skubal*²¹⁴ appears to stem from a misapprehension of the distinction between domicile and residence in relation to divorce and the application of either concept to the situation of a serviceman. Residence is a question of fact. Domicile, on the other hand, is a conclusion of law with respect to one's permanent home. There are many Texans around the world who regard Texas as their domicile and who have maintained ties that demonstrate their intention to maintain it. There are also many foreign nationals who now reside in Texas and regard Texas as their domicile. There are still others whose stay here is one of indefinite duration even though there is a very reasonable apprehension, as in the case of servicemen, that the present situation is not permanent. A serviceman may nevertheless maintain a domicile in Texas if he intends to make Texas his home indefinitely or permanently. Therefore, if he sues in Texas for divorce, he need not rely on section 3.23²¹⁵ of the Family Code

FAM. CODE § 11.05(a): 1979 Tex. Sess. Law Serv. ch. 584, § 1, at 1201, ch. 643, § 2, at 1471, ch. 763, § 1, at 1888 (Vernon); added two new §§ 11.05(e): 1979 Tex. Sess. Law Serv., ch. 584, § 1, at 1201, ch. 763, § 2, at 1888 (Vernon); and amended § 11.06(d): Tex. Sess. Law Serv., ch. 763, § 2, at 1888 (Vernon). These amendments to § 11.05(a) are tersely summarized in 79-3 STATE BAR SECTION REPORT, FAMILY LAW, 25 (Fall 1979). The legislature also added new §§ 11.052, 11.053: 1979 Tex. Sess. Law Serv., ch. 584, §§ 3-4, at 1202-03 (Vernon). Section 11.052 codifies the results of *Corliss v. Smith*, 560 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, no writ), discussed in Newton, *Conflict of Laws, Annual Survey of Texas Law*, 33 Sw. L.J. 425, 446 (1979), and disposes of the holding in *Zeisler v. Zeisler*, 553 S.W.2d 927 (Tex. Civ. App.—Dallas 1977, no writ), discussed in Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 32 Sw. L.J. 387, 396-98 (1978).

211. 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ).

212. California's long-arm statute is broad enough to reach certain nonresident third persons holding property of the spouses so that such property is effectively put within the power of the California courts. See *In re Bastian*, 94 Cal. App. 3d 483, 156 Cal. Rptr. 524, 526-27 (1979). But see *World-Wide Volkswagen Corp. v. Woodson*, 1000 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

213. *Shaffer v. Heitner*, 433 U.S. 186 (1977) (semble).

214. 584 S.W.2d 45 (Tex. Civ. App.—San Antonio 1979, writ dism'd). See also *Seiler v. Seiler*, No. 16081 (Tex. Civ. App.—San Antonio, June 20, 1979, no writ).

215. TEX. FAM. CODE ANN. § 3.23 (Vernon 1975). In spite of *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807 (1959), this provision seems of dubious constitutional validity. See

in order to lay the jurisdictional basis for his suit.

Receivers and Masters. In 1965 the Texas legislature enacted art. 2338-2b²¹⁶ empowering district and juvenile courts in Wichita County to appoint referees to whom the courts might refer matters concerning failure to pay "child support, temporary alimony, or separate maintenance"²¹⁷ and related matters. In 1975 a similar act²¹⁸ authorized the appointment of a "full-time master" for such purposes in Dallas County, and in 1977 the legislature authorized masters for like purposes in Harris County.²¹⁹ During the legislative session of 1979 a further act²²⁰ was passed that seems to supplement and limit these earlier enactments and to authorize such appointments elsewhere as the county commissioners court may direct.²²¹ But since the prior acts were not specifically referred to in the 1979 legislation, the appointment of masters under the earlier acts may be independent of the 1979 act.²²² In any event, the act does not affect the appointment and authority of masters in chancery under rule 171.²²³ The appointment of either sort of master is not authorized in a jury case.²²⁴

The appointment of a receiver is a drastic measure²²⁵ in a divorce proceeding, and the receiver's activities are carefully circumscribed by law. In *Wood and Pullman, Inc. v. Wood*²²⁶ the husband's employer was ordered to pay the husband's wages to a receiver for disbursement as temporary alimony. Since this interlocutory order granted injunctive relief, it was appealable.²²⁷ Since its effect was tantamount to garnishment of wages, in violation of the Texas Constitution²²⁸ and statute,²²⁹ the order was set aside.

In *North Side Bank v. Wachendorfer*²³⁰ the husband held record title to

McKnight, *Commentary of the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 326 (1974).

216. TEX. REV. CIV. STAT. ANN. art. 2338-2b (Vernon 1971).

217. *Id.* § 2.

218. TEX. REV. CIV. STAT. ANN. art. 2338-9b.2 (Vernon Supp. 1980).

219. *Id.* art. 2338-1d. The act does not refer to Harris County specifically, but rather to "a county of more than 1,500,000 population." *Id.* § 1(a).

220. 1979 Tex. Gen. Laws, ch. 719, §§ 1-12, at 1771.

221. *Id.* §§ 1(a), (b), (c).

222. There is only an oblique hint of interrelation between the most recent and the earlier acts. Section 13 of the 1979 act provides that if a certain bill concerning Dallas County should pass, the provision of the 1979 act *would* apply to the district courts in Dallas County. The bill referred to was vetoed. The implication is that if that bill did not become law, as was the case, the 1979 act would not apply to Dallas County.

223. TEX. R. CIV. P. 171.

224. *Mann v. Mann*, 592 S.W.2d 4 (Tex. Civ. App.—Beaumont, writ filed) (rule 171 master); *Garrison v. Garrison*, 568 S.W.2d 709 (Tex. Civ. App.—Beaumont 1978, no writ) (statutory master).

225. See *Keton v. Clark*, 67 S.W.2d 437, 439-40 (Tex. Civ. App.—Waco 1933, writ ref'd).

226. 585 S.W.2d 761 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd).

227. *Id.* at 762; see TEX. R. CIV. P. 385(d). A similar order in which the employer was merely ordered to accumulate the wages of the employee was not appealed in *Hopkins v. Hopkins*, 539 S.W.2d 242 (Tex. Civ. App.—Fort Worth 1976, no writ).

228. TEX. CONST. art. XVI, § 28.

229. TEX. REV. CIV. STAT. ANN. art. 4099 (Vernon 1966).

230. 585 S.W.2d 789 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

certain realty that he had mortgaged to a bank by a deed of trust. In a property settlement pursuant to a divorce, the court awarded a one-half undivided interest in the land to the wife. Since the husband had defaulted on his note prior to the divorce, four days after entry of the divorce decree the bank posted a notice for a trustee's sale under the deed of trust. Asserting that she had not had proper notice of the sale, the ex-wife promptly filed a motion for the appointment of a receiver of the property. The court granted the motion at an ex parte hearing without notice to the ex-husband, who then appealed. The appellate court held that the trial court had violated the notice provisions of rule 695²³¹ and had overlooked the more appropriate and less drastic remedy of a temporary restraining order.²³² The appellate court further noted that article 2318²³³ specifically provides that a receivership of property is not available to an owner of the property against a creditor.

Finality of Judgment. The court's *rendition of judgment* is made either orally or by filing a memorandum. The court thereby "pronounces its decision and conclusions upon the matter submitted to it for adjudication." The *entry of judgment* is the ministerial act that furnishes enduring evidence of the judicial act of rendition.²³⁴ If the court does not determine all the matters before it, however, the rendition or entry is merely interlocutory. Appellate courts have discussed a number of troublesome applications of these principles in the last few years.²³⁵

Although the court's handling of the peculiar sequence of events that occurred in *Austin v. Austin*²³⁶ is instructive, the case is unlikely to have

231. TEX. R. CIV. P. 695.

232. In this instance the trial court's order amounted to a temporary injunction, and TEX. R. CIV. P. 681 had not been complied with since no notice had been given. The movant's attorney had also overlooked the bond requirement in TEX. R. CIV. P. 684 that arises when a third person is sought to be enjoined in a divorce proceeding. See *Goodwin v. Goodwin*, 456 S.W.2d 885 (Tex. 1970), discussed in McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 41 n.53 (1971). See also *Couch Mortgage Co. v. Hughes*, 536 S.W. 2d 70, 72 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

If a motion for continuance is granted to either party, that party must bear in mind that he is not entitled to additional notice of trial under TEX. R. CIV. P. 245. *Magana v. Magana*, 576 S.W.2d 131, 134 (Tex. Civ. App.—Corpus Christi 1978, no writ).

233. TEX. REV. CIV. STAT. ANN. art. 2318 (Vernon 1971).

234. *Eastin v. Eastin*, 588 S.W.2d 812, 812 (Tex. Civ. App.—San Antonio 1979, writ *dism'd*). The principal difficulty with this formulation is that the term "rendition of judgment" in TEX. R. CIV. P. 329b.5 has been sometimes thought to mean *entry of judgment*. This confusion stems in part from the provision of TEX. R. CIV. P. 306a that "[i]n determining the periods within which the various steps of an appeal must be taken, the date of rendition of a judgment or order shall be deemed to be the date upon which the written draft thereof was signed by the trial judge as stated therein." That rule goes on to provide, however, that "this rule shall not be construed as determining what constitutes rendition of a judgment or order in any other situation or for any other purpose."

235. See McKnight, *Family Law: Husband and Wife Annual Survey of Texas Law*, 33 Sw. L.J. 99, 122-24 (1979); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 111, 122-23 (1978); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 110, 118 (1977).

236. 586 S.W.2d 937 (Tex. Civ. App.—Austin 1979, writ granted), *on prior appeal*, 553 S.W.2d 9 (Tex. Civ. App.—Eastland 1977, writ *dism'd*), *commented on in* McKnight, *Family*

great precedential impact because of its unusual facts. At the first trial the court considered the grounds for divorce and division of property and made a brief docket entry. After the death of the wife three weeks later, the trial court abated the proceeding. On the husband's appeal the appellate court held that, if the divorce was granted *and* if property division was made, the wife's death was not a proper ground for abatement. The case was therefore remanded to the trial court for a determination of the meaning of the docket entry so that the trial court might enter a judgment granting or denying the divorce. In the meantime the trial judge had retired. On remand to the trial court the new judge could not discover the meaning of the docket entry.²³⁷ He therefore retried the case and granted a divorce. On the second appeal, the court of civil appeals held that the evidence addressed at the second trial was insufficient on which to ground a divorce and reversed the trial court's judgment.²³⁸ It should be noted that after the first trial the judge could have vacated or modified his original order *for cause* within thirty days under rule 329b.5;²³⁹ cause, however, cannot be the death of a party. The cause must relate to the grounds for divorce or another circumstance arising prior to rendition of judgment.²⁴⁰

In *Kocman v. Kocman*²⁴¹ a vast lapse of time rather than a brief one posed a problem of finality of judgment. The divorce court awarded a house to the wife in its decree of divorce, and the husband filed a motion for new trial four days later. Seven weeks later an agreed motion for continuance was filed and thereafter a hearing was had and a new trial ordered. Nothing further occurred until the wife filed her writ of possession for the house four years later. The court concluded that rule 329b.3 and .4²⁴² caused the divorce judgment to become final forty-five days after the husband's filing of his motion for new trial. Hence, the judgment had already become final before the motion for continuance, and the subsequent order of the court was therefore irrelevant.

As a general rule, when a court fails to adjudicate all matters submitted to it, its order is merely interlocutory and not final. This situation has arisen in a number of instances when a court has purported to sever the issues of divorce and property division.²⁴³ With respect to issues within the parent-child relationship, a reservation of judgment on matters of conservatorship causes an order of divorce, initially rendered, to be interlocu-

Law: Husband and Wife, Annual Survey of Texas Law, 31 Sw. L.J. 109, 123 (1978). The commentator somewhat misapprehended the appellate court's conclusion.

237. There is no indication that either party attempted to subpoena the retired judge in order to enquire of him what the docket entry meant.

238. 586 S.W.2d at 942.

239. TEX. R. CIV. P. 329b.5.

240. See *Verret v. Verret*, 570 S.W.2d 138 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ), discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 123 (1979).

241. 581 S.W.2d 516 (Tex. Civ. App.—Waco 1979, no writ).

242. TEX. R. CIV. P. 329b.3 & 4.

243. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 111, 122-23 (1978). See also McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 122-23 (1979).

tory.²⁴⁴ In reaching the same conclusion in a recent case²⁴⁵ the court added that "no order of severance was entered."²⁴⁶ The implication is that the court might sever the suit affecting the parent-child relationship joined with the divorce suit for trial under section 3.55.²⁴⁷

It was also recently concluded that a court order providing for sale of a couple's property, for subsequent division of the proceeds by the court is an interlocutory order and therefore not subject to appeal.²⁴⁸ If this reasoning is sound, it would also support an order to sell the homestead subject to the court's disposition of the proceeds, which might include the payment of general debts and costs.²⁴⁹ The better course in a situation of this type would be for the appellate court to consider the merits of the division, including the purpose of the sale.

Motion for New Trial. In *Brown v. Brown*²⁵⁰ the Eastland court of civil appeals reiterated the point that a defaulting party²⁵¹ who fails to set up a meritorious defense is not entitled to a new trial. More significantly, the court also added its interpretation of new rule 324:²⁵²

A motion for new trial shall not be a prerequisite to the right to complain on appeal . . . and the omission of a point in such motion . . . shall be necessary to file a motion for new trial in order to present a complaint which has not otherwise been ruled upon.

The court disagreed with the conclusion of the El Paso court of civil appeals²⁵³ that a complaint that a judgment is supported by insufficient evidence or is against the overwhelming preponderance of the evidence must be assigned as error in a motion for new trial in a nonjury case.

[W]hen the court renders judgment it has "otherwise ruled upon" the sufficiency of the evidence to support the controlling facts sustaining the judgment. An appellant, however, must file a motion for new trial in order to present a complaint which the record fails to disclose was ruled upon by the court.²⁵⁴

In applying its interpretation of the rule, the Eastland court observed that, in a default judgment case, the appellant cannot raise issues on appeal not specified in the motion for new trial because those issues were not objected

244. *Choate v. Choate*, 576 S.W.2d 656, 657 (Tex. Civ. App.—Beaumont 1979, no writ); *Campbell v. Campbell*, 550 S.W.2d 164, 166 (Tex. Civ. App.—Austin 1977, no writ).

245. *Kelley v. Kelley*, 583 S.W.2d 671, 673-74 (Tex. Civ. App.—Austin 1979, writ *dism'd*).

246. *Id.* at 673.

247. TEX. FAM. CODE ANN. § 3.55(b) (Vernon 1975).

248. *Treadway v. Treadway*, 576 S.W.2d 121, 122 (Tex. Civ. App.—Texarkana 1978, no writ).

249. *See Foster v. Foster*, 583 S.W.2d 868, 870 (Tex. Civ. App.—Tyler 1979, no writ) (final order to sell homestead was not superseded and hence had become moot on appeal). *See also Poston v. Poston*, 572 S.W.2d 800, 803 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

250. *Brown v. Brown*, 590 S.W.2d 808 (Tex. Civ. App.—Eastland 1979, no writ).

251. In *Brown* the husband had answered but failed to appear at the trial.

252. TEX. R. CIV. P. 324 (effective Jan. 1, 1978).

253. *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex. Civ. App.—El Paso 1979, no writ).

254. 590 S.W.2d at 811.

to at the trial and were hence *not ruled upon*.²⁵⁵

In *Griffith v. Griffith*²⁵⁶ the most the appellant-husband could have expected was a new trial, since he had specifically waived the presence of a court reporter and therefore came to the appellate court without an adequate statement of facts. After entry of the judgment the appellant had requested findings of facts and conclusions of law, which were filed. The husband then sought further findings, but the trial court did not respond to this request. On appeal the husband asserted that the refusal of his request constituted error. The appellate court was unsympathetic to his plea. Justice Keith added some advice to cover this sort of dilemma,²⁵⁷ but the judge's citations²⁵⁸ do not suggest a solution. What the justice may have been suggesting obliquely was greater diligence and diplomacy in the endeavor. But neither course can rectify the initial foolhardiness of declining the presence of the court reporter.

Appeal. An appeal bond must be filed within thirty days of the judgment.²⁵⁹ The delay in ruling on a pauper's affidavit in lieu of a bond does not extend the time for filing the bond.²⁶⁰ If it is shown that the ruling contesting the affidavit constituted an abuse of discretion, the appeal may proceed.²⁶¹

An appeal may be precluded if the appellant disobeys the court's order.²⁶² In *Goodridge v. Goodridge*²⁶³ the husband-appellant had violated the trial court's order by selling property awarded to the wife. The wife's motion to dismiss the husband's appeal was nevertheless denied. It was pointed out that the wife had conceded she had adequate remedies to protect her property or to recover its value.²⁶⁴ Although the husband should have had an opportunity to explain his flouting of the court's award, the doors of the appellate court should not be open to one who deliberately disregards a judicial order without good cause.

As a general proposition, the acceptance of benefits of a decree is a bar to an appeal from that decree.²⁶⁵ There are certain exceptions to this rule,

255. *Id.*

256. 584 S.W.2d 498 (Tex. Civ. App.—Beaumont 1979, no writ).

257. *Id.* at 499-500.

258. *Stronck v. Stronck*, 538 S.W.2d 854, 856 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); *Brown v. Brown*, 520 S.W.2d 571, 575 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

259. TEX. R. CIV. P. 356(a).

260. *King v. Payne*, 156 Tex. 105, 113-14, 292 S.W.2d 331, 334-35 (1956).

261. *Talley v. Talley*, 587 S.W.2d 541, 542 (Tex. Civ. App.—Corpus Christi 1979, writ *dism'd*).

262. *See, e.g., Alexander v. Gunning*, 572 S.W.2d 34, 35 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (conservatorship case). In *Coplin v. Coplin*, 579 S.W.2d 278, 279 (Tex. Civ. App.—Dallas 1979, no writ), the court brushed aside allegations of disobedience of the trial court's order with the observation that the issue was one for the trial court, rather than the appellate court, to decide.

263. 591 S.W.2d 571 (Tex. Civ. App.—Dallas 1979, no writ).

264. Prompt recordation of the judgment in the records of the county where the realty was situated would have also given a prospective purchaser notice.

265. *Carle v. Carle*, 149 Tex. 469, 472, 234 S.W.2d 1002, 1004 (1950). For a recent in-

however. The use of benefits to satisfy financial needs is one exception.²⁶⁶ Another is the acceptance of a benefit that the appellee concedes or must concede to be due the appellant.²⁶⁷ In *Kidd v. Kidd*²⁶⁸ the homestead had been sold by order of the court, and after payment of debts due on the property the proceeds were ordered divided equally between the spouses. The appellee asserted that the appellant was barred from his appeal by acceptance of this benefit. Since that aspect of division was independent of others in issue on appeal, however, the court treated the case as falling within the exception of a conceded benefit.²⁶⁹ Yet another exception may be labelled with the maxim *de minimis non curat lex*.²⁷⁰

Equitable Bill of Review. In *Turner v. Turner*²⁷¹ the ex-husband filed his bill of review to set aside a property settlement agreement that had been incorporated into a decree of divorce. The respondent countered by the unusual ploy of praying that the petitioner show cause why his bill of review should not be denied. The court accordingly ordered the ex-husband to appear for that purpose and at the end of the hearing entered a judgment on the merits. The appellate court turned aside this irregular form of proceeding and remanded the cause to the trial court.²⁷²

Other bills of review proceedings were more prosaic in that essential elements for granting the bill either went unalleged²⁷³ or unproved.²⁷⁴ In *Hamborsky v. Hamborsky*,²⁷⁵ however, the ex-wife's bill of review turned on an alleged fraudulent conveyance of community realty by the ex-husband prior to the filing of the petition for divorce. Such fraud, however, is *intrinsic*, whereas proof of extrinsic fraud is necessary to sustain a bill of review.²⁷⁶ In a recent California case²⁷⁷ the court held that a corporate director-husband was under no duty, in either his capacity as director or husband, to inform his wife during divorce proceedings that the corporation, whose stock was held by the community, contemplated a public offer-

stance, see *Johnson v. Johnson*, 584 S.W.2d 307, 309 (Tex. Civ. App.—Texarkana 1979, no writ) (alternative ground for court's conclusion).

266. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 127-28 (1979). See also *Coplin v. Coplin*, 579 S.W.2d 278, 279 (Tex. Civ. App.—Dallas 1979, no writ).

267. *Carle v. Carle*, 149 Tex. 469, 472, 234 S.W.2d 1002, 1004 (1950).

268. 584 S.W.2d 552 (Tex. Civ. App.—Austin 1979, no writ).

269. *Id.* at 554-55.

270. See *Coplin v. Coplin*, 579 S.W.2d 278, 279 (Tex. Civ. App.—Dallas 1979, no writ).

271. 576 S.W.2d 452 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

272. *Id.* at 454.

273. *Carroll v. Carroll*, 580 S.W.2d 410, 412-13 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

274. *Northcutt v. Jarrett*, 585 S.W.2d 874, 877 (Tex. Civ. App.—Amarillo 1979), writ *ref'd n.r.e. per curiam*, 592 S.W.2d 930 (Tex. 1979). The Texas Supreme Court there took the opportunity to disapprove the holding in *Deen v. Deen*, 530 S.W.2d 913 (Tex. Civ. App.—Fort Worth 1975, no writ), that a lack of negligence need not be proved when a waiver of process is invalidly executed.

275. 584 S.W.2d 330 (Tex. Civ. App.—San Antonio 1979, no writ).

276. *Id.* at 332.

277. *In re Connolly*, 23 Cal. 3d 590, 591 P.2d 911, 153 Cal. Rptr. 423 (1979).

ing that might greatly increase the stock's value.²⁷⁸ Such withholding of information was therefore not fraudulent; but even if fraudulent, it would have been intrinsically fraudulent and hence not of the sort that would ground a bill of review.

V. DIVISION ON DIVORCE

Property Settlement Agreements. In addition to the immediate objective of the division of property, two further goals are of utmost importance in drafting property settlement agreements. The instrument must not only provide for favorable tax treatment²⁷⁹ but must also be developed so that the terms of the agreement will not be adversely affected by the rules of state law. Although a settlement agreement need not be incorporated in the divorce decree to be enforceable,²⁸⁰ the agreement may be so incorporated.²⁸¹ If the agreement is made a part of the decree, it stands as an agreed judgment and "is accorded the same degree of finality and binding force as a final judgment rendered at the conclusion of adversary proceeding."²⁸² Thus the terms of the settlement are merged in the judgment and

278. 591 P.2d at 916, 153 Cal. Rptr. at 428.

279. See Schaer v. Commissioner, 1979 T.C.M. (P-H) 1145; Cason, *Tax Aspects of Divorces and Separations*, 42 TEX. L.J. 1012 (1979); cf. Saniewski v. Commissioner, 1979 T.C.M. (P-H) 1244; Karageorgevitch v. Commissioner, 1979 T.C.M. (P-H) 962; Alexander v. Commissioner, 1979 T.C.M. (P-H) 927. See also Siewert v. Commissioner, 72 T.C. 326, 333 (1979). In *Siewert* the property settlement agreement provided that the husband should receive substantially more than one-half of the community property. The wife was to be paid a substantial sum of money under the agreement. The court treated part of this transaction as a taxable sale rather than as an equal division of property. In so concluding, the court decided that a large bank loan negotiated by the husband a few hours before the divorce in order to pay a lump sum to the wife did not constitute a community liability. The husband had not specified that the notes were community liabilities and "the bank expected them to be paid by [the husband] not the community." *Id.* at 335-36. But if the husband had become insolvent prior to the payment of the note, the bank could have relied on the presumption of community liability in order to attempt to recover the unpaid balance from the community assets transferred to the wife. See *Boyd v. Ghent*, 93 Tex. 543 547, 57 S.W. 5, 6-7 (1900); *Dean v. First Nat'l Bank*, 494 S.W.2d 222, 226 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.); *First Nat'l Bank v. Hickman*, 89 S.W.2d 838, 842 (Tex. Civ. App.—Austin 1935, writ ref'd); *Grandjean v. Runke*, 39 S.W. 945, 946 (Tex. Civ. App. 1897, no writ). The husband was successful, however, in arguing that a bank-overdraft that he negotiated shortly before the divorce in order to purchase an annuity for the wife was a community liability. 72 T.C. at 336.

280. *Francis v. Francis*, 412 S.W.2d 29 (Tex. 1967). In *Damstra v. Starr*, 585 S.W.2d 817 (Tex. Civ. App.—Texarkana 1979, no writ), the ex-husband was dissatisfied with a bargain he and his wife had struck in their property settlement on divorce. In order to buy the wife's community interest in his accounts receivable and assets on hand, the husband executed a note to her and, following the divorce, made payments on the note. When he discovered that his accounts receivable were not as valuable as he had earlier believed and that his payments on the note were not deductible under the federal income tax laws, he attempted to cancel the note and to recover payments made. The court determined that neither an error in predicting a future fact nor a mistake of law will relieve a party from his contract. *Id.* at 820.

281. A court should not, of course, enter judgment on the basis of a property agreement if the arrangement has not been assented to by both spouses. *Eastin v. Eastin*, 588 S.W.2d 812, 814 (Tex. Civ. App.—San Antonio 1979, no writ).

282. *Ex parte Gorena*, 23 Tex. Sup. Ct. J. 32, 33 (Oct. 17, 1979) (quoting *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979)). *Gorena* did not, however, involve an agreement to pay contractual alimony. The court's general conclusion in *Gorena* and *McCray* seems to

any contractual defenses that might have been raised concerning enforceability are no longer available.²⁸³ If the settlement agreement contains contractual alimony provisions, however, its approval by the court or its incorporation in the decree does not change its contractual quality, because it is beyond the court's power to order the payment of permanent alimony.²⁸⁴

A property settlement agreement may furnish a contractual basis for enforcement by a third party beneficiary. In *Stegall v. Stegall*²⁸⁵ an adult son recovered the amount of college tuition and fees that the father had failed to provide pursuant to a separation agreement. The property settlement agreement at issue in *Pitts v. Ashcraft*²⁸⁶ contained a noncompetition agreement providing that the former wife would not engage, nor encourage anyone to engage, in the funeral business. Alleging third party beneficiary status, the husband's family's funeral corporation failed to establish a breach of the covenant even though the wife had made cash gifts to her son, who subsequently entered that business.²⁸⁷

Power to Divide Separate Personalty. While the Texarkana court of civil appeals has asserted that title to community property cannot be divested from parents to their children,²⁸⁸ eight courts of civil appeals²⁸⁹ have now held that *Eggemeyer v. Eggemeyer*²⁹⁰ is to be read as applying to separate realty only and that divorce courts may divest the separate personalty from one spouse in favor of the other. During the past year six new holdings²⁹¹ and one hearty dictum²⁹² were added to the catalogue of authorities supporting this proposition.²⁹³

In one of these cases, *Spencer v. Spencer*,²⁹⁴ the husband had begun to accumulate retirement rights when he entered military service in 1935.

abrogate the rule that a consent judgment may not be modified except by consent. *Mikeska v. Mikeska*, 584 S.W.2d 565, 566 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (citing *Boyd v. Boyd*, 545 S.W.2d 520, 523 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ)).

283. 23 Tex. Sup. Ct. J. at 33 (citing *Peddicord v. Peddicord*, 522 S.W.2d 666 (Tex. Civ. App.—Beaumont 1975, no writ)).

284. *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979).

285. 571 S.W.2d 564 (Tex. Civ. App.—Fort Worth 1979, no writ).

286. 586 S.W.2d 685 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

287. *Id.* at 693-94.

288. *Treadway v. Treadway*, 576 S.W.2d 121, 122-23 (Tex. Civ. App.—Texarkana 1978, no writ) (dictum).

289. The courts in Fort Worth, Dallas, Texarkana, El Paso, Beaumont, Waco, Eastland, and Tyler support this proposition, and none oppose it. There has not been a dissenting judge in any of these cases.

290. 554 S.W.2d 137 (Tex. 1977).

291. *Brown v. Brown*, 590 S.W.2d 808, 812 (Tex. Civ. App.—Eastland 1979, no writ); *Spencer v. Spencer*, 589 S.W.2d 174, 176 (Tex. Civ. App.—El Paso 1979, no writ); *Campbell v. Campbell*, 586 S.W.2d 162, 166-69 (Tex. Civ. App.—Fort Worth 1979, writ granted); *In re Trujillo*, 580 S.W.2d 873, 875 (Tex. Civ. App.—Texarkana 1979, no writ); *York v. York*, 579 S.W.2d 24, 25-26 (Tex. Civ. App.—Beaumont 1976, no writ); *Crowell v. Crowell*, 578 S.W.2d 562, 564-65 (Tex. Civ. App.—Fort Worth 1979, no writ).

292. *Faulkner v. Faulkner*, 582 S.W.2d 639, 641 (Tex. Civ. App.—Dallas 1979, no writ).

293. For a discussion of previous reactions to *Eggemeyer*, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 133 n.273 (1979).

294. *Spencer v. Spencer*, 589 S.W.2d 174 (Tex. Civ. App.—El Paso 1979, no writ).

The couple was married in 1948. On his retirement in 1957 the husband began receiving retirement benefits that would have been then characterized as fractionally divisible in community and separate shares. When the couple was divorced in 1959 the judgment was silent as to the pension benefits, and each thereafter held the community share of benefits as tenants in common of separate property. The ownership interest in the benefits was unaffected by the couple's remarriage in 1960. As a result of their subsequent divorce in 1978, the trial court awarded the wife's separate interest in the husband's retirement benefits to the husband. On appeal, the division was held to be an abuse of the trial court's discretion.²⁹⁵ Although separate personalty of the wife might be awarded to the husband under some circumstances, it was not appropriate in this situation in which the equities very much favored the wife. In attempting to refute the wife's separate interest, the husband asserted that the wife's claim had been barred by the statute of limitation because of her failure to exercise her right for nearly twenty years. The court, however, found no indication of repudiation of the wife's right by the husband, and the statute of limitation can only begin to run against one cotenant when the other cotenant gives notice of a repudiation of the cotenancy.²⁹⁶

*Reimbursement.*²⁹⁷ In *Swearingen v. Swearingen*²⁹⁸ the doctrine of reimbursement appears to have been used inappropriately to circumvent the rule against divestiture of separate realty enunciated in *Eggemeyer*. The facts in *Swearingen* reveal only that a down payment of \$6,000 on a home purchased during the marriage was made from the husband's separate property. The divorce judgment allowed the husband reimbursement for his down payment. On appeal, he claimed unsuccessfully that the court wrongly divested him of his separate realty. If the purchase was made wholly on credit or by giving a community note, and if a first payment was made on the indebtedness with the husband's \$6,000, there can be no criticism of the court's conclusion. If, on the other hand, the home was purchased with a down payment of part of the purchase price and the remainder was supplied by a community note, the separate estate of the husband and the community would own the home as tenants in common in proportionate shares under the inception of title doctrine.²⁹⁹ Hence reimbursement of a part of the purchase price would constitute divestiture of separate title to realty.

295. *Id.* at 176.

296. *Id.* Indeed, it would be very difficult to make a factual showing of sufficient repudiation of a separate claim to either personalty or realty by either spouse while the couple is living together.

297. For a general analysis of the law of reimbursement, see McKnight, *Is There a Right of Reimbursement in Texas?*, in MARRIAGE DISSOLUTION IN TEXAS ch. C (State Bar of Texas 1979); McKnight, *Reimbursement Between Marital Estates on Marriage Dissolution and Partition* in ADVANCED FAMILY LAW COURSE ch. D (State Bar of Texas 1979).

298. 578 S.W.2d 829, 833 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dismissed).

299. *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881 (1937); *Love v. Robertson*, 7 Tex. 6 (1851).

It is asserted from time to time that the expenditure of community funds to pay ad valorem taxes on separate property should be reimbursed to the community.³⁰⁰ The assertion is misdirected if the property is productive of community income or other community enjoyment. If income exceeds expenses, including taxes, those expenses properly fall on the community.³⁰¹

In *Schechter v. Schechter*³⁰² principles of reimbursement were utilized in several contexts. Evaluating the property division very broadly, the appellate court saw reimbursement claims of the community against the wife's separate estate and those of the wife's separate estate against the community as cancelling each other out. The court also applied the rationale of *Schmidt v. Huffman*³⁰³ to restore to the wife the value of the inventory of her separate mercantile business as of the time of marriage. In *Schmidt* the husband's business inventory at the time of marriage had been restored to his estate at his death. Less evidence of disposition of the separate property was required in *Schechter* than in *Schmidt*, but the equitable standards of division on divorce allow a greater breadth of discretion than do the standards used in cases of succession.³⁰⁴ In the general context of reimbursement, *Schmidt* and *Schechter* are examples of restitution of separate property in return for capital contributions to the well-being of the family. This concept may be used by courts with increased frequency.³⁰⁵

Exercise of Discretion. Because the divorce court is granted wide discretion in dividing the marital property, a claimant often finds it difficult to show any abuse of discretion on appeal.³⁰⁶ Trial courts may apply a vari-

300. *Maben v. Maben*, 574 S.W.2d 229, 232 (Tex. Civ. App.—Fort Worth 1978, no writ).

301. *Cadwell v. Dabney*, 208 S.W.2d 127, 129 (Tex. Civ. App.—Austin 1948, writ ref'd n.r.e.); *Ames v. Ames*, 188 S.W.2d 689, 690 (Tex. Civ. App.—Galveston 1945, no writ).

302. 579 S.W.2d 502, 505-06 (Tex. Civ. App.—Dallas 1978, no writ).

303. 73 Tex. 112, 11 S.W. 175 (1889). See also *Blumer v. Kallison*, 297 S.W.2d 898 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.).

304. In *Schechter* the husband asserted that the wife did not trace the inventory from the beginning of the marriage to the end. The court indicated that the requirement of strict tracing is more appropriate in instances involving debtor-creditor relations. If, for example, a community creditor of the other spouse levies execution on a stock of merchandise of what has been a jointly operated separate proprietorship, the owner-spouse must prove that the assets in question are separate by applying strict tracing principles. *Hardee v. Vincent*, 136 Tex. 99, 147 S.W.2d 1072 (1941); *Middlebrook v. Zapp*, 73 Tex. 29, 10 S.W. 732 (1889); *Jones v. Epperson*, 69 Tex. 586, 7 S.W. 488 (1889). The court properly distinguishes the facts in *Schechter* from the debtor-creditor cases, because reimbursement does not reflect ownership tracing principles but rather those of indebtedness.

305. For other recent examples, see *Means v. Means*, 535 S.W.2d 911, 916-17 (Tex. Civ. App.—Amarillo 1976, no writ); *Horlock v. Horlock*, 533 S.W.2d 52, 56-58 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed). Earlier instances include *Hartman v. Hartman*, 253 S.W.2d 480, 482-83 (Tex. Civ. App.—Austin 1952, no writ); *Farrow v. Farrow*, 238 S.W.2d 255, 257 (Tex. Civ. App.—Austin 1951, no writ); *First Nat'l Bank v. Hickman*, 89 S.W.2d 838, 840-41 (Tex. Civ. App.—Austin 1935, writ ref'd) (*semble*); *Moor v. Moor*, 57 S.W. 992 (Tex. Civ. App. 1900, no writ), reprinted at 255 S.W. 231 (Tex. Civ. App. 1900).

306. See, e.g., *Campbell v. Campbell*, 587 S.W.2d 513, 514-15 (Tex. Civ. App.—Dallas 1979, no writ) (testimony as to the value of significant properties was insufficient to show an abuse of discretion); *Foster v. Foster*, 583 S.W.2d 868, 870-71 (Tex. Civ. App.—Tyler 1979, no writ) (although the total amount of assets awarded to the husband greatly exceeded the amount awarded to the wife, the disparity resulted from the award to the husband of the community homestead that he was ordered to sell in order to pay community debts; there-

ety of standards, but the circumstances of particular cases are so diverse that an objective analysis of results would be very difficult to formulate.³⁰⁷ There are, however, some recurring themes. If partition in kind is not possible, the court will usually order sale of community property in order to achieve a division.³⁰⁸ If there are minor children for whom a home must be provided, however, the court will not ordinarily order sale of the family home.³⁰⁹ If a sale of the home is ordered and the objecting spouse fails to supersede the judgment pending appeal, the appeal may be for naught.³¹⁰ Rather than ordering a sale of a going business, a divorce court may award the spouses undivided shares, but such a resolution is extremely rare.³¹¹ It is sometimes stated as a justification for rejecting an appeal for abuse of discretion that the appellant received more than one-half of the community estate.³¹² Although this may be classified as an objective standard, its application does not constitute a sufficient review of the exercise of judicial discretion.

Foreign Realty. Texas courts do not assert the power to divide foreign realty in a divorce context.³¹³ California courts, on the other hand, assert the power both to characterize and to dispose of foreign realty when those issues are submitted by the parties.³¹⁴ Relying upon the fact that a Florida divorce court had conclusively determined the husband's ownership of Pennsylvania realty, a Florida appellate court has concluded that the ex-wife could not pursue her claims to the realty in a Pennsylvania court.³¹⁵ A federal court sitting in Pennsylvania has agreed that the petitioning wife is now precluded from asserting claims to the Pennsylvania land that could have been maintained in the Florida court.³¹⁶ Heretofore only one Texas appellate case³¹⁷ (and that one unreported³¹⁸) stood for the proposition

fore an abuse of discretion was not shown); *Hammonds v. Hammonds*, 583 S.W.2d 807, 809-10 (Tex. Civ. App.—Dallas 1979, no writ) (the respective values of properties divided were not shown; hence the court could not determine whether there had been an abuse of discretion).

307. See McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 433-44 (1976), for a discussion of criteria and standards. See also Karnezis, *Fault as Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce*, 86 A.L.R. 3d 1116 (1978).

308. *Hammonds v. Hammonds*, 583 S.W.2d 807, 808-09 (Tex. Civ. App.—Dallas 1979, writ *dism'd*).

309. *Maben v. Maben*, 574 S.W.2d 229, 232 (Tex. Civ. App.—Fort Worth 1978, no writ).

310. *Foster v. Foster*, 583 S.W.2d 868, 870 (Tex. Civ. App.—Tyler 1979, no writ).

311. See, e.g., *In re Trujillo*, 580 S.W.2d 873, 875 (Tex. Civ. App.—Texarkana 1979, no writ); *Braswell v. Braswell*, 476 S.W.2d 444, 447-48 (Tex. Civ. App.—Waco 1972, writ *dism'd*); *Flournoy v. Flournoy*, 315 S.W.2d 150, 151 (Tex. Civ. App.—El Paso 1958, no writ); *Brown v. Brown*, 191 S.W.2d 814, 817 (Tex. Civ. App.—Dallas 1945, no writ).

312. *Schecter v. Schecter*, 579 S.W.2d 502, 506 (Tex. Civ. App.—Dallas 1978, no writ); *Grost v. Grost*, 561 S.W.2d 223, 229 (Tex. Civ. App.—Tyler 1977, writ *dism'd*).

313. *Kaherl v. Kaherl*, 357 S.W.2d 622 (Tex. Civ. App.—Dallas 1962, no writ).

314. See *Braselton v. Clearfield State Bank*, 606 F.2d 285, 288-89 (10th Cir. 1979).

315. *Simon v. Simon*, 293 So. 2d 780, 781 (Fla. Dist. Ct. App. 1974); *Simon v. Simon*, 317 So.2d 83 (Fla. Dist. Ct. App. 1975), *cert. denied*, 429 U.S. 827 (1976).

316. *Simon v. Simon*, 478 F. Supp. 548, 550-51 (E.D. Pa. 1979).

317. *Lopez v. Lopez*, No. 15,788 (Tex. Civ. App.—San Antonio, April 20, 1977, no writ).

318. It is nonetheless available on LEXIS.

that a divorce court might order a party to convey foreign realty acquired with community funds in order to achieve an equitable division of the marital estate. In quick succession two appellate cases have dealt with the courts' power to order a party subject to its in personam jurisdiction to dispose of foreign realty. In one³¹⁹ the property had been acquired with community funds. In the other the wife had purported to convey a partial interest in her separate property to her husband.³²⁰ In another instance³²¹ a Texas court upheld the disposition of a note secured by a mortgage of foreign realty.

Attorney's Fees. An award of attorney's fees is in the discretion of the trial court in dividing the marital estate and making an equitable apportionment of the responsibility for their liabilities.³²² The court may assess an attorney's fee even when a jury advises against doing so.³²³ A court may also award attorney's fees pursuant to an agreement providing for attorney's fees when either party has to seek judicial enforcement of the agreement.³²⁴ In *In re Neiderl*³²⁵ the trial court ordered that both parties execute the documents necessary for the sale of certain realty. Four months later the ex-wife brought a motion to have the husband found in contempt for failure to execute the required instruments. The husband thereupon executed the documents and was therefore not found in contempt, but the attorney's fee and costs incurred in bringing the contempt proceeding were assessed against his share of the proceeds. On appeal, the order to pay attorney's fees and costs was reversed as constituting a penalty.

In *Paugh v. Paugh*³²⁶ the appellate court pointed out that "attorney's fees should be reasonable under the circumstances of [each] case on its own merits, and should bear some reasonable relationship to the amount

319. *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex. Civ. App.—El Paso 1979, no writ).

320. *Brown v. Brown*, 590 S.W.2d 808, 812-13 (Tex. Civ. App.—Eastland 1979, no writ). Purporting to apply Texas law to the transaction before it, the appellate court erroneously affirmed the trial court's conclusion that the wife could not transform her California separate realty into a joint tenancy between her and her husband. See *Davis v. East Tex. Sav. & Loan Ass'n*, 163 Tex. 361, 354 S.W.2d 926 (1962). In affirming the trial court's order requiring the husband to execute a conveyance of his interest in the property to his wife, the appellate court deleted that part of the court's order divesting the husband's title to the California land. 590 S.W.2d at 813.

321. *Campbell v. Campbell*, 586 S.W.2d 162, 170 (Tex. Civ. App.—Fort Worth 1979, writ granted on another issue).

322. For a general discussion of attorney's fees, see McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 455-61 (1976). See also McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 121 (1977).

323. *Reyna v. Reyna*, 584 S.W.2d 926, 928 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (modification of conservatorship).

324. *Stegall v. Stegall*, 571 S.W.2d 564, 566 (Tex. Civ. App.—Fort Worth 1978, no writ). Attorney's fees were awarded in connection with enforcement of a property settlement agreement in accordance with its terms. Compare *Damstra v. Starr*, 585 S.W.2d 817, 821 (Tex. Civ. App.—Texarkana 1979, no writ), with respect to attorney's fees and costs.

325. 583 S.W.2d 461, 462-63 (Tex. Civ. App.—Amarillo 1979, no writ).

326. 579 S.W.2d 38 (Tex. Civ. App.—Waco 1979, no writ).

in controversy."³²⁷ The circumstances of this case revealed that the husband had a net monthly income of \$1,580, owned one car, and was the conservator of two minor sons by a previous marriage. He had no income producing property and no savings. The wife was, at that time, not able to work. The home awarded to the wife was subject to a lien requiring payment of \$464 a month, and her monthly car payments were \$204. The trial court had ordered the husband to pay child support in the amount of \$500 a month and attorney's fees of \$2,500. Because the appellate court concluded that the attorney's fees were excessive, a remittitur of \$1,000 was ordered. Although the appellate court did not indicate either the amount of time required to prepare the case or the difficulty of the issues involved, the results illustrate the adage that small cases with big problems are unremunerative to counsel involved.³²⁸

Division After Divorce. If the trial court commits judicial error by wrongly characterizing marital property and dividing it accordingly, a litigant's recourse is to attack the decree directly.³²⁹ It is sometimes difficult, however, to determine whether the court made a final division of particular property.³³⁰ If community property is not divided, it becomes a tenancy in common upon divorce.³³¹ In *Yeo v. Yeo*³³² the spouses' property settlement agreement was incorporated in the decree divorcing them in 1964.³³³ The agreement provided that the wife released to the husband "all other property of whatever nature, separate or community, in his possession or claimed by him, and wherever located."³³⁴ Although there was conflicting testimony as to whether the husband's military retirement benefits were in the contemplation of the parties when they entered into the agreement, the court held on the basis of prior judicial precedents that the language of possession and claim did not refer to the retirement interest.³³⁵ The court went on to conclude that "unless the property involved is specifically identified and described, comprehensive release clauses are not effective to

327. *Id.* at 40.

328. This is a paraphrase of Justice Keith's remarks in *Smith v. Smith*, 535 S.W.2d 380, 381 (Tex. Civ. App.—Beaumont), *rev'd*, 544 S.W.2d 121 (Tex. 1976).

329. *See, e.g.*, *Bray v. Bray*, 576 S.W.2d 664, 665-66 (Tex. Civ. App.—Beaumont 1978, no writ). The substantive question in this case was whether renewal commissions from the sale of life insurance policies during marriage were community property even though the commissions were received by the husband after the divorce.

330. *See, e.g.*, *Constance v. Constance*, 544 S.W.2d 659 (Tex. 1976) (statement in court order of fact that the husband received \$220 a month in retirement benefits and that none of these benefits were being awarded to the wife was sufficient to decree ownership in the husband).

331. *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970).

332. 581 S.W.2d 734 (Tex. Civ. App.—San Antonio 1979, no writ).

333. The settlement was entered into long before either *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970), or *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976), was decided. In *Busby* the court concluded that an accrued (vested) pension interest constituted community property. The court admonished counsel to so advise trial judges. 457 S.W.2d at 555. In *Cearley* the court held that unaccrued pension interests were subject to division on divorce. 544 S.W.2d at 663-66.

334. *Id.* at 737.

335. 581 S.W.2d at 738-39.

transfer or release property"³³⁶ This statement seems too broad. If parties make an informed and intended release of unknown or unidentified property and that release is not actuated by the fraud of one of them, it should operate effectively to include all property not specifically identified.

In *Matthews v. Houtchens*³³⁷ the divorce decree had stated that there was no community property to divide. Although this was clearly an erroneous conclusion of the trial court, the appellate court held that this recital did not stand as an adjudication that the retirement benefits at issue were the separate property of the husband.³³⁸ Because the retirement benefits were not included in the divorce decree, title to them did not vest solely in either husband or wife. Instead, the two became co-tenants of the property.³³⁹

When a direct attack to challenge the existence of a tenancy in common cannot be mounted by appeal or writ of error, an ex-spouse may attempt to set aside the judgment by bill of review so that a discretionary division can be achieved. If that approach is also unavailable, a partition of the cotenancy should be sought.³⁴⁰ The ultimate barrier to partition is a statute of limitation, but the limitation period will not begin to run with respect to the cotenancy of retirement benefits until there is a repudiation of the cotenant's rights after the payments have begun to be received.³⁴¹

In the aftermath of divorce, necessary changes in the fire insurance policy on the home occupied by the still-united family constituents may be overlooked with disastrous results. In *Duren v. U.S. Fire Insurance Co.*³⁴² the policy provided the company would not be liable for loss following a change of ownership of the insured property unless the company was notified of the change in writing. In the divorce decree the community home was awarded to the husband, and several years later he conveyed it to his ex-wife who had lived in it with their children. After the home was severely damaged by fire, the insurance policy was unenforceable because its terms had not been complied with.

Enforcement. When a court awards a money judgment or orders one ex-spouse to pay the other a monetary amount over a period of time but the ex-spouse falls into arrears, execution may be had on a judgment in de-

336. *Id.* at 739.

337. 576 S.W.2d 880 (Tex. Civ. App.—Fort Worth 1979, no writ).

338. *Id.* at 883. The recitation in a divorce decree that no community property had been acquired is not *res judicata* to prevent a partition of property not dealt with by the divorce court. *Clendenin v. Krock*, 527 S.W.2d 471, 473 (Tex. Civ. App.—San Antonio 1975, no writ) (citing *Harkness v. McQueen*, 207 S.W.2d 676, 679 (Tex. Civ. App.—Galveston 1947, no writ)).

339. 576 S.W.2d at 883.

340. *See, e.g.*, *Hamborsky v. Hamborsky*, 584 S.W.2d 330, 331-32 (Tex. Civ. App.—San Antonio 1979, no writ).

341. *See Yeo v. Yeo*, 581 S.W.2d 734, 739-40 (Tex. Civ. App.—San Antonio 1979, no writ); *Cruse v. Cruse*, 572 S.W.2d 68, 70-71 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.). *See McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 141-42 (1979), for a discussion of *Cruse*. *See* notes 294-96 *supra* and accompanying text for another example of lack of repudiation of a cotenant's interest.

342. 579 S.W.2d 32 (Tex. Civ. App.—Tyler 1979, no writ).

fault³⁴³ or arrears may be reduced to judgment followed by execution.³⁴⁴ If the parties merely enter into a contractual undertaking that one will pay the other a monetary amount, the breach must be reduced to judgment. The doctrine of anticipatory breach is applicable to such a contractual breach.³⁴⁵ There is some authority for the proposition that this doctrine is applicable even if the contract is incorporated in, and hence merged into, the judgment.³⁴⁶ In those instances when the funds of the delinquent party are in the hands of a third person, garnishment may be sought. For purpose of garnishment, military retirement benefits are not exempt from seizure as current wages,³⁴⁷ but garnishment of the United States is not likely to be available to satisfy awards that a Texas divorce court might make other than for child support.³⁴⁸ When ex-spouses have sought to reach retirement benefits in the hands of various third persons, they have been met with the argument that the federal Employee Retirement Income Security Act of 1974 (ERISA)³⁴⁹ preempts recovery. The Waco court of civil appeals has followed³⁵⁰ the great weight of authority in rejecting this argument.³⁵¹

The most commonly sought remedy for the enforcement of judicial orders is the exercise of the court's contempt powers.³⁵² Although reliance is usually had on a written order to do or refrain from doing an act pendente lite or after judgment, an oral order of which an alleged contemnor has specific knowledge may be subject to enforcement by contempt.³⁵³ Recent instances in which contempt powers have been invoked include the violation of an order to sign documents and deliver them personally to the other

343. TEX. REV. CIV. STAT. ANN. art. 5069—1.05 (Vernon Supp. 1979) provides that all judgments bear interest at 9% from the date of judgment. A judgment for attorney's fees bears the same interest. *Poston v. Poston*, 572 S.W.2d 800, 803-04 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

344. *See, e.g., Wiley v. Wiley*, 576 S.W.2d 465 (Tex. Civ. App.—Waco 1978, no writ).

345. *Chavez v. Chavez*, 577 S.W.2d 306, 307 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

346. *See McKnight, Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 107-08 (1975), for a discussion of cases dealing with contractual child support.

347. *Wagar v. United States*, 582 S.W.2d 896 (Tex. Civ. App.—San Antonio 1979, no writ); *United States v. Miranda*, 581 S.W.2d 711 (Tex. Civ. App.—San Antonio 1979, no writ).

348. *See McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 135-36 (1979), for a discussion of garnishment.

349. Pub. L. No. 93-406, 88 Stat. 829 (codified at 26 U.S.C. §§ 1132, 1144 (1976)).

350. *General Dynamics Corp. v. Harris*, 581 S.W.2d 300, 303-04 (Tex. Civ. App.—Waco 1979, no writ).

351. *See, e.g., Cody v. Riecker*, 594 F.2d 314 (2d Cir. 1979); *American Tel. & Tel. Co. v. Merry* 592 F.2d 118 (2d Cir. 1979); *Senco of Florida, Inc. v. Clark*, 473 F. Supp. 902 (M.D. Fla. 1979); *Operating Eng'rs Local No. 428 Pension Trust Fund v. Zamborsky*, 470 F. Supp. 1174 (D. Ariz. 1979); *In re Pilatti*, 96 Cal. App. 3d 63, 157 Cal. Rptr. 594 (1979); *In re Bastian*, 94 Cal. App. 3d 483, 156 Cal. Rptr. 524 (1979); *In re Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 363 (1979); *Ward v. Ward*, 164 N.J. Super. 354, 396 A.2d 365 (Super. Ct. Ch. Div. 1978). *Contra, General Motors Corp. v. Townsend*, 468 F. Supp. 466 (E.D. Mich. 1976).

352. For a general, current treatment of the subject, *see* *Rasor & Koons, Drafting and Enforcement by Contempt of Divorce Decrees*, in *MARRIAGE DISSOLUTION IN TEXAS* ch. D (State Bar of Texas 1979).

353. *Ex parte Barnes*, 581 S.W.2d 812 (Tex. Civ. App.—Fort Worth 1979) (dictum).

party,³⁵⁴ the failure to obey orders prohibiting the contemnor from interfering with a receiver's collecting money,³⁵⁵ and noncompliance with a direction to pay a portion of retirement benefits to the ex-spouse as they were received.³⁵⁶ The principal barrier to enforcement of citations for contempt is the lack of specificity in the orders. All too often the alleged contemnor had not been told precisely what to do or not to do. When challenged by writs of habeas corpus, the orders frequently fall short of the high standard of particularity required under the circumstances.³⁵⁷

There has been a great variety of opinion with respect to the constitutionality of civil contempt orders issued for failure to pay a monetary amount.³⁵⁸ Some have condemned all such orders (apart from those made for the support of children), whether payment is ordered to third persons or to the other spouse to achieve an equitable property division.³⁵⁹ The Supreme Court of Texas, however, has condoned the use of the contempt power to enforce the division of a community interest from a particular fund of money³⁶⁰ or from retirement benefits as they are paid.³⁶¹ In the former instance, payment was to be made directly to the former spouse; in the latter, to the registry of the court, but on similar facts a court of civil appeals has enforced coercion to pay the former spouse directly.³⁶² Permissibility of contempt orders in these instances is said to rest on the pensioner's status as a constructive trustee.³⁶³

Within the last few years, a number of courts of civil appeals have developed the concept that if money is ordered to be paid over a period of time from a fund not in existence when the order was made, disobedience of the order is not contemptible.³⁶⁴ This view stems in large measure from the

354. *Ex parte* Choate, 582 S.W.2d 625 (Tex. Civ. App.—Beaumont 1979) (order to sign instruments); *Ex parte* McKinley, 578 S.W.2d 437 (Tex. Civ. App.—Houston, [1st Dist.] 1979) (order to execute promissory note and deed of trust); *Ex parte* Trick, 576 S.W.2d 437 (Tex. Civ. App.—San Antonio 1978, no writ) (order to sign listing agreement for sale of home and to deliver coin collection). Because some attorneys have occasionally erred in filing a writ of error in response to an unsuccessful writ of habeas corpus in a court of civil appeals, and there are, therefore, a few habeas corpus cases marked "writ of error dismissed," it is perhaps worth commenting that habeas corpus cases do not properly have writ of error histories and hence do not require such notations.

355. *Ex parte* Benitez, 590 S.W.2d 704 (Tex. 1979).

356. *Ex parte* Turner, 584 S.W.2d 585 (Tex. Civ. App.—Houston [14th Dist.] 1979).

357. *Ex parte* Slavin, 412 S.W.2d 43 (Tex. 1967). There the court stated:

It is an accepted rule of law that for a person to be held in contempt for disobeying a court decree, the decree must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him.

Id. at 44 (citations omitted).

358. TEX. CONST. art. I, § 18 forbids imprisonment for debt.

359. *Ex parte* Roberts, 584 S.W.2d 925 (Tex. Civ. App.—Dallas 1979).

360. *Ex parte* Preston, 162 Tex. 379, 384, 347 S.W.2d 938, 940-41 (1961) (husband ordered to turn over money received from sale of property).

361. *Ex parte* Sutherland, 526 S.W.2d 536, 539 (Tex. 1975).

362. *Ex parte* Anderson, 541 S.W.2d 286, 287-88 (Tex. Civ. App.—San Antonio 1976).

363. The unstated rationale of this approach seems to be that the consequences of an equitable relationship permit an equitable remedy.

364. See, e.g., *Ex parte* Jackson, 590 S.W.2d 775, 776 (Tex. Civ. App.—El Paso 1979) (payment to be made to the other spouse for liabilities discharged and to be discharged "in

supreme court's opinion in *Ex parte Yates*.³⁶⁵ There the husband held a promissory note that evidenced a substantial debt from a third person. The divorce court awarded the wife one-half of the amount owed, ordered the husband to pay her \$500 a month to redeem the note, and further ordered the husband to deliver the note to the wife as security for his payment to her. The Texas Supreme Court held that because the wife was, in effect, awarded a money judgment that the husband was to pay from his future "earnings," the order could not be enforced by contempt.³⁶⁶ To do so would be to imprison the husband for debt in violation of the Texas Constitution. The language of the order was also imprecise and ambiguous. This holding should not be generalized to mean that any order to make periodic payments of money, except in a constructive trust situation, is thereby rendered unenforceable by contempt. Even if one accepts the argument that it is improper to order payment from a fund not yet in hand because it lacks a tangible referent, it does not follow that all orders to make periodic, monetary payments to achieve an equitable division of the marital estate on divorce are invalid. If the fund to be divided is amply *identified* and a spouse is ordered to pay a total amount that does not exceed the amount of the other spouse's share of the fund, the source of the actual dollars paid should be irrelevant.³⁶⁷ A significant rationalization of principles and results would be accomplished if that much of the argument is accepted. Although only a few more converts can be expected beyond this point, the argument will be carried a step further. An order to pay particular debts to third persons from this *identified* fund should also be enforceable by contempt. Because a division of the fund is the object of the court, whether the debts are owed for an attorney's fee or for a liability to the other spouse should be irrelevant. Although it has been consistently held that contempt will not lie for the enforcement of an attorney's fee in matters of divorce,³⁶⁸ except for fees incurred in connection with child support and conservatorship,³⁶⁹ enforcement by citation for contempt should be available for an order to pay such debts as an integral part of the division of an identified fund.

The Supreme Court of Texas and the courts of civil appeals have concurrent jurisdiction to issue writs of habeas corpus to dissolve restraints on

order to balance the equities"; the source of payments was not identified); *Ex parte Neff*, 542 S.W.2d 268 (Tex. Civ. App.—Fort Worth 1976) (payment to be made from unspecified funds to the other spouse); *Ex parte Duncan*, 462 S.W.2d 336, 338 (Tex. Civ. App.—Houston [1st Dist.] 1970) (dictum concerning a hypothetical order to pay a third person a debt owed).

365. 387 S.W.2d 377 (Tex. 1965).

366. *Id.* at 380.

367. *See, e.g.*, *Kidd v. Kidd*, 584 S.W.2d 552, 555 (Tex. Civ. App.—Austin 1979, no writ). There the discussion centered on the refutation of the argument that periodic payments ordered by the court were alimony. There was no discussion of contempt. But the situation is one in which the payments were closely tied to a division of community property, clearly identified, on which a lien was placed for the discharge of the payments.

368. *Ex parte Choate*, 582 S.W.2d 625, 628 (Tex. Civ. App.—Beaumont 1979); *Ex parte Werner*, 496 S.W.2d 121, 122 (Tex. Civ. App.—San Antonio 1973) (*semble*).

369. TEX. FAM. CODE ANN. § 14.09(a) (Vernon 1975); *Ex parte McManus*, 589 S.W.2d 790, 792 (Tex. Civ. App.—Dallas 1979). *But see Ex parte Myrick*, 474 S.W.2d 767, 772 (Tex. Civ. App.—Houston [1st Dist.] 1971).

liberty arising from divorce, spousal and child support, and child conservatorship cases.³⁷⁰ Ordinarily, the supreme court will refuse to entertain such writs unless the jurisdiction of a court of civil appeals has been unsuccessfully sought.³⁷¹ Because orders of the supreme court will be treated by courts of civil appeals as dispositive in a particular matter, if relief is first sought in the supreme court, attorneys for parties to a related matter should provide a court of civil appeals with information on action previously taken by the supreme court so that the court of civil appeals will know what grounds for relief were considered by the supreme court, whether the supreme court evaluated the petition on its merits, or whether it deferred consideration to a court of civil appeals.³⁷²

Collateral Attack. Except for a proceeding by bill of review, an attempt to alter the disposition of property in a divorce decree by a subsequent suit constitutes a collateral attack on the judgment and will fail. Thus, an assertion in a new action that the post-divorce receipt of renewal commissions by a life insurance agent constitutes community property is barred as *res judicata* when the issue was argued and resolved in the suit for divorce.³⁷³ Similarly, an ex-wife awarded a fixed amount representing one-half of the 1971 value of the family homestead cannot effectively assert a one-half interest in the present value of the property eight years later.³⁷⁴

Effects of Bankruptcy on Property Division. Questions of the dischargeability of property settlements and property divisions will continue to be raised under the Bankruptcy Reform Act of 1978,³⁷⁵ as under the earlier act.³⁷⁶ As most recently emphasized in *Harbour v. Harbour*,³⁷⁷ the ex-spouse challenging a discharge must show that the obligation was in the nature of alimony, support, and maintenance rather than a property settlement or property division. When the Fifth Circuit Court of Appeals last reviewed a Texas case of this sort in 1975,³⁷⁸ the court concluded that a money judgment awarded by a divorce court to an ex-wife for reimbursement or repayment of a loan constituted an "alimony substitute" for discharge purposes.³⁷⁹ The test, however, must be formulated by the state courts.³⁸⁰ A divorce court's award for a wife's attorney's services are in the

370. TEX. REV. CIV. STAT. ANN. art. 1824a (Vernon Supp. 1980).

371. *Ex parte* Dillard, 577 S.W.2d 519 (Tex. Civ. App.—Texarkana, no writ).

372. 572 S.W.2d at 522.

373. *Bray v. Bray*, 576 S.W.2d 664, 665-66 (Tex. Civ. App.—Beaumont 1978, no writ). When the trial court commits judicial error in wrongly characterizing marital property, the litigant's recourse is a direct appeal. *Id.*

374. *McLemore v. Johnston*, 585 S.W.2d 347, 348-49 (Tex. Civ. App.—Dallas 1979, no writ).

375. 11 U.S.C. § 523(a)(5) (Supp. II 1978), effective October 1, 1979.

376. For a discussion of the application of the previous act, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 143-44 (1979), McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 133 (1978).

377. 590 S.W.2d 828, 830 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

378. *In re Nunnally*, 506 F.2d 1024 (5th Cir. 1975).

379. *Id.* at 1027.

380. *See* *Barth v. Barth*, 448 F. Supp. 710 (E.D. Mo. 1978), *aff'd without published opin-*

nature of support and thus are not subject to discharge in bankruptcy.³⁸¹ If attorney's fees are treated as an integral part of the property division on divorce,³⁸² however, an award for attorney's fees would be properly treated as discharged in bankruptcy.³⁸³

ion, 590 F.2d 340 (8th Cir. 1978). See also *In re Shacter*, 467 F. Supp. 64 (D. Md. 1979); *cf. In re Albin*, 591 F.2d 94 (9th Cir. 1979) (court applied law of Virginia).

381. *Silcott v. Wilson*, 579 S.W.2d 291, 293 (Tex. Civ. App.—Dallas 1979, no writ). See also *In re Steingesser*, 602 F.2d 36, 38 (2d Cir. 1979); *Deems v. Schauer*, 470 F. Supp. 255, 257 (D.N.D. 1979).

382. See notes 368-69 *supra* and accompanying text.

383. See, e.g., *Jones v. Tyson*, 518 F.2d 678, 681 (9th Cir. 1975), in which the court comments on California authorities.