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## Family Law: Husband and Wife

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# FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight\*

NO one will assert that the revision of the constitutional definition of Texas marital property has revolutionized the subject. The revision has, nonetheless, given the topic a new direction that, with proper implementation by the courts, may in time suggest new approaches to problems and their solutions. The principal impact of the new definition will be on characterization and management of marital property, with consequential effects on division upon divorce as well as at death. In any case, *Arnold v. Leonard*<sup>1</sup> will no longer have the central place in the system that it has had for the past fifty-five years. Other suggestions of change are also on the horizon. Allowing prison inmates conjugal visits was unsuccessfully proposed at the 1979 session of the Texas Legislature. Ultimately something may come of this suggestion, which has long been accepted practice in Mexico.

At the 1979 session, legislation was also unsuccessfully proposed to make spousal rape the subject of criminal prosecution. Although a subsequent study indicated that a substantial majority of the public polled does not favor the creation of such an offense,<sup>2</sup> this sort of legislation in all likelihood will be proposed again. A suggestion that has been made from time to time is merely to include rape among the various types of assault, thereby bringing spousal rape within the definition.<sup>3</sup>

## I. STATUS

*Informal Marriage.* In the interval since the publication of the 1980 *Survey*, the Dallas court of civil appeals has withdrawn its initial opinion in *Claveria v. Estate of Claveria*<sup>4</sup> and has substituted a new one.<sup>5</sup> In the new opinion the court emphasized the factual elements supporting an inference of agreement rather than the inference itself. Under section 1.91(b) of the Family Code<sup>6</sup> a judicial inference that a couple had agreed to be married

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1. 114 Tex. 535, 273 S.W. 799 (1925).

2. R. TESKE, F. WILLIAMS & T. DULL, TEXAS CRIME POLL, SPRING, 1980 SURVEY 23 (1980).

3. Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A.J. 1088, 1091 (1980); Comment, *Rape in Marriage: The Law in Texas and the Need for Reform*, 32 BAYLOR L. REV. 109, 117 (1980).

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

5. 597 S.W.2d 434 (Tex. Civ. App.—Dallas 1980), *rev'd*, 24 Tex. Sup. Ct. J. 229 (Feb. 14, 1981).

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

may not be entertained in the absence of a finding that the couple had lived together as husband and wife and had held themselves out to the public in that capacity. As to the holding-out requirement, the court stated that proof of a single instance of acknowledging themselves as husband and wife for the purpose of securing a mortgage loan was insufficient in law to establish holding-out as husband and wife in general.<sup>7</sup> The Texas Supreme Court, however, reversed this decision, holding that the record contained some evidence of an informal marriage.<sup>8</sup> The case was remanded to the appellate court to pass upon the factual sufficiency of the evidence.<sup>9</sup>

Courts in various other states continue to extend the rights of persons who under Texas law might be regarded as informally married.<sup>10</sup> Under federal law unmarried couples have a right to demand that their incomes be aggregated when a lender determines their credit worthiness in a joint mortgage application,<sup>11</sup> but for purposes of the dependency allowance for federal income tax purposes, the United States Court of Appeals for the Fourth Circuit recently held that if cohabitation is violative of local law, the constitutionality of that law may not be tested in the tax court.<sup>12</sup> Hence, if local law does not regard the relationship as unlawful, the claim of the dependency deduction may properly be allowed.<sup>13</sup>

A conflict of laws issue involving informal marriage was before the Beaumont court of civil appeals in *Braddock v. Taylor*.<sup>14</sup> There the couple had begun living together as husband and wife in Texas, but the woman was unaware that the man was already married to someone else. This situation was very similar to that in *Durr v. Newman*.<sup>15</sup> In *Durr*, however, the couple continued to be domiciliaries of Texas even though the man worked in New Mexico, a non-common-law-marriage state, and it was during that time that he was divorced from his prior spouse. In *Braddock* the man moved to California, where informal marriages cannot be entered into, and while living there, the impediment to his remarriage was dissolved by divorce. The question in *Braddock*, just as in *Durr*, was whether the relationship entered into in Texas ripened into a valid informal mar-

7. 597 S.W.2d at 439.

8. *Claveria v. Estate of Claveria*, 24 Tex. Sup. Ct. J. 229 (Feb. 14, 1981).

9. *Id.* at 231.

10. See Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 276-83 (1981); Jennings, *Unmarried Cohabitants: New Issues, New Answers, New Problems*, 8 COMMUNITY PROP. J. 47, 51-52 (1981); Annot., 94 A.L.R.3d 552 (1979).

11. See *Markham v. Colonial Mortgage Serv. Co.*, 605 F.2d 566 (D.C. Cir. 1979); Loeb, *Equal Credit/Equal Management: Spousal Signatures in Community Property States*, 34 PERSONAL FINANCE L.Q. REP. 190 (1980); Note, *Protection of Unmarried Couples Against Discrimination in Lending Under the Equal Credit Opportunity Act: Markam v. Colonial Mortgage Service Co.*, 93 HARV. L. REV. 430 (1979).

12. *Ensminger v. Commissioner*, 610 F.2d 189, 191 (4th Cir. 1979).

13. *Shackelford v. United States*, 3 B.R. 42, 45 (Bankr. Ct. W.D. Mo. 1980); see *In re Rivera*, 5 B.R. 313 (Bankr. Ct. M.D. Fla. 1980).

14. 592 S.W.2d 40 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

15. 537 S.W.2d 323 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.), discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 106 (1977).

riage upon the removal of the impediment. The difference between the two cases turns on maintenance or severance of the Texas domicile of the spouse who was not free to enter into the alleged informal marriage. If the domicile of the parties continues to be Texas, then Texas law will control the marital relationship. If, however, the domicile of one of the parties is changed, then Texas law no longer controls. Hence the court in *Braddock* concluded that the removal of the disability while the husband was a domiciliary of California did not affect the prior relationship commenced in Texas.<sup>16</sup>

A principal difficulty in proving an informal marriage after the death of one of the parties is the dead man's statute.<sup>17</sup> If the contestant of the marriage elicits testimony from the proponent, however, the statute is waived, and the witness may testify fully with regard to transactions with the decedent that tend to prove the informal marriage.<sup>18</sup>

Although in Texas and some other states<sup>19</sup> a bona fide spouse of a void marriage is treated as a spouse for purposes of property acquisitions as long as that person is unaware of impediments to the marriage, social security benefits are not available to putative spouses. In a case recently decided by a federal court sitting in Nevada,<sup>20</sup> the Social Security Administration successfully interposed the invalidity of a foreign divorce of a first marriage to invalidate the second marriage. In that instance the husband had been granted a divorce from his first wife by a Mexican court. When his second wife claimed social security benefits, the Administration successfully argued that because neither the husband nor his first wife had ever been domiciliaries of Mexico, the divorce was invalid and thus the second marriage was void.<sup>21</sup> The court held that even though the second wife had married the husband in good faith and did not know of the impediment to the marriage, she could not claim social security benefits.<sup>22</sup>

*Privileged Testimony.* In *Trammel v. United States*<sup>23</sup> the United States Supreme Court concluded that the federal rule<sup>24</sup> that one spouse may not testify against the other should be modified to allow the spouse-witness to decide whether or not to testify.<sup>25</sup> According to the Court, the spouse-witness "may be neither compelled to testify nor foreclosed from testify-

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16. 592 S.W.2d at 42.

17. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1925).

18. *Smith v. Smith*, 607 S.W.2d 617, 621 (Tex. Civ. App.—Waco 1980, no writ).

19. *See Lee v. Hunt*, 483 F. Supp. 826 (W.D. La. 1978).

20. *Lugot v. Harris*, 499 F. Supp. 1118 (D. Nev. 1980).

21. *See also Thompson v. Harris*, 504 F. Supp. 653, 654-55 (D. Mass. 1980). In *Bragdon v. Bragdon*, 594 S.W.2d 561, 565 (Tex. Civ. App.—Amarillo 1980, no writ), the court refused to allow an ex-husband to attack an Alabama divorce (void because neither party was domiciled there) because he had relied on its validity in remarrying.

22. 499 F. Supp. at 1120.

23. 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980), discussed in Note, *Modification of the Privilege Against Adverse Spousal Testimony: Trammel v. United States*, 34 Sw. L.J. 1013 (1980).

24. *See Wyatt v. United States*, 362 U.S. 525 (1960); *Hawkins v. United States*, 358 U.S. 74 (1958).

25. 63 L. Ed. 2d at 196, 100 S. Ct. at 914.

ing."<sup>26</sup> A later Texas case, however, noted that the decision in *Trammel* did not affect the Texas privilege rule.<sup>27</sup> Thus, in Texas courts, willingness of a spouse to testify is not enough to remove the bar to the testimony.<sup>28</sup> Voluntary testimony given in certain exceptional circumstances, however, is admissible.<sup>29</sup>

*Interspousal Immunity.* Although the Texas Supreme Court has not directly addressed the question of whether there might be recovery for negligence in an interspousal case, a Texas court of civil appeals has held that a cause of action does not lie.<sup>30</sup> On the other hand, the Supreme Judicial Court of Massachusetts has recently held that the doctrine of interspousal immunity will not preclude recovery in a nonvehicular negligence case.<sup>31</sup>

The law of domicile is controlling, however, over the *lex loci delicti* with respect to a tort between non-Texas spouses. In *Robertson v. Estate of McKnight*<sup>32</sup> a husband and wife who were both domiciled in New Mexico were killed in an airplane crash that occurred in Texas. The husband was the pilot of the plane. The estate of the wife brought an action in Texas for wrongful death against the estate of the husband. The trial court granted the defendant's motion for summary judgment because Texas law bars a suit between spouses based on negligence.<sup>33</sup> The Tyler court of civil appeals affirmed<sup>34</sup> and was then reversed by the Texas Supreme Court.<sup>35</sup> Article 4678,<sup>36</sup> as it read at the time of the deaths, dealt with choice of law in tort cases, but it applied only to causes of action involving a death occurring outside Texas. Accordingly, the court ruled that article 4678 was not relevant to this case.<sup>37</sup>

In *Robertson* the applicable statute was article 4671,<sup>38</sup> but because article 4671 contained no statutory choice of law provisions for torts that occurred within Texas, the court turned to the common law of Texas to determine which state's law controlled.<sup>39</sup> Citing *Gutierrez v. Collins*,<sup>40</sup> the court concluded that the subject matter of the dispute was more significantly related to the law of New Mexico than to that of Texas.<sup>41</sup> The court examined the record and found that it revealed "no contacts between [the] interspousal relationship and Texas other than the fact that the accident

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26. *Id.*

27. *Young v. Texas*, No. 58-668 (Tex. Crim. App. Sept. 10, 1980).

28. *Id.*

29. Note, *supra* note 23, at 1015-16.

30. *Bruno v. Bruno*, 589 S.W.2d 179, 179 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

31. *Brown v. Brown*, 409 N.E.2d 717, 719 (Mass. 1980).

32. 609 S.W.2d 534 (Tex. 1980).

33. *Id.* at 535.

34. 591 S.W.2d 639, 644 (Tex. Civ. App.—Tyler 1979).

35. 609 S.W.2d 534, 537 (Tex. 1980).

36. 1917 Tex. Gen. Laws, ch. 156, § 1, at 365; *see* TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1980-1981) (current version).

37. 609 S.W.2d at 536.

38. TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1980-1981).

39. 609 S.W.2d at 536.

40. 583 S.W.2d 312 (Tex. 1979).

41. 609 S.W.2d at 537.

. . . occurred in Texas."<sup>42</sup> The court rejected an argument that the New Mexico rule permitting interspousal suits violated the public policy of Texas.<sup>43</sup>

*Robertson* is analogous to *Lederle v. United Services Automobile Association*.<sup>44</sup> Although the latter case lacks precedential value because the parties settled, and the cause then before the supreme court was dismissed ab initio, the conclusion reached by the Waco court of civil appeals in *Lederle* is consistent with *Robertson*. In *Lederle* a Texas married woman was injured while driving in Oklahoma. Applying the Texas law as understood at the time, the court invoked the rule of domicile to preclude recovery on the part of the wife in an accident in which the husband was a participant.<sup>45</sup> On the other hand, a federal court sitting in New Mexico applied the *lex loci delicti* rule in awarding relief to a Texas-domiciled wife who was injured by her husband in New Mexico.<sup>46</sup>

In a Pennsylvania case,<sup>47</sup> Maryland spouses brought an action for damages for injuries they suffered in an automobile collision with the defendant in Pennsylvania. With respect to the cause of action of the wife, who was the passenger, the defendant sought contribution against the husband. The defendant was successful in this regard, because under Pennsylvania law a husband-driver is not immune from liability for contribution in this sort of case.<sup>48</sup>

In *Lester v. United States*<sup>49</sup> the federal district court for the Northern District of Texas concluded that a cause of action arising in Guam on behalf of a Texas married woman would require the application of Texas marital law for the determination of damages, although the law of Guam would apply with respect to the determination of whether a cause of action arose.<sup>50</sup> This may be typified as a middle ground between the Texas and Pennsylvania approaches to torts involving foreign spouses.

An interspousal vehicular tort may also involve the application of the Texas guest statute. In *Pomerantz v. Rosenberg*<sup>51</sup> the plaintiff-passenger sued the driver, her deceased husband's brother, for injuries sustained in an automobile accident. The court ruled that the action was barred under the Texas guest statute<sup>52</sup> because the plaintiff was within the second degree of affinity to the driver of the automobile, and that the plaintiff's husband's

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42. *Id.*

43. *Id.*

44. 394 S.W.2d 31 (Tex. Civ. App.—Waco 1965), writ *dism'd by agr. per curiam*, 400 S.W.2d 749 (Tex. 1966), discussed in McKnight, *Family Law: Annual Survey of Texas Law*, 24 Sw. L.J. 49, 51 (1970); Comment, *Lederle—A Vote for the Domicile Rule in Interspousal Conflict Causes*, 18 BAYLOR L. REV. 477 (1966).

45. 394 S.W.2d at 34.

46. *Roberson v. U-Bar Ranch, Inc.*, 303 F. Supp. 730, 731-32 (D.N.M. 1968).

47. *Krick v. Carter*, 477 F. Supp. 152 (M.D. Pa. 1979).

48. *Id.* at 156.

49. 487 F. Supp. 1033 (N.D. Tex. 1980).

50. *Id.* at 1039.

51. 593 S.W.2d 815 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

52. TEX. REV. CIV. STAT. ANN. art. 6701b, § 1(a) (Vernon 1977).

death did not terminate this relationship because there were living issue of the marriage of the plaintiff and the defendant's brother.<sup>53</sup>

*Interspousal Crime.* In *Semaire v. Texas*<sup>54</sup> a husband charged with the killing of his wife pleaded self-defense. The accused had gone to an apartment where his estranged wife was staying in order to exchange her coat for some of his jewelry. She refused to admit him and told him to leave the coat and that she would not return the jewelry. She also warned him that she would start shooting if he did not go away. The husband broke down the door and stumbled into the room but said that he had no intention of harming his wife. On glancing at his wife, the husband saw her raise her hand, as though she was going to shoot him, and he thereupon shot her. The wife died of the wounds inflicted, and the accused was prosecuted for murder. The trial court refused to charge the jury on the issue of self-defense. The court of criminal appeals reversed the conviction.<sup>55</sup> The court reasoned that under the circumstances the wife's use of force would not have been lawful as a matter of law, and the evidence did not show conclusively that the accused provoked his wife's use of force.<sup>56</sup> Because the accused husband denied any intent to harm his wife when he broke into the apartment, the court ruled that the evidence created only a question of fact for the jury on provocation: the accused was entitled to have the jury decide whether he had a reasonable belief that he was justified in defending himself against the use of force that he believed was unlawful.<sup>57</sup>

*Wife's Name.* The primitive notion that identity is fixed by the name by which one is called continues to require a legal response in some instances. A corollary to this notion is that a wife's conventional use of her husband's surname somehow requires her to refrain from using another surname for other purposes. Rigid adherence to this sort of primitivism among courthouse bureaucrats is not surprising. In response to an inquiry by one such bureaucrat, the Texas attorney general very properly advised that a married woman may register to vote by using a hyphenated composite of her maiden surname and that of her husband.<sup>58</sup>

## II. CHARACTERIZATION OF MARITAL PROPERTY

*Antenuptial Agreements.* Achieving the purposes of premarital agreements and contracts is made a great deal easier under the amendment to article XVI, section 15 of the Texas Constitution than it had been under the pred-

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53. 593 S.W.2d at 818.

54. 612 S.W.2d 529 (Tex. Crim. App. 1980).

55. *Id.* at 531.

56. *Id.*

57. *Id.*

58. TEX. ATT'Y GEN. OP. No. MW-225 (1980).

ecessor provision.<sup>59</sup> The Matrimonial Property Act of 1967<sup>60</sup> provided that marital property agreements between prospective spouses were effective even if they were merely agreements in writing and not otherwise contractual. Because the property regime of the parties to such agreements is constitutionally defined once marriage ensues, the statute failed to achieve its purpose to the extent that the parties attempted to alter the character of their future community acquisitions. The constitutional definition of marital property was construed with such strictness that it was almost as difficult to enter into a valid premarital undertaking affecting marital acquisitions during the course of a marriage as it was to enter into the same sort of undertaking during marriage. In *Williams v. Williams*<sup>61</sup> the Texas Supreme Court clearly enunciated the proposition that if property acquired as community property was sought to be affected by such an agreement, performance of formalities with respect to the property was necessary in order to give the premarital agreement its intended effect.<sup>62</sup> Consequently, the utility of such agreements was curtailed seriously. The 1980 constitutional amendment responded to the need for reform necessitated by *Williams*.

The self-executing constitutional amendment of 1980 makes it possible for persons intending to marry to provide that what would otherwise be community property, because acquired during the marriage, will be separate property. In drafting such agreements, however, counsel for each party should be particularly careful to insure that the other party understands the terms of the agreement.<sup>63</sup> Further, in order to preclude a future assertion of fraud, duress, or overreaching, it is virtually imperative that

59. TEX. CONST. art. XVI, § 15; see McKnight & Davis, *For Amendment No. 9*, 43 TEX. B.J. 921 (1980). The amended version reads:

§ 15. Separate and community property of husband and wife

All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time 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 acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; and the spouses may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned by one of them, or which thereafter might be acquired, shall be the separate property of that spouse; and 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.

TEX. CONST. art. XVI, § 15 (Vernon Pam. Supp. 1955-1980).

60. 1969 Tex. Gen. Laws, ch. 888, § 1, at 2729; see McKnight & Davis, *supra* note 59.

61. 569 S.W.2d 867 (Tex. 1978), discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 105-08 (1979).

62. 569 S.W.2d at 870.

63. See *Babb v. Babb*, 604 S.W.2d 574, 576 (Ark. 1980) (ante-nuptial agreement valid because no fraud or misunderstanding).



both parties be represented by independent counsel. A problem may be encountered, however, with regard to the compensation of counsel for the party who is less able to pay an appropriate fee. To deal with this problem, provisions for the payment of the fee of both parties can be built into the agreement as part of a formula for the payment of future taxes and related matters.<sup>64</sup>

The language of the agreement should be carefully drawn to track the terms of the amended constitution. The constitution now contains two provisions of different breadth. First, spouses or proposed spouses are allowed to partition any future acquisitions that would be community property, that is, income from separate property or earnings.<sup>65</sup> Secondly, there is a provision that allows the spouses to agree that income from separate property will be the separate property of the owner of the property producing the income.<sup>66</sup> This latter provision was inserted to deal specifically with the estate tax cases that prompted the amendment.<sup>67</sup> Because the partition provision embraces both earnings and income from separate property and the agreement provision covers only income from separate property, instruments that are intended to cover earnings as well as income from separate property should be specifically stated in terms of partition, as that word is used in the constitution. Because there may be implementing legislation related to the constitutional provision, the terms of that legislation should be carefully followed in the drafting of future partitions and agreements.<sup>68</sup>

Counsel will want to familiarize themselves with the general property consequences, as well as the tax consequences, of agreements that they seek to draw. Because similar agreements have long been recognized in

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64. See *Estate of Wylie v. Commissioner*, 69 T.C. 227 (1977), *rev'd*, 610 F.2d 1282 (5th Cir. 1980).

65. TEX. CONST. art. XVI, § 15; see note 59 *supra*.

66. *Id.*

67. *Castleberry v. Commissioner*, 68 T.C. 682 (1977), *rev'd*, 610 F.2d 1282 (5th Cir. 1980); *Estate of Wylie v. Commissioner*, 69 T.C. 227 (1977), *rev'd*, 610 F.2d 1282 (5th Cir. 1980).

68. See Roberts, *Texas Family Code: Separate Property Amendments*, 44 TEX. B.J. 50 (1981). The proposal is that each agreement have this or substantially similar language: "EACH PARTY TO THIS AGREEMENT UNDERSTANDS THAT BY SIGNING THIS DOCUMENT HE OR SHE MAY BE PERMANENTLY SURRENDERING CLAIMS HE OR SHE WOULD OTHERWISE HAVE UNDER TEXAS LAW TO INCOME OR PROPERTY DERIVED FROM SEPARATE PROPERTY OF HIS OR HER SPOUSE." *Id.* at 51 (emphasis in original). This proposal ought not to be enacted. Insisting that each party be represented by independent counsel is far more to the point. The requirement of such a recital is not only demeaning to the intelligence of the parties, but puts an undue requirement of formality on the undertaking. If such a provision is included and if the proponent of the agreement has the burden of showing a lack of fraud in reaching the agreement, it may be all the evidence that a proponent of an agreement will need to discharge his burden of showing that the other party gave informed consent. Indeed, if the agreement is sworn to before a notary, as such agreements frequently are, this provision would be *prima facie* evidence of the truth of the statement made and would shift any burden of the proponent to the contestant. The validity of agreements entered into in states without such recitals might also be unnecessarily questioned. In drafting the amendment, it was thought sufficient that the agreement should be in writing. See also *Estate of Bright v. United States*, 619 F.2d 407 (5th Cir. 1980); 10 TEX. TECH. L. REV. 1119 (1979).

such community property jurisdictions as Louisiana and California, along with separate property jurisdictions,<sup>69</sup> counsel may want to consider the experience with such agreements in sister states. Additionally, counsel should explore the possibility of providing for the consequences of divorce<sup>70</sup> and death in such agreements.<sup>71</sup> As used in other states, agreements of this sort frequently include provisions with respect to the division of property on divorce. Pending divorce, provisions abrogating the duty of support of a spouse or of children, however, cannot necessarily be relied upon as binding.

*Spousal Partitions and Agreements.* Prior to 1963,<sup>72</sup> the contractual capacity of a Texas woman of full age altered significantly upon her marriage, and the law of interspousal agreements reflected that change. Although Texas law gave effect to premarital agreements by engaged couples for limited purposes,<sup>73</sup> interspousal transactions during marriage were severely limited by the wife's lack of general capacity to enter into enforceable agreements,<sup>74</sup> the policy of the law to protect the married woman from the undue influence of her husband,<sup>75</sup> and the independent policy of protecting creditors of the marriage.<sup>76</sup> The only circumstance in which spouses were allowed to convert their community property into separate property, except by gift, was the partition of community property in anticipation of divorce.<sup>77</sup> Not until the Texas Constitution was amended in 1948 was it possible for spouses to partition their community property whenever they chose; even then, however, completed partitions of future acquisitions could not be made. Although the weight of judicial precedent would have allowed such a partition on separation,<sup>78</sup> the language of the constitution, if literally construed, forbade a partition of nonexistent community property in that instance as well. Under the 1980 revision of the constitutional definition of marital property, partitions of future acquisitions of community property are clearly allowed and, as the term "parti-

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69. See Bartke, *Marital Sharing—Why Not Do It By Contract?*, 67 GEO. L.J. 1131 (1979).

70. See *Greschler v. Greschler*, 71 A.D.2d 322, 422 N.Y.S.2d 718 (1979) (by striking down New York constitutional provision, court did not specifically indicate that premarital agreements would control in cases dealing with consequences of divorce).

71. See Ingram, *Premarital and Marital Planning for Preservation of Separate Property*, in MARRIAGE DISSOLUTION IN TEXAS 1980, ch. A., app. E at E-11 to E-16 (State Bar of Texas 1980).

72. See 1963 Tex. Gen. Laws, ch. 472, §§ 1-6, at 1188-89.

73. See *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964) (prenuptial agreement that income arising from property would remain separate was invalid); *Gorman v. Gause*, 56 S.W.2d 855 (Tex. Comm'n App. 1933, judgment adopted) (spousal agreement that property acquired during marriage would be separate property was void).

74. See *Kellett v. Trice*, 95 Tex. 160, 66 S.W. 51 (1902).

75. See *Protzel v. Schroeder*, 83 Tex. 684, 19 S.W. 292 (1892).

76. See *Cox v. Miller*, 54 Tex. 16 (1880).

77. See *Rains v. Wheeler*, 76 Tex. 390, 13 S.W. 324 (1890).

78. See McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 32 (1972); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 134 n.36 (1968).

tion" has already been defined by statutory usage,<sup>79</sup> a partition may be in unequal shares as applied to a particular property or unequal shares of different properties. A partition, however, must involve a division so that each spouse takes some part of the community property; if one takes all, there is no partition. The same admonitions are applicable to partitions or agreements between spouses as antenuptial agreements.<sup>80</sup>

*Separate Property Acquired by Gift or Inheritance.* In spite of the availability of marital property agreements, the principal sources of separate property will continue to be property brought into the marriage, that acquired during the marriage by gift or inheritance, and those acquisitions that represent the value of physical or psychic loss. One of the curiosities of Texas marital property law is that a gift to both spouses is interpreted as a tenancy in common shared by both as separate property.<sup>81</sup> This result rests merely on the actual intention of the donor or the constitutional language that associates acquisition by gift with separate rather than community property. In other community property systems, however, it is almost universally held that the community can be the recipient of a gift.<sup>82</sup> The Texas view, that a deed of gift to the husband and wife causes each to take a half interest as separate property, was recently reiterated in *White v. White*.<sup>83</sup>

A far more complicated, but perhaps more rational, set of rules governs transactions between Texas spouses. For example, there is a presumption of gift when one spouse transfers separate or community property to the other<sup>84</sup> or buys property in the name of the other using the separate cash of the purchaser to pay the purchase price.<sup>85</sup> An alleged recent example of the latter type of transaction is *Purser v. Purser*,<sup>86</sup> in which the husband asserted that he used his separate funds to purchase realty in the names of both himself and his wife. The evidence, however, was insufficient to prove that the property was paid for at its inception with the husband's separate property, and, thus, the court concluded that the presumption of gift did not arise.<sup>87</sup> If the presumption of gift had applied,<sup>88</sup> however, and

79. TEX. FAM. CODE ANN. § 5.42 (Vernon 1975); 1969 Tex. Gen. Laws, ch. 577, § 1, at 2729; 1967 Tex. Gen. Laws, ch. 309, § 1, at 738; 1949 Tex. Gen. Laws, ch. 242, § 1, at 450.

80. See text accompanying notes 63 and 65-68 *supra*.

81. See *Bradley v. Love*, 60 Tex. 472 (1883).

82. See W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 155-56 (1971). See also Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1 (1969).

83. 590 S.W.2d 587, 588 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

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

85. See *Higgins v. Johnson's Heirs*, 20 Tex. 389 (1857).

86. 604 S.W.2d 411 (Tex. Civ. App.—Texarkana 1980, no writ).

87. *Id.* at 414. Insufficient and unconvincing evidence to disprove presumed intent is a common pitfall in these cases. See, e.g., *Hampshire v. Hampshire*, 485 S.W.2d 314, 316 (Tex. Civ. App.—Fort Worth 1972, no writ) (husband failed to rebut presumption that husband and wife grantees each acquire a one-half interest in property conveyed by deed); *Patterson v. Metzger*, 424 S.W.2d 255, 260 (Tex. Civ. App.—Corpus Christi 1967, no writ) (husband's evidence so meager and unsatisfactory that it could not rebut presumption of community property); cf. *Peterson v. Peterson*, 595 S.W.2d 889, 892-93 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (husband's intention not to make a gift proved).

88. The court further noted that if it had been proved that separate funds had been used

the wife had taken an undivided interest in the property, the terms of the recently adopted constitutional amendment<sup>89</sup> would cause the income produced by the donee's share of the property to be her separate estate, while the income produced by the husband's share would be community property.

A situation was presented in *Duke v. Duke*<sup>90</sup> that is difficult to resolve. Prior to marriage the husband entered into a contract to buy land and paid earnest money as part of the contract price, but he directed that the title be put in the name of himself and his named "wife," a woman he married soon afterward. The conveyance was made during the marriage as the husband had directed. Though this apparent acquisition during marriage made the property presumptively community, the fact that the purchase occurred prior to marriage would make the property the husband's separate property,<sup>91</sup> were it not for the form of the title, made in accordance with the purchaser's prior instructions. There is, therefore, a suggested intention of gift of an undivided half of the property, though there is no presumption of gift under these circumstances. The appellate court, however, side-stepped this issue by concluding that the contract of sale was merged into the deed,<sup>92</sup> and, thus, the facts of the sale were screened effectively from legal view.

*Tracing.* The principal means of rebutting the presumption that all property acquired during marriage is community are (1) showing that the property was acquired by gift or inheritance, (2) showing that the property was acquired prior to marriage, and (3) tracing the existing property to a separate property source. In *Batmanis v. Batmanis*<sup>93</sup> the heirs of a deceased spouse were able to show that certain certificates of deposit could be traced to similar certificates held by the decedent prior to his marriage.<sup>94</sup> In another case involving the purchase of realty, the purchasing spouse was able to trace the purchase price to separate proceeds of inherited property deposited in his bank account and withdrawn within one month of his marriage.<sup>95</sup> The appellate court sustained the finding of the trial court by "viewing the evidence in its entirety,"<sup>96</sup> although no evidence was introduced to establish the beginning balance of the account into which the funds were deposited or to establish what deposits or withdrawals were made between the date of marriage and the date of the withdrawal. This

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to buy the land, the husband's evidence was insufficient to rebut the presumption of gift that would have arisen. 604 S.W.2d at 414.

89. TEX. CONST. art. XVI, § 15; see note 59 *supra*.

90. 605 S.W.2d 408 (Tex. Civ. App.—El Paso 1980, writ *dism'd*).

91. See *Evans v. Ingram*, 288 S.W. 494 (Tex. Civ. App.—Waco 1926, no writ).

92. 605 S.W.2d at 410.

93. 600 S.W.2d 887 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ *ref'd n.r.e.*).

94. *Id.* at 889.

95. *Peterson v. Peterson*, 595 S.W.2d 889, 892 (Tex. Civ. App.—Austin 1980, writ *ref'd n.r.e.*).

96. *Id.* at 892.

approach may be appropriate for dealing with claims for reimbursement, but not for tracing.

Another conclusion reached in *Batmanis* is difficult to square with the decision of the Texas Supreme Court in *Tarver v. Tarver*.<sup>97</sup> *Tarver* involved the problem of untangling the claims of two successive communities when claimants of the first community, asserting the right of their deceased parent, made a claim against the second community for funds of the first allegedly commingled therein. In *Tarver* the supreme court held that the burden of tracing was on the claimants of the first community and that the fiduciary situation of the survivor of the first community did not affect this burden of proof.<sup>98</sup> Without citing *Tarver*, the court in *Batmanis* held that the claimants of the first marriage succeeded in their obligation of tracing by showing that a specific amount of rents and dividends had been collected during the second marriage from property that was the deceased parent's share of the first community.<sup>99</sup> These funds were deposited in the checking account of the surviving parent of the first community and there were commingled with the funds of the second community. In this instance, the court said that the survivor's responsibility as a trustee allowed the beneficiaries to trace the funds into the trustee's new investments made with commingled funds.<sup>100</sup> The court attempted to legitimize its departure from the holding in *Tarver* by relying on a variant of the first-in-first-out rule recently relied on in tracing cases: "where, as here, the trustee commingles [*sic*] trust money with his own and money is expended, it will be presumed that his own money is expended first."<sup>101</sup> Thus, the court held that the first community was entitled to recovery of the rents and dividends.<sup>102</sup>

As an aid to tracing the courts have developed a rule that when an account contains both separate and community funds, withdrawals for community purposes will be deemed to be community funds, thereby leaving separate funds within the account.<sup>103</sup> The utilization of this rule was dubiously employed in *Batmanis*<sup>104</sup> and is certainly inapplicable to show that a purchase was made with separate funds when money is merely withdrawn from a commingled account to make a purchase during marriage that

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97. 394 S.W.2d 780 (Tex. 1965).

98. *Id.* at 783.

99. 600 S.W.2d at 890.

100. *Id.*

101. *Id.*

102. *Id.* In *Gentry v. Marburger*, 596 S.W.2d 201 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.), which also involved successive community estates, the executor of the first wife sought the power of a justice court in evicting the second wife from property in which the first community claimed an interest. The court concluded that the justice court lacked jurisdiction of a forcible detainer suit in this instance because questions of title to the property were directly involved. *Id.* at 203-04.

103. See *Harris v. Ventura*, 582 S.W.2d 853 (Tex. Civ. App.—Beaumont 1979, no writ); *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.—Dallas 1955, writ dism'd).

104. 600 S.W.2d at 890.

would otherwise be characterized as a community acquisition.<sup>105</sup>

When a purchase is made during marriage it is presumptively community property.<sup>106</sup> The same is true with respect to a loan of money to a spouse. The money borrowed by the spouse is deemed to be community property unless the lender clearly looks only to the separate estate of the borrowing spouse for repayment. In *Mortenson v. Trammell*<sup>107</sup> the court misapplied this rule. The wife borrowed funds from a lender and assigned her separate property as collateral for the note that was made in her name only. The court concluded from these facts that the lender had looked to her separate credit and, therefore, the money borrowed would be separate property.<sup>108</sup> From the report, however, the lender appeared not to have looked solely to the wife's separate credit. Even though the lender on default might have had recourse to the separate collateral, the lender apparently was not so restricted, and in any case, if the collateral had been insufficient to cover the amount of the loan, recourse could have been had against the community.<sup>109</sup> In previous cases this rule has been very strictly applied.<sup>110</sup>

*Federal Retirement Benefits.* Since the United States Supreme Court decided *Hisquierdo v. Hisquierdo*,<sup>111</sup> which defined federal railroad retirement benefits as the separate property of the employee-spouse based on the intent of Congress, Texas courts have held that federal railroad retirement and other benefits are not "property" subject to division on divorce.<sup>112</sup> This reasoning has been employed in various situations,<sup>113</sup> including cases involving Veterans Administration disability benefits.<sup>114</sup>

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105. See *Kuehn v. Kuehn*, 594 S.W.2d 158 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (first withdrawals from bank account presumed community).

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

107. 604 S.W.2d 269, 275-76 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

108. *Id.* at 276.

109. Equally unjustified is the conclusion that an obligation is owed by the community because the liability was secured by community property. *Aronson v. Aronson*, 590 S.W.2d 189, 190-91 (Tex. Civ. App.—Dallas 1980, no writ).

110. See, e.g., *Brussard v. Tian*, 156 Tex. 371, 295 S.W.2d 405 (1956) (vendor's lien note executed during marriage by husband presumed a community obligation); *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881 (1937) (property acquired on community credit and money borrowed on community obligation is community property); *Carter v. Grabeel*, 341 S.W.2d 458 (Tex. Civ. App.—Amarillo 1960, no writ) (obligation to pay deferred purchase price of property deeded to wife after marriage presumed a community debt). See also *Bell v. Bell*, 593 S.W.2d 424 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (when separate cash and community credit are used in making a purchase, the property purchased is held as a tenancy in common between the separate and community estate in the proportion each bears to the purchase price).

111. 439 U.S. 572 (1979). For another aspect of railroad retirement benefits, see *United States R.R. Retirement Bd. v. Fritz*, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980).

112. *Perez v. Perez*, 587 S.W.2d 671, 672 (Tex. 1979) (military retirement pay); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 401 (Tex. 1979) (railroad retirement pay).

113. See McKnight, *Family Law: Husband and Wife, Annual Survey of the Texas Law*, 34 Sw. L.J. 115, 121-23 (1980).

114. See *Ex parte Johnson*, 591 S.W.2d 453 (Tex. 1979); *Ex parte Pummill*, 606 S.W.2d 707 (Tex. Civ. App.—Fort Worth 1980); *Arrambide v. Arrambide*, 601 S.W.2d 197, 198-99 (Tex. Civ. App.—El Paso 1980, no writ); *Johnson & Anderson, Divorce and Veterans Benefits*, 44 TEX. B.J. 78 (1981). In *Arrambide*, 601 S.W.2d at 198-99, the ex-husband had ex-

The United States Supreme Court is expected to determine shortly whether the rule in *Hisquierdo* is applicable to all federal military retirement benefits.<sup>115</sup> Civil service retirement benefits, however, are treated as community property on the basis of the provision in the federal statute stating that community property benefits in civil service retirement pay may be divided by a divorce court.<sup>116</sup> A different sort of federal statute,<sup>117</sup> however, was struck down as unconstitutional when applied in community property states.<sup>118</sup> This statute prescribed a presumption that income of a husband would be treated as his separate property unless the wife exercised substantial management and control over it.<sup>119</sup> The application of this rule was construed as discriminating against married women in community property jurisdictions, in violation of the equal protection clause of the fifth amendment to the United States Constitution.<sup>120</sup>

Disconcerting comments appear in *Gaudion v. Gaudion*<sup>121</sup> to the effect that residence rather than domicile controls the character of earnings in the nature of federal retirement benefits. In that divorce case the husband asserted that the interest accumulated toward his retirement while he was stationed in Texas was not community property but rather was a separate interest because he had continuously maintained his domicile in a common law state. If this was indeed true, the property should have been characterized as separate. The court merely held that residence controlled, without carefully considering the fact of domicile.<sup>122</sup>

Two recent cases considered an attorney's liability to his client for failure to raise the issue of divisibility of military retirement benefits at the time of the divorce proceeding. In *Perkins v. Barrera*<sup>123</sup> the former wife sued her attorney for the amount to which she would be entitled in a partition of retirement benefits not dealt with in her divorce in 1967. At that time, the husband already was retired and receiving retirement benefits. There was a dispute as to whether the attorney advised the wife of her rights in the 1967 divorce action. Following the divorce, however, a settlement had been reached between the ex-spouses with respect to the ex-

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changed his military retirement benefits for Veterans Administration benefits. The ex-wife questioned the propriety and consequences of the exchange. See *Valdez v. Ramirez*, 574 S.W.2d 748, 752 (Tex. 1978), discussed in *McKnight*, *supra* note 61, at 146; *Dessommes v. Dessommes*, 505 S.W.2d 673, 678-79 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.), discussed in *McKnight*, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 73-73 (1974).

115. See *McCarty v. McCarty*, No. 45056 (Cal. Ct. App. Feb. 6, 1980), discussed in 8 COMMUNITY PROP. J. 71-72 (1981). Texas courts have continued to treat ordinary military retirement benefits as community property. *McGinty v. McGinty*, 592 S.W.2d 34, 35 (Tex. Civ. App.—Beaumont 1979, writ dism'd).

116. See *Cowan v. Plsek*, 592 S.W.2d 422 (Tex. Civ. App.—Waco 1979, no writ).

117. 42 U.S.C. § 411(a)(5)(A) (1976).

118. *Hester v. Harris*, 631 F.2d 53, 57 (5th Cir. 1980); *Carrasco v. Secretary of HEW*, 628 F.2d 624, 630-31 (1st Cir. 1980).

119. 42 U.S.C. § 411(a)(5)(A) (1976).

120. *Hester v. Harris*, 631 F.2d 53, 57 (5th Cir. 1980); *Carrasco v. Secretary of HEW*, 628 F.2d 624, 630-31 (1st Cir. 1980).

121. 601 S.W.2d 805, 807 (Tex. Civ. App.—Austin 1980, no writ).

122. *Id.* at 807.

123. 607 S.W.2d 3 (Tex. Civ. App.—San Antonio 1980, no writ).

wife's claim for her community interest in the retirement benefits. In her suit against the lawyer, the ex-wife did not seek consequential damages. The trial court entered summary judgment against the ex-wife, and the court of civil appeals affirmed.<sup>124</sup> On rehearing the appellate court concluded that even if the attorney had failed to advise his client of her rights, she had been fully compensated for the rights she had allegedly lost by her settlement with her former husband.<sup>125</sup>

In *Medrano v. Miller*,<sup>126</sup> however, it was the husband who sued his lawyer for malpractice in that the lawyer had failed to have the husband's nonvested military retirement benefits adjudicated in his 1972 divorce proceeding. A majority of the San Antonio court of civil appeals held that because the law was unsettled at the time of the divorce as to the partitionability of nonvested military retirement benefits, the attorney, who was not shown to have acted otherwise than in good faith on behalf of his client, was not negligent in failing to get an adjudication of the interest in the benefits.<sup>127</sup> Chief Justice Cadena, however, could not agree that the attorney was not negligent as a matter of law.<sup>128</sup> He nonetheless concurred with the majority's disposition of the case on the narrower ground that the ex-husband's rights against his attorney, if any, were barred by the statute of limitation.<sup>129</sup>

*Loss of Consortium and Workers' Compensation Claims.* In *Whittlesey v. Miller*<sup>130</sup> the Texas Supreme Court made it clear that the wife as well as the husband has a cause of action for loss of consortium and that the recovery is the separate property of the plaintiff-spouse.<sup>131</sup> The court concluded that the rule would be applied prospectively, but was not binding under the principle of stare decisis.<sup>132</sup> In *Newman v. Minyard Food Stores, Inc.*<sup>133</sup> the husband's injury that gave rise to the wife's complaint occurred ten months prior to the supreme court's decision in *Whittlesey*. Nevertheless, the court concluded that a cause of action would lie.<sup>134</sup> In *Copelin v. Reed Tool Co.*<sup>135</sup> the principles involved in this sort of cause of action were defined in greater detail. Although the workers' compensation statute<sup>136</sup> exempts the employer of the injured worker-spouse from liability

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124. *Id.* at 7.

125. *Id.* at 7-8.

126. 608 S.W.2d 781 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

127. *Id.* at 784.

128. *Id.* at 785 (Cadena, C.J., concurring).

129. *Id.*

130. 572 S.W.2d 665 (Tex. 1978); see Note, *An Expanded Cause of Action in Texas—Whittlesey v. Miller: Either Spouse May Recover for the Negligent Impairment of Consortium*, 33 Sw. L.J. 895 (1979).

131. 572 S.W.2d at 668, 669.

132. *Id.* at 669.

133. 601 S.W.2d 754 (Tex. Civ. App.—Dallas 1980, writ granted per curiam, 24 Tex. Sup. Ct. J. 116 (Dec. 20, 1980)).

134. *Id.* at 757.

135. 596 S.W.2d 302 (Tex. Civ. App.—Houston [14th Dist.], *aff'd*, 610 S.W.2d 736 (Tex. 1980).

136. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).



arising from the worker's negligence and hence precludes the other spouse's action in those instances, the employer is not exempt from liabilities that arise for intentional injuries inflicted by the employer on an employee. Thus, the worker's spouse has a cause of action outside the statutory scheme, and the recovery is characterized as the separate estate of the recovering spouse.<sup>137</sup>

Although there is no question that ordinary earnings, and compensation for their loss, are community property, difficult questions of characterization have arisen from time to time with respect to earnings that one spouse may make when employed by the other. Some old cases rejected the idea of a contract between spouses for wages when Texas statutes concerning a married woman's contractual capacity and powers of management over community property were significantly different.<sup>138</sup> A contrary view, however, was even then expressed when employment was within a business context.<sup>139</sup> *United States Fidelity & Guaranty Co. v. Roberts*<sup>140</sup> posed a question regarding the compensability of professional services rendered by one spouse to the other in the context of a workers' compensation claim. Although the court held that the serving spouse could not recover under workers' compensation law for services usually rendered under normal circumstances,<sup>141</sup> the court stated that a wife might recover for nursing services customarily performed by persons engaged in nursing activity when the husband was in need of such services as a result of an injury for which workers' compensation was sought.<sup>142</sup>

*Intestate Succession.* From time to time the suggestion has been made that the Texas rule with respect to intestate succession to community property be changed so that the surviving spouse would take the whole of the deceased spouse's community interest. Since 1844 Louisiana has maintained the rule that if a spouse dies intestate, a life estate, terminable upon remarriage, in the deceased spouse's community share passes to the surviving spouse if all of the descendants of the decedent are also those of the surviving spouse.<sup>143</sup> The State Bar of Texas has proposed that Texas should follow Louisiana's lead in making the surviving spouse the absolute taker

137. See Rubinstein, *Personal Injuries and the Texas Survival Statute: The Case for Recovery of Damages for a Decedent's Lost Future Earnings*, 12 ST. MARY'S L.J. 49 (1980).

138. See *Frame v. Frame*, 120 Tex. 61, 36 S.W.2d 152 (1931); *Pottorff v. J.D. Adams Co.*, 70 S.W.2d 745 (Tex. Civ. App.—El Paso 1934, writ ref'd).

139. See *In re Gutierrez*, 33 F.2d 987 (S.D. Tex. 1929).

140. 598 S.W.2d 49 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

141. *Id.* at 50; see *Transport Ins. Co. v. Polk*, 400 S.W.2d 881 (Tex. 1966); *Finch v. Texas Employers' Ins. Ass'n*, 564 S.W.2d 807 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

142. 598 S.W.2d at 51. The effects of remarriage on a widow's workers' compensation benefits are dealt with in *Blankenship v. Highlands Ins. Co.*, 594 S.W.2d 147 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); *Freeman v. Texas Compensation Ins. Co.*, 586 S.W.2d 172 (Tex. Civ. App.—Fort Worth 1979), *aff'd*, 603 S.W.2d 186 (Tex. 1980) (upon remarriage, widow's share of death benefits is redistributed to minor beneficiaries); cf. *Cruz v. Hendy Int'l Co.*, 638 F.2d 719, 726-27 (5th Cir. 1981) (seaman's spouse's suit in admiralty for loss of society does not include recovery for value of home nursing services).

143. LA. CIV. CODE ANN. art. 915 (West Supp. 1981).

of the decedent's community share in that situation.<sup>144</sup> Although opinions may differ as to the wisdom of the basic thrust of this proposal, there are details inherent in the proposal that need further attention. For example, the estates of persons who have intended to die intestate relying on the present law should not be affected in those instances when testamentary power no longer can be exercised because of a lack of testamentary capacity. Louisiana law may also be looked to for guidance in approaching some of the broader ramifications of the proposal. First, if the deceased spouse is survived by common descendants of the surviving spouse and the surviving spouse takes the whole of the community estate, there is little reason for the present rule providing a life estate in a third of the separate realty and a third of the personalty outright for the surviving spouse. This is a common law departure from community property concepts of succession that Louisiana has never adopted. Secondly, however, in the case of the surviving spouse who still might not adequately be provided for with the decedent's share of the community because the entire community estate is small, or in the case of a surviving spouse who will not take the decedent's share of the community because there are descendants of the decedent not descending from the survivor, the family allowance of the surviving spouse should be expanded along the lines of the Louisiana *marital fourth*.<sup>145</sup> Thus, the surviving spouse could be provided an allowance for an amount to be fixed by the court, up to a fourth of the separate estate of the decedent. Further, if the one-year limitation<sup>146</sup> on the family allowance were also removed, the allowance could be treated as a marital deduction for estate tax purposes.

With respect to succession taxes, proposals have been made for amendment of the Texas inheritance tax scheme to take advantage of federal credits allowed for state estate taxes paid.<sup>147</sup> The state would profit by these taxes, which otherwise would be payable to the federal government.<sup>148</sup>

### III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

*Interspousal Transfers and Partitions.* In *Bassett v. Bassett*<sup>149</sup> a former husband brought suit against his former wife to cancel a deed made during their marriage, by which property of the husband was conveyed to the wife pursuant to the wife's promise made prior to marriage that she would move to the husband's city of residence and live with him there as his wife. After the conveyance was made, the wife refused to comply with her prom-

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144. See Quilliam, *Texas Probate Code: Intestate Succession to Community Property*, 44 TEX. B.J. 40 (1981).

145. LA. CIV. CODE ANN. arts. 2432-2434 (West Supp. 1981).

146. TEX. PROB. CODE ANN. § 287 (Vernon 1980).

147. I.R.C. § 2011.

148. Brian, *Inheritance Tax "Pick-up" Statute: Computation of Tax*, 44 TEX. B.J. 46 (1981); McMahan, *Texas Inheritance Tax Statute: Computation of the State Death Tax*, 44 TEX. B.J. 43 (1981).

149. 590 S.W.2d 531 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ *dism'd*).

ise. Under the law as it stood prior to the revision of the constitutional definition of marriage contracts and interspousal transactions,<sup>150</sup> an agreement that one spouse would make a conveyance to the other in consideration of a promise of marriage was valid if it was in writing.<sup>151</sup> A conveyance made in compliance with an unwritten and therefore unenforceable agreement was nonetheless valid.<sup>152</sup> In *Bassett* the agreement that impelled the conveyance was actuated by fraud, and the conveyance was therefore set aside.<sup>153</sup> The grantee sought to defend on the ground that the promise in question was unenforceable because it was against public policy, and that such a promise, even if fraudulently made, could not serve as a basis for the former husband's action. The court noted that the action was for the cancellation of a deed based on fraud in the inducement.<sup>154</sup> The court held, therefore, that the defrauding party could not defend on the ground that the transaction induced by fraudulent promises was illegal or against public policy.<sup>155</sup>

One of the principal objects of the constitutional reform of 1980 was to provide a climate of law in which spouses are allowed greater freedom in readjusting their property interests. Not a stated objective of the draftsmen of the provision<sup>156</sup> or its proponents,<sup>157</sup> however, was that the amendment would dispose of the barrier set up by the Texas Supreme Court in *Hilley v. Hilley*<sup>158</sup> and *Williams v. McKnight*,<sup>159</sup> which precluded spousal conversion of community property into a joint tenancy. Prior to the adoption of the amendment, the Beaumont court of civil appeals decided *Maples v. Nimitz*,<sup>160</sup> holding that by executing account cards and nothing more, spouses could not convert a community bank account into a joint tenancy account with right of survivorship.<sup>161</sup> As had been pointed out earlier in *Hilley*, such a result could be achieved only if the spouses first transformed their community property into shares of separate property and then recombined it as a joint tenancy.<sup>162</sup>

The constitutional amendment allows spouses to partition as shares of separate property their presently held community property, as well as that which they may acquire in the future.<sup>163</sup> The question then is whether, in spite of *Hilley* and *Williams*, spouses may now agree in writing to partition

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150. See notes 59-80 *supra* and accompanying text.

151. *Ellington v. Ellington*, 29 Tex. 2, 6 (1867); *Gorman v. Gause*, 56 S.W.2d 855, 858 (Tex. Comm'n App. 1933, judgment adopted).

152. *McFadden v. McFadden*, 213 S.W.2d 71, 75 (Tex. Civ. App.—Amarillo 1948, mand. overr.).

153. 590 S.W.2d at 532.

154. *Id.* at 533.

155. *Id.*

156. See *McKnight*, *supra* note 113, at 120 & n.43.

157. See *McKnight & Davis*, *supra* note 59, at 921.

158. 161 Tex. 569, 342 S.W.2d 565 (1961).

159. 402 S.W.2d 505 (Tex. 1966).

160. 610 S.W.2d 794 (Tex. Civ. App.—Beaumont 1980, writ granted).

161. *Id.* at 797.

162. 161 Tex. at 579, 342 S.W.2d at 571.

163. See TEX. CONST. art. XVI, § 15; note 59 *supra*.

their community property (both presently held and to be acquired in the future) as a particular kind of separate property holding, that is, as a joint tenancy with right of survivorship, without first partitioning the property as general separate property. Although the new language of the constitution does not specifically address this point, such an interpretation of its language seems reasonable.<sup>164</sup> Legislation has been introduced to achieve this result.<sup>165</sup> Even if direct conversion of a community interest into a joint tenancy is allowed under the amendment, the question of whether the spouses actually intended that result will still remain in some instances. The issue of whether the parties to the creation of an ostensible joint tenancy meant to create such an estate or merely meant to create a convenience account in which the nature of the funds was not altered has also arisen in connection with nonspousal transactions.<sup>166</sup> Parol evidence is admissible in such cases to show that the parties did not intend to create a joint tenancy in the strict sense.<sup>167</sup>

*Transactions Affecting Separate Property Liability.* Spouses' activities in their dealings with third persons may present ambiguous situations with respect to the binding nature of their mutual undertakings. In *Little v. Clark*,<sup>168</sup> for example, a husband entered into negotiations with a real estate agent concerning the payment of the cost of a real estate appraisal of certain community property, apparently subject to the joint management of the spouses. At the closing of the transaction, the wife, acting for herself and for her husband, purported to bind both parties. In a dispute that later arose between the husband and the real estate agent, the court concluded that inferences could be drawn from the facts surrounding the conversations between the husband and the real estate agent, and from the tenor of those conversations, to establish a confirmation of authority for the wife to execute the agreement on the husband's behalf, thus entitling the third person to enforce the contract.<sup>169</sup>

The Texas Supreme Court's decision in *City Products Corp. v. Berman*<sup>170</sup> presents a more difficult ambiguity in the standing of the spouses. In *Berman* two wives owned an interest in realty as their separate property. In 1958, when joinder of husbands was required for the consummation of valid transfers of their wives' separate property, the wives, along with their husbands and some other owners, entered into a lease of the realty in which the spouses and the other owners were identified as "landlords" and

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164. Prior to its approval, an opponent of the amendment pointed out that the new language might be so construed. Johansen, *Against Amendment No. 9*, 43 TEX. B.J. 925, 926-27 (1980).

165. S.B. 922, 67th Legis., Reg. Sess. (1981).

166. See *Dulak v. Dulak*, 513 S.W.2d 205 (Tex. 1974). On the evidentiary effect of the signing of the signature card creating an ostensible joint tenancy account, see *Alexander v. Bowens*, 595 S.W.2d 176, 178-79 (Tex. Civ. App.—Tyler 1980, no writ).

167. *Griffin v. Robertson*, 592 S.W.2d 31, 33 (Tex. Civ. App.—Texarkana 1979, no writ).

168. 592 S.W.2d 61 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

169. *Id.* at 63.

170. 610 S.W.2d 446 (Tex. 1980), *rev'g* 579 S.W.2d 313 (Tex. Civ. App.—Eastland 1979).

as the members of a particular partnership. They were also identified as such in three subsequent renewals of the agreement. These agreements contained stipulations that the landlords would not lease any other property within 1,000 feet of the premises for use as a variety store. One of the partners later leased a commercial building within the prohibited zone for use as a variety store, and suit was brought by the original lessees for violation of the covenant. As one of the defenses in this suit, the lessors-landlords asserted that the original lease to the plaintiffs was in fact void as in violation of the Texas antitrust statute, in that nonowners (the husbands) had participated in the lease, and that it therefore constituted a noncompetition covenant in restraint of trade. For purposes of marital property law the narrow issue was whether the two husbands in question participated in the transaction as owners or merely as partners.<sup>171</sup> The supreme court concluded that the two husbands were acting only as partners-lessors.<sup>172</sup> Because they acted in no other capacity, the court reasoned that there was no conspiracy in restraint of trade in violation of the antitrust statute.<sup>173</sup>

*Solely Managed Community Property.* In *Cumming v. Johnson*,<sup>174</sup> a Ninth Circuit decision, a Texas husband resisted the enforcement of a contract to transfer community shares of a corporation on the ground that his wife had not joined him in the execution of the agreement to transfer. The shares in question were held in the husband's name only. The plaintiff, therefore, argued that under section 5.24 of the Texas Family Code<sup>175</sup> the property was presumed to be subject to the sole management, control, and disposition of the husband, and that the plaintiff was entitled to rely on the husband's authority to deal with the property. The husband, however, argued that the plaintiff was not so entitled because the plaintiff had actual or constructive notice of the husband's lack of authority. The husband's argument was based on the fact that the plaintiff was chief executive officer of the company whose shares were involved. Moreover, the plaintiff had served on an executive committee that sent both the husband and wife two letters promising them defense and indemnification in their existing litigation against the corporation. The thrust of the latter argument was that dealings with the wife in relation to the shares would not have been engaged in had it not been thought that the wife had an interest in the shares. The court stated that the rule in Texas is that statutes concerning notice should be construed most liberally in favor of the party who is affected by the notice.<sup>176</sup> The court therefore rejected the husband's argument that the plaintiff was not entitled to rely on the husband's sole authority under sec-

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171. The court of civil appeals determined that the two husbands had no ownership interest in the property and that the purported partnership was nonexistent. 579 S.W.2d at 318.

172. 610 S.W.2d at 449-50.

173. *Id.*

174. 616 F.2d 1069 (9th Cir. 1979).

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

176. 616 F.2d at 1075 (citing *Phinney v. Langdeau*, 337 S.W.2d 393, 395 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.)).

tion 5.24(a) of the Family Code.<sup>177</sup> The court distinguished *Williams v. Portland State Bank*<sup>178</sup> as a case of actual notice and stated that the plaintiff's knowledge in the instant case was not of the same magnitude as that in *Williams*.<sup>179</sup> In *Cumming* the court further held that the wife's community interest in the shares in question did not preclude an order of specific performance against the husband for their transfer.<sup>180</sup> The court noted, however, that if the wife had wished to assert that the shares were subject to joint spousal control rather than sole control of the husband, she could have petitioned to intervene in the action.<sup>181</sup>

*Liability.* Liability of community property for a spouse's obligation not arising from the commission of a tort falls on the property subject to that spouse's sole or joint management.<sup>182</sup> In *In re Bathrick*<sup>183</sup> the husband's trustee in bankruptcy, on behalf of his unsecured creditors, successfully asserted a claim for conversion of property against the Internal Revenue Service. The husband and wife had filed a joint tax return and were entitled to a refund. All but a trivial amount of the income had been earned by the husband. The refund would, therefore, have been subject to his sole management if the amount attributable to the wife's earnings were ignored or otherwise subject to his joint management. In either case the refund should have been available to satisfy his debts. The trustee, therefore, asserted a claim against the IRS for the refund. The IRS, nonetheless, proceeded to issue checks to each spouse for half the amount of the refund. The bankruptcy court held the IRS liable for conversion in the amount of the check issued to the wife.<sup>184</sup>

Section 5.22(c) of the Family Code<sup>185</sup> provides that spouses may by oral agreement allocate the management of particular community property in one spouse or the other when the property would otherwise be subject to their joint management. In *LeBlanc v. Waller*<sup>186</sup> the husband's creditor intervened in a divorce proceeding to reach certain assets that under an oral separation agreement were subject to the sole control of the wife. Prior to the agreement the assets had been subject to joint control or to the sole control of the husband. There was no indication that this agreement was entered into with an intent to defraud the creditor. In fact, the hus-

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177. 616 F.2d at 1075-76.

178. 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ dism'd by agr.) (bank's prior attempt to obtain wife's signature on note showed actual notice of wife's interest in property).

179. 616 F.2d at 1076 n.10.

180. *Id.* at 1076.

181. *Id.* at n.11. See also *Cooper v. Texas Gulf Indus.*, 513 S.W.2d 200 (Tex. 1974) (wife sought to rescind purchase consummated with funds subject to the joint management of the spouses). *Cooper* invites an innovative use of remand to give the wife an opportunity to intervene. If she fails to do so, the judgment should become final.

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

183. 1 B.R. 428 (Bankr. Ct. S.D. Tex. 1979).

184. *Id.* at 433.

185. TEX. FAM. CODE ANN. § 5.22(c) (Vernon 1975).

186. 603 S.W.2d 265 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

band was not a debtor of the creditor at the time the agreement was entered into. The court rejected the creditor's claim and held that the agreement of the spouses was sufficiently within section 5.22 to insulate the property from the creditor's claim.<sup>187</sup>

*LeBlanc* thus illustrates a basic inconsistency in the Texas scheme of management and liability of community property that is at least partially cured by the recent constitutional amendment.<sup>188</sup> The court in *Stewart Title Co. v. Huddleston*<sup>189</sup> succinctly stated the old principles of liability as they stood before the November 1980 amendment of the constitution:<sup>190</sup> property subject to a creditor's claim was not affected by a partition of community property and thus was not affected by a decree of divorce that awarded property to the other spouse.<sup>191</sup> Under the constitution as it stood before the amendment, an interspousal partition was specifically made subject to the preexisting claims of creditors, although a gift of property from one spouse to the other without an intention to defraud creditors would have cut off the creditor's claim.<sup>192</sup> Moreover, prior to the amendment, the spouses might, by an oral agreement as to management, preclude a creditor's recovery when a partition in writing would not have had that effect.<sup>193</sup>

As amended, the constitution no longer allows an existing creditor to reach partitioned property unless it was partitioned with the intent to defraud the creditor.<sup>194</sup> The amendment, however, does not specifically cover divorce decrees that have the effect of partitioning the property. In such instances, therefore, the property should be partitioned under section 5.42 of the Family Code<sup>195</sup> so that property partitioned in favor of a nondebtor spouse will not be subject to liabilities incurred by the other spouse.<sup>196</sup> Such an approach should suffice provided that neither spouse intends to defraud creditors of the debtor-spouse and that the debtor-spouse is not made insolvent as a result of the partition.

Several cases decided prior to the constitutional amendment illustrate the objective of this approach. In *Inwood National Bank v. Hoppe*<sup>197</sup> the

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187. *Id.* at 268.

188. See TEX. CONST. art. XVI, § 15; note 59 *supra*; McKnight, *Management, Control and Liability of Marital Property*, in TEXAS FAMILY LAW AND COMMUNITY PROPERTY 159, 180-82 (J. McKnight ed. 1975).

189. 598 S.W.2d 321 (Tex. Civ. App.—San Antonio), writ *ref'd n.r.e. per curiam*, 608 S.W.2d 611 (Tex. 1980).

190. The effective date of the amendment is subject to some doubt. Some authorities contend that it is effective as of the canvas of the election and proclamation by the Governor. See, e.g., *Texas Water & Gas Co. v. Cleburne*, 21 S.W. 393 (Tex. Civ. App. 1892, no writ). Other authorities support the proposition that the proclamation makes the amendment retroactive to the date of the election. See, e.g., *Christian v. Howeth*, 522 S.W.2d 700 (Tex. Civ. App.—Fort Worth 1975, writ *ref'd n.r.e.*).

191. 598 S.W.2d at 323.

192. TEX. BUS. & COM. CODE ANN. § 24.02 (Vernon 1968).

193. See notes 185-87 *supra* and accompanying text.

194. See TEX. CONST. art. XVI, § 15; note 59 *supra*.

195. TEX. FAM. CODE ANN. § 5.42 (Vernon 1975).

196. See McKnight & Davis, *supra* note 59, at 923.

197. 596 S.W.2d 183 (Tex. Civ. App.—Texarkana 1980, writ *ref'd n.r.e.*).

court concluded that a former husband's discharge in bankruptcy did not have the effect of releasing property awarded to the wife in a divorce decree from liability incurred by the husband.<sup>198</sup> *Hoppe* rested on the incorrect assumption that the wife was personally bound on the husband's obligation to which she was not a party.<sup>199</sup> This assertion is sometimes identified as the "community debt" argument. This reasoning, however, is contrary to the management and liability concepts on which the Family Code is based. In *Hoppe*, for instance, the husband's discharge in bankruptcy would have had the effect of discharging any community debt that he might have incurred unilaterally.

Another situation involving the assumed applicability of the community debt argument is found in *Steed v. Bost*.<sup>200</sup> During the marriage a creditor obtained a judgment against the husband. After the spouses' divorce the husband's judgment creditor brought suit against the ex-wife to subject property awarded to her in the divorce decree to the judgment debt against the husband. Subsequently, the ex-husband filed a voluntary petition in bankruptcy. The husband's trustee in bankruptcy then intervened in the suit brought by the creditor against the ex-wife. The division of property in the divorce decree had been made pursuant to a property settlement agreement between the spouses. The jury, however, found that this agreement was made with an intent on the part of the husband to defraud his creditors. The trial court set the transfer aside, but did not order the property sold or delivered to the trustee; nor did it render a personal judgment against the wife, as prayed.<sup>201</sup> The trustee's appeal was directed to the court's failure to render a personal judgment against the wife. The appellate court assumed for purposes of the appeal that the trustee had either a right to a personal judgment against the ex-wife to the extent of the value of the property she had received, or a right to have the transfer to her set aside.<sup>202</sup> The court held that the trustee was not entitled to both types of relief.<sup>203</sup> Because the trial court had set aside the transfers to the ex-wife, the court ruled that the trustee would be able to reach the property with a writ of execution.<sup>204</sup> Because the trustee had not offered any evidence as to the value of the property received by the ex-wife, however, the court stated that a personal judgment for the value of the property received could not have been rendered even if the trustee had chosen to pursue that remedy.<sup>205</sup>

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198. *Id.* at 185.

199. See *Swinford v. Allied Fin. Co.*, 424 S.W.2d 298, 301 (Tex. Civ. App.—Dallas, writ *dism'd*), *cert. denied*, 393 U.S. 923 (1968). In *Swinford* both spouses were parties to the obligation sought to be enforced. The husband's trustee in bankruptcy had waived its interest in the security. *Swinford*, therefore, does not support the conclusion reached in *Hoppe*.

200. 602 S.W.2d 385 (Tex. Civ. App.—Austin 1980, no writ).

201. *Id.* at 387.

202. *Id.* at 388.

203. *Id.*

204. *Id.*

205. *Id.* at 388-89.



Under the constitution as it now stands,<sup>206</sup> property received by a wife under a separation agreement that was partitioned to her with intent to defraud the husband's creditors is not insulated from creditors' claims to which it might have been subjected during marriage. In attempting to reach the property, however, the creditor must make his choice of remedies between having the transfer set aside or taking a personal money judgment against the ex-wife for the value of the property received by her at the time of its receipt.

In *Miller v. City National Bank*,<sup>207</sup> a recent pre-amendment case, the court apparently overlooked the then prevailing law with respect to liability of property after divorce that might have been reached by a creditor prior to the divorce. During the marriage the husband alone executed notes to the plaintiff-bank. After the divorce the bank sued the wife for the amount owed on the note by the ex-husband, alleging that certain community property was divided in favor of the wife in the divorce decree. The bank did not seek to set aside the award of property to the wife by the divorce court, but merely sought a judgment against her for the amount of the note. The appellate court reversed the judgment of the trial court and held that there was no evidence to support the conclusion that the notes were the liabilities of the wife jointly with her husband who incurred the debts.<sup>208</sup> This result will be reached under present law when a partition is made between the spouses without an intent to defraud creditors.

*Effects of a Spouse's Death.* A surviving spouse is empowered by statute<sup>209</sup> to sell any community assets for the payment of community liabilities. Whether the property dealt with was subject to the sole management of the decedent or the survivor, or was subject to their joint management during marriage, is immaterial.<sup>210</sup> Nor does it matter whether the property is sold in the name of the survivor individually or as survivor.<sup>211</sup> In the case of a conveyance of community realty in this context, also immaterial is the fact that personalty has not been exhausted before the realty was sold.<sup>212</sup> In light of these principles, some anomalous results may arise on the denial of a claim presented against the estate of a deceased spouse.

In *Albiar v. Arguello*<sup>213</sup> a claim against the estate of the deceased spouse was presented to the decedent's administrator, whose inaction was alleged to constitute a rejection of the claim. Because the creditor failed to file suit against the administrator within the prescribed ninety days,<sup>214</sup> the court ruled that suit against the administrator was barred thereafter.<sup>215</sup> Because

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206. TEX. CONST. art. XVI, § 15; see note 59 *supra*.

207. 594 S.W.2d 823 (Tex. Civ. App.—Waco 1980, no writ).

208. *Id.* at 826.

209. TEX. PROB. CODE ANN. § 160 (Vernon 1980). See also *id.* § 168.

210. See *Horton v. Harris*, No. 1382, slip op. at 7 (Tex. Civ. App.—Tyler Dec. 18, 1980).

211. *Id.*, slip op. at 7.

212. *Id.*, slip op. at 7-8.

213. 612 S.W.2d 219 (Tex. Civ. App.—Eastland 1980, no writ).

214. TEX. PROB. CODE ANN. § 313 (Vernon 1980).

215. 612 S.W.2d at 220.

the claim was based on a note signed by the decedent and the surviving spouse, the creditor's suit against the survivor in his individual capacity was valid. The court, however, concluded that it was valid only against the survivor's half of the community estate.<sup>216</sup> This result followed because the decedent's half had passed to the decedent's heirs and was not the survivor's property. The curious result is with respect to the survivor's liability. If the debtor had sued the survivor alone as a maker of the joint note during the marriage, the creditor would have been allowed to recover from the maker the entire amount of the note and would have been able to satisfy the claim out of any community property subject to the sole or joint management of the survivor-spouse. Although community property subject to the sole or joint control of the deceased spouse passes to that spouse's personal representative and is subject to payment of any debts owed by the decedent, a reciprocal effect is not had with respect to the decedent's interest in property subject to the sole control of the surviving spouse.<sup>217</sup>

*Homestead: Designation and Extent.* Once property is established as the homestead<sup>218</sup> of a debtor by his use of it as such, the burden is upon the creditor who attempts to seize it to show the contrary.<sup>219</sup> The debtor who has given a mortgage on property asserted to be his homestead may, nevertheless, bear a certain burden of persuasion when he moves to set aside a foreclosure of the mortgage to show that the property was his homestead when the mortgage was given.<sup>220</sup> Having alleged the homestead character of the property and offered proof to sustain it, the debtor's position is secure unless the creditor can show the contrary. The fact that the property may have since lost its homestead character is irrelevant. The rule is otherwise, however, with respect to the sale of the homestead by one spouse without the joinder of the other. In that instance, the sale is merely inoperative so long as the homestead character of the property continues.<sup>221</sup> If the homestead is abandoned, the transfer is valid.<sup>222</sup> If both spouses join in the contract for the sale of the homestead, which is not a mere option to a purchaser to contract at some later date, both spouses are bound, and the contract is specifically enforceable by the purchaser.<sup>223</sup> The distinction between a contract of sale and an option may be shown by the fact that the transaction is designated as a contract of sale in the instrument of agreement, which uses language of sale throughout; on the other

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216. *Id.*

217. TEX. PROB. CODE ANN. § 177(b) (Vernon 1980).

218. See *Cauble v. Gray*, 604 S.W.2d 197 (Tex. Civ. App.—Dallas 1980, no writ).

219. *Chalk v. Daggett*, 257 S.W. 228, 232 (Tex. Comm'n App. 1924, judgment adopted). See also *Hargadine v. Whitfield*, 71 Tex. 482, 491, 9 S.W. 475, 478-79 (1888) (creditor has burden to establish abandonment of homestead).

220. *Braden Steel Corp. v. McClure*, 603 S.W.2d 288, 291-93 (Tex. Civ. App.—Amarillo 1980, no writ).

221. *Grissom v. Anderson*, 125 Tex. 26, 30, 79 S.W.2d 619, 621 (1935).

222. *Kunkel v. Kunkel*, 515 S.W.2d 941, 948 (Tex. Civ. App.—Amarillo 1974, writ refused n.r.e.).

223. *Donahoe v. Allen*, 608 S.W.2d 745, 748 (Tex. Civ. App.—Beaumont 1980, no writ).

hand, a provision that the vendor must accept a sum as a forfeit for default on the part of the buyer indicates an option rather than a sale.<sup>224</sup>

In the case of a transfer as opposed to a mortgage, if one spouse fails to join in the transaction, the death of that spouse causes the conveyance by the other spouse by sale or gift to become perfected.<sup>225</sup> In the case of an attempted mortgage of a homestead, waiver of homestead protection is ineffective in the absence of designation of other property that might be claimed as the homestead, but the spouses may achieve the same objective by making a conveyance of the homestead to a corporation that they control and then allowing the corporation to mortgage the property.<sup>226</sup>

The duration of the homestead extends for the lives of both of the spouses, though both may dispose of the property during their joint lives and the survivor (if the owner) may dispose of the property as he or she wishes.<sup>227</sup> A nice distinction may be drawn between the power of the surviving spouse to mortgage the family homestead and that of the person who holds a homestead merely as a single adult. In the latter case, the single person seems to be precluded by the constitution from making a valid mortgage on the property,<sup>228</sup> whereas earlier case law (before a homestead was provided for an adult single person) allowed a surviving spouse to mortgage the homestead.<sup>229</sup> The surviving spouse, however, cannot sell the separate homestead of a deceased spouse in the face of opposition by the decedent's heir or a devisee of the property.<sup>230</sup> The rights of the heir or devisee, nonetheless, may be postponed substantially if the surviving spouse owns an interest in the property subject to homestead occupancy and the surviving spouse remarries and dies leaving a surviving spouse.<sup>231</sup> In this instance the surviving spouse of the second marriage is entitled to homestead rights in the ownership interest in the property held by the surviving spouse of the first marriage.<sup>232</sup> If, however, the first surviving spouse had no ownership interest in the property, the second surviv-

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224. *Id.* at 747.

225. *Id.* at 748. *But see* Tolman v. Overstreet, 590 S.W.2d 635 (Tex. Civ. App.—Tyler 1979, no writ).

226. Eckard v. Citizens Nat'l Bank, 588 S.W.2d 861, 862 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

227. See Comment, *Termination of the Texas Homestead—A Summary*, 10 TEX. TECH L. REV. 1019, 1020-30 (1979).

228. See TEX. CONST. art. XVI, § 50.

229. See Lacy v. Rollins, 74 Tex. 566, 12 S.W. 314 (1889). Following a divorce, the nature of a homestead as a family homestead or that of a single adult depends on the condition of the family unit dissolved. If there were children of the marriage, even though no longer minor children, the homestead is a family homestead. If there were no children, the interest of the homestead claimant is that of a single adult. In this latter instance the family homestead terminates on divorce. Day v. Day, 610 S.W.2d 195, 198 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). The single-adult homestead of the remaining family constituent is a new rather than a continuing homestead.

230. Franklin v. Woods, 598 S.W.2d 946, 950 (Tex. Civ. App.—Corpus Christi 1980, no writ).

231. Gentry v. Marburger, 596 S.W.2d 201, 203-04 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

232. *Id.* (citing 28 TEX. JUR. 2D *Homesteads* § 193, at 618 (1961)).

ing spouse cannot assert a homestead claim.<sup>233</sup> Recently it has been asserted that the surviving spouse, guilty of wrongfully killing the deceased spouse, forfeits the homestead right in property owned in whole or in part by the decedent.<sup>234</sup> The instance in which the point was argued, however, turned upon the validity of a temporary injunction of occupancy by the surviving spouse, and, therefore, was inconclusive.<sup>235</sup>

Texas, unlike several other states,<sup>236</sup> has not treated its increases in the homestead exemption as having a retroactive effect.<sup>237</sup> The result is that the increase of the homestead exemption from \$5,000 to \$10,000 does not affect a homestead already acquired or liens already in existence. If the bankrupt's homestead must be sold in order to realize the value of the nonexempt portion for secured and unsecured creditors, the proceeds from the nonexempt portion should first be applied to a first mortgage lien on the property to the extent that it is in excess of the purchase-money mortgage.<sup>238</sup> The bankrupt has the equitable right to force the lienholder to take his share out of the nonexempt portion first, even though the effect is to reduce the amount of assets against which the general creditor might have a claim.<sup>239</sup>

Federal law impinges upon the homestead exemption in several significant ways. First, the federal tax lien prevails over the homestead right provided by state law.<sup>240</sup> Secondly, the Tax Reform Act of 1978 creates what has been referred to as "marriage tax." If two taxpayers each own a residence and marry before selling their residences, they are entitled to only one exclusion, in that the law provides only one lifetime exclusion for a married couple; each spouse does not have a separate exclusion.<sup>241</sup> Thus, under the Act, the marriage of a person over fifty-five causes that person to lose the \$100,000 tax-free exclusion of gain from the sale of a principal residence.<sup>242</sup> If, however, either spouse sells his or her home before marriage, the seller is entitled to the \$100,000 exclusion.<sup>243</sup> Finally, the federal Bankruptcy Act may have some bearing on the handling of the homestead exemption of the bankrupt debtor.<sup>244</sup>

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233. *Marino v. Lombardo*, 277 S.W.2d 749, 754 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.).

234. *Philen v. Sorensen*, 609 S.W.2d 656 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

235. *Id.* at 657.

236. *See, e.g., United States v. Smith*, 486 F. Supp. 76 (E.D. La. 1980). *But see In re Bassin*, 637 F. Supp. 668 (9th Cir. 1980); *In re Echavarren*, 2 B.R. 215 (Bankr. Ct. D. Idaho 1980).

237. *Valley Bank v. Skeen*, 401 F. Supp. 139, 140 (N.D. Tex. 1975); *In re Bobbitt*, 3 B.R. 372, 373 (N.D. Tex. 1976).

238. *In re Bobbitt*, 3 B.R. 372, 373 (N.D. Tex. 1976).

239. *Id.*

240. *United States v. Wilson*, 500 F. Supp. 831, 833 (N.D. Tex. 1980).

241. *See* I.R.C. § 1034.

242. *See id.*

243. *Id.*

244. *See* 11 U.S.C. § 522 (Supp. III 1979). For federal exemption of certain federally created pension rights, *see General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980); *Fisher, New Bankruptcy Exemption Law: What It Means for Texans*, 44 TEX. B.J. 145, 149

*Exempt Personalty.* The Bankruptcy Act provides that couples and others jointly liable may file their petition in bankruptcy together as "joint debtors" in a single proceeding, subject to a single filing fee.<sup>245</sup> A bankruptcy court in the Northern District of Texas recently considered whether a husband and wife, proceeding as "joint debtors," might each claim a different exemption: the state exemption for one and federal exemption for the other.<sup>246</sup> The court concluded that in such a bankruptcy proceeding only one of the personal property exemptions may be claimed by both spouses, because the state exemption is claimed as a "family exemption" under state law, and there is no room to claim any other exemptions.<sup>247</sup> The question was whether the wife could claim the federal exemption under the Act after the husband had chosen to claim state exemptions. The mere fact that the wife cannot claim any state exemption should not bar her from claiming the federal exemption in her own bankruptcy. Conceding for the purpose of argument that the state merely allows a family exemption, it does not necessarily follow that a member of that family who would not be entitled to a state exemption is precluded from claiming the federal exemption under the federal Act.

In *In re Bardwell*<sup>248</sup> a creditor sought to prevent both spouses' discharge in bankruptcy, asserting that a knowingly false financial statement was given by them in obtaining a loan from the creditor. The bankruptcy court dismissed the creditor's objection to the wife's discharge, and the creditor appealed.<sup>249</sup> The Fifth Circuit held that the wife, who believed that the financial statement was true and did not act with such reckless indifference to the facts as to warrant the finding that she had acted fraudulently, was not precluded from claiming a discharge.<sup>250</sup>

In every instance when husbands and wives are jointly liable, however, both may not be before the bankruptcy court as "joint debtors."<sup>251</sup> In the recent case of *In re Jeffery*<sup>252</sup> the bankruptcy court held that when the husband's liability on a joint obligation with his wife was sought to be discharged in bankruptcy, and a particular country club membership certificate evidencing whole-ownership of the interest in the husband and wife vested in the trustee in bankruptcy, the wife, who was neither a party to the turnover action nor the bankruptcy, could not be compelled to turn over and endorse the certificate to the trustee.<sup>253</sup>

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(1981); Comment, *The New Bankruptcy Law: A Comparison of Texas and Federal Exemptions*, 17 Hous. L. Rev. 373 (1980).

245. 11 U.S.C. § 302 (Supp. III 1979).

246. *In re Cannady*, BK 5-79-00090 (Bankr. Ct. N.D. Tex. Aug. 25, 1980).

247. *Id.*, slip op. at 11. The court stated: "In this case the schedules indicate that the husband is claiming the Texas family exemptions in personal property valued at more than \$20,000. By so claiming the family exemption he has effectively prevented the wife, a member of that family, from claiming additional exemptions." *Id.*

248. 610 F.2d 228 (5th Cir. 1980).

249. *Id.* at 229.

250. *Id.* at 230.

251. *Id.*

252. 2 B.R. 197 (S.D. Tex. 1980).

253. *Id.* at 199.

It should be noted briefly that landlords' liens with respect to personalty have been revised recently.<sup>254</sup> Because these liens commonly have such a large bearing on family welfare, their applicability should not be overlooked.

#### IV. DIVORCE PROCEEDINGS

*Jurisdiction and Venue.* In divorce cases, challenges to the court's jurisdiction rarely concern the court's power to grant the divorce or to make a division of property; instead, most jurisdictional attacks are directed at the court's ability to affect the parent-child relationship.<sup>255</sup> In *In re Allen*<sup>256</sup> both jurisdictional issues were before the court. A wife filed a conservatorship matter in county *A*. Subsequently, the husband filed for divorce as well as conservatorship in county *B* and made a motion to transfer the conservatorship proceeding from the court in county *A* to that in county *B*. The wife thereupon countered by amending her petition in county *A* to include a prayer for divorce. Citing *Cleveland v. Ward*<sup>257</sup> the appellate court held that the court in county *B* had acquired dominant jurisdiction of the entire controversy because the divorce suit had been filed there first.<sup>258</sup> The court also concluded that under section 3.55(c) of the Family Code<sup>259</sup> the husband's motion to transfer the parent-child relationship case created a mandatory duty on the part of the court in county *A* to transfer the matter to the court in county *B*.<sup>260</sup> Thus, the wife's amendment of her earlier petition to embrace a suit for divorce was to no avail because it was filed after the court in county *B* had acquired dominant jurisdiction of the divorce case. The *Allen* case is of further relevance because the wife, at the time of the suit, had not yet been a resident of county *A* long enough to file a petition for divorce. The appellate court specifically stated that, although there is some authority suggesting that a petitioner may file a petition for divorce without meeting durational county residence requirements,<sup>261</sup> such a premature filing cannot divest a court of dominant jurisdiction of its power to hear a case already on file.<sup>262</sup> Along similar

254. See TEX. REV. CIV. STAT. ANN. art. 5236 (Vernon Supp. 1980-1981).

255. See Solender, *Family Law: Parent and Child*, *infra* at 156. For an example of this phenomenon, see *Cossey v. Cossey*, 602 S.W.2d 591, 593-95 (Tex. Civ. App.—Waco 1980, no writ), in which the court refused to exercise its jurisdiction over a parent-child matter because the children resided in Louisiana and the divorce would not be contested at trial.

256. 593 S.W.2d 133 (Tex. Civ. App.—Amarillo 1979, no writ). For a case in which a Texas court assumed jurisdiction over a divorce and the accompanying parent-child matter even though successive petitions were filed in both Texas and a sister state, see *Felch v. Felch*, 605 S.W.2d 399 (Tex. Civ. App.—Waco 1980, writ dismissed).

257. 116 Tex. 1, 285 S.W. 1063 (1926). See also *Brown v. Brown*, 566 S.W.2d 378 (Tex. Civ. App.—Corpus Christi 1978, no writ).

258. 593 S.W.2d at 137. See also *Johnson v. Avery*, 414 S.W.2d 441 (Tex. 1966); *V.D. Anderson Co. v. Young*, 128 Tex. 631, 101 S.W.2d 798 (1937); *In re Parr*, 543 S.W.2d 433 (Tex. Civ. App.—Corpus Christi 1976, no writ).

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

260. 593 S.W.2d at 137.

261. See, e.g., *Beavers v. Beavers*, 545 S.W.2d 29 (Tex. Civ. App.—Waco 1976, no writ); *Shankles v. Shankles*, 445 S.W.2d 803 (Tex. Civ. App.—Waco 1969, no writ).

262. 593 S.W.2d at 137 n.4.

lines, another court<sup>263</sup> concluded that the duration of one's residence in a county is not broken by a mere temporary absence from the county.<sup>264</sup>

*McCombs v. Forney*<sup>265</sup> presented a nice point concerning a plea of privilege. A wife joined a third-party defendant in her cross-claim for divorce. The third party filed a plea of privilege to which the wife failed to file a timely controverting affidavit. The third party was, therefore, entitled to have the cause of action, as it applied to him, transferred to the county named in his plea. At that point, however, the spouses reached a settlement in their divorce suit, and the action by the wife against the third party was dismissed with prejudice and without notice. Subsequently, the wife filed a bill of review alleging, inter alia, that the former husband had secreted community assets and, therefore, that the settlement reached during the divorce proceeding was void. The third party was once again joined and he once again filed a plea of privilege. This time, the wife filed a timely controverting affidavit. In determining whether the plea should be sustained, the court stated:

In this case, which is a case of first impression, it would seem that equity would require that the issues be tried separately. If the judgment is not vacated as to the underlying cause of action against [the third party], then there would be no need to consider transferring the cause of action against [him]. If the judgment is vacated, then his plea of privilege should be sustained because venue as to the underlying cause of action was settled in the prior proceeding. This is so because when [the wife] dismissed her cause in the prior suit after having failed to timely file her controverting affidavit she abandoned her contest of the plea of privilege and made an admission that the plea was well taken . . . . However, should the trial judge, after hearing on a written motion, find that good cause existed for the late filing of the controverting plea . . . then [the third party's] plea of privilege should be heard and ruled on by the trial court.<sup>266</sup>

Two cases dealt with the related matters of disqualification of an attorney and recusal of the judge because of an alleged prohibited family relationship with the attorney. In *Lott v. Lott*<sup>267</sup> the husband asserted that the wife's attorney should be disqualified from appearing on behalf of his client because he had been representing both the husband and the wife in a proceeding against a third person for personal injuries to the wife. When the wife employed him to sue her husband for divorce, the attorney notified the husband that he could no longer represent him in the suit against the third person. The husband later intervened in that suit, which was brought by the attorney on behalf of the wife only. In the divorce proceeding, the court awarded the wife the proceeds of her claim in the third-party suit; the husband also was awarded the amount of his claim. In attempting

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263. *Lott v. Lott*, 605 S.W.2d 665 (Tex. Civ. App.—Dallas 1980, writ dismissed).

264. *Id.* at 668.

265. 607 S.W.2d 591 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

266. *Id.* at 592.

267. 605 S.W.2d 665 (Tex. Civ. App.—Dallas 1980, writ dismissed).

to show the impropriety of the attorney's representing the wife against him in the divorce proceeding, the husband argued that the suits for personal injury and divorce were interrelated and that the wife had changed her pleadings in the personal injury proceeding from a claim for treble damages under the deceptive trade practices act, which would have produced community property, to a claim for negligence, which would have constituted separate property under the circumstances. The court rejected the husband's contention, stating: "While there may be the appearance of impropriety here, it is not sufficient to warrant the disqualification of the attorney."<sup>268</sup>

In *Martinez v. Martinez*<sup>269</sup> the husband sought to have the judge recuse himself because his wife's attorney was the judge's son-in-law and was, in a sense, a party because attorney's fees could be awarded in the proceeding. The court rejected the husband's contention, basing its conclusion on two substantive grounds of precedent:<sup>270</sup> article V, section 11 of the Texas Constitution<sup>271</sup> and statutory article 15.<sup>272</sup> When read together, these authorities provide that a judge shall not sit in any case in which any party is related to him by affinity within the third degree.<sup>273</sup> Although the wife did not specifically seek attorney's fees, and no attorney's fees were awarded, the husband's strongest argument was that the judge could have awarded attorney's fees and, therefore, might unjustly favor his relative's client in making the property division. Whether he could have granted attorney's fees would have depended on the nature of the relief sought; the court, however, did not discuss the issue. Instead, it distinguished workers' compensation cases,<sup>274</sup> stating that the judge must be disqualified in such cases because he is required to approve attorney's fees.<sup>275</sup> The court also pointed out that an attorney with a contingent fee contract is not directly interested in the subject matter of a lawsuit and, therefore, is not a party within the meaning of the statute<sup>276</sup> disqualifying a judge who is related to him unless the judge must approve the fee.<sup>277</sup> The court's conclusion, therefore, seems well within the existing precedents, but if the impropriety of the judge's sitting in such cases is as strong as it would seem to be, a provision could be added to the Family Code to prohibit such an abuse in accordance with the constitutional provision.<sup>278</sup>

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268. *Id.* at 668.

269. 608 S.W.2d 719 (Tex. Civ. App.—San Antonio 1980, no writ).

270. *Id.* at 720-21.

271. TEX. CONST. art. V, § 11.

272. TEX. REV. CIV. STAT. ANN. art. 15 (Vernon 1959).

273. *Id.*; TEX. CONST. art. V, § 11.

274. *See, e.g.*, *Indemnity Ins. Co. of N. America v. McGee*, 163 Tex. 412, 356 S.W.2d 666 (1962); *Postal Mutual Indem. Co. v. Ellis*, 140 Tex. 570, 169 S.W.2d 482 (1943).

275. 608 S.W.2d at 720.

276. TEX. REV. CIV. STAT. ANN. art. 15 (Vernon 1959); *see* text accompanying notes 270-73 *supra*.

277. 608 S.W.2d at 721 (citing *Dow Chem. Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565 (1962)).

278. The recent amendment of TEX. R. CIV. P. 18a may, however, adequately deal with



*Robertson v. Robertson*<sup>279</sup> is a very peculiar case. In 1978 a wife sued her husband for divorce. In the decree granting the divorce, each of the daughters of the parties, who were adults at the time, were granted money judgments against the husband, though neither daughter was a party to the proceeding. The judgment rendered in favor of the daughters was to have been paid in annual installments. In the present action the daughters brought suit against their father to foreclose a lien on property securing the payment of the money judgments. In reversing the trial court's judgment foreclosing the lien, the appellate court held that the prior divorce decree insofar as it granted relief to the daughters was void on its face because they were not parties.<sup>280</sup> The court went on to observe that even if the divorce judgment were not void as to the daughters, they could not maintain a suit for the whole amount owed to them because there was no provision in the decree authorizing acceleration in the event of default, nor was there an allegation in their petition of anticipatory repudiation.<sup>281</sup>

*Continuance.* A point of error taken with respect to a denial of a motion for continuance cannot be expected to be treated very seriously by the appellate court unless the motion itself was made in compliance with the prescribed rules.<sup>282</sup> If an affidavit of certain facts is required but not offered to support the motion, an appeal from the denial of the motion will not succeed.<sup>283</sup> One court stated:

If the ground of the motion is the want of testimony, the party applying for it must show, among other things, that the absent testimony is material, showing the materiality thereof, and if the continuance is because of the absence of a material witness (party), what is expected to be proved by such testimony.<sup>284</sup>

Even in the event of compliance with the rules, the decision to grant or deny the motion lies within the discretion of the trial judge, and the judge's order will not be disturbed without a showing of an abuse of discretion.<sup>285</sup>

*Amendment of Pleading.* Leave of the judge must be obtained in order to amend a pleading by adding new substantive matters within seven days of trial.<sup>286</sup> Leave to amend will be granted "unless there is a showing that

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the point. See Pope & McConico, *Practicing Law with the 1981 Texas Rules*, 32 BAYLOR L. REV. 456, 490-91 (1980).

279. 608 S.W.2d 245 (Tex. Civ. App.—Eastland 1980, no writ).

280. *Id.* at 247.

281. *Id.* For instances in which the principle of anticipatory breach has been applied in child support cases, see McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 107-08 (1975).

282. TEX. R. CIV. P. 251, 252.

283. See Felch v. Felch, 605 S.W.2d 399 (Tex. Civ. App.—Waco 1980, writ dismissed); Brown v. Brown, 599 S.W.2d 135 (Tex. Civ. App.—Corpus Christi 1980, no writ). See also Frick v. Frick, 587 S.W.2d 771 (Tex. Civ. App.—El Paso 1979, writ dismissed).

284. Brown v. Brown, 599 S.W.2d 135, 137 (Tex. Civ. App.—Corpus Christi 1980, no writ).

285. See, e.g., Hernandez v. Heldenfels, 374 S.W.2d 196 (Tex. 1963).

286. TEX. R. CIV. P. 63.

such amendment will operate as a surprise to the opposite party."<sup>287</sup> If the judge refuses to allow amendment, however, the burden of showing an abuse of his discretion is on the complaining party; there is no burden on the opposing party at that point to show surprise.<sup>288</sup>

*Jury Trial.* In *Jones v. Jones*<sup>289</sup> the Beaumont court of civil appeals held that it is reversible error for a court to fail to empanel a jury in a divorce proceeding when one is timely demanded and there are factual issues that are in dispute.<sup>290</sup> Denial of a jury is harmless error only if the facts are undisputed. If there is a disputed fact and a jury trial is requested by either party, it should be granted as a matter of course.<sup>291</sup> In *Young v. Young*,<sup>292</sup> however, the Austin court of civil appeals took a somewhat different approach. In November the case was set for trial on the nonjury docket for February 20. A demand for a jury trial was made and the jury fee paid on February 6. At the hearing on February 20 the court administrator testified that the earliest possible setting for a jury trial would be the following August. The trial court's conclusion, sustained by the appellate court, was that rule 216<sup>293</sup> requires that a "demand for a jury be made and the fee paid 'on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause in the non-jury docket, but not less than ten days in advance.'"<sup>294</sup> Thus, in this instance, the demand for jury trial was not made within a reasonable time and, therefore, the moving party was not entitled to a jury trial even though the motion was made fourteen days before the matter was set for trial.<sup>295</sup>

In another case<sup>296</sup> the appellate court approved the separation of issues for submission to the jury. This was a case of two successive divorces between the same parties. In the second divorce the court also had before it a bill of review with respect to the first divorce. In order to save time, the trial court heard evidence on the bill of review and submitted those issues to the jury<sup>297</sup> before hearing evidence on the second divorce, after which, other issues were submitted to the jury. Although rule 270<sup>298</sup> provides that "no evidence on a controversial matter shall be received after the verdict of the jury," that rule was not violated here because "no evidence on the bill of review issues was received after the jury verdict on those issues."<sup>299</sup>

287. *Id.*

288. *Hardin v. Hardin*, 597 S.W.2d 347, 349-50 (Tex. 1980).

289. 592 S.W.2d 19 (Tex. Civ. App.—Beaumont 1979, no writ).

290. *Id.* at 20. *See also* *Jerrell v. Jerrell*, 402 S.W.2d 885, 886 (Tex. Civ. App.—San Antonio 1966, no writ).

291. *See* TEX. CONST. art. I, § 15; *id.* art. V, § 10; TEX. FAM. CODE ANN. § 3.61 (Vernon Supp. 1980-1981).

292. 589 S.W.2d 520 (Tex. Civ. App.—Austin 1979, writ *dism'd.*)

293. TEX. R. CIV. P. 216.

294. 589 S.W.2d at 521 (emphasis by court) (quoting TEX. R. CIV. P. 216).

295. *Id.* at 521.

296. *Humphrey v. Humphrey*, 593 S.W.2d 824, 825 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ *dism'd.*)

297. TEX. R. CIV. P. 174(b).

298. TEX. R. CIV. P. 270.

299. 593 S.W.2d at 825.

*Masters and Receivers.* Two issues are paramount with respect to masters: first, whether in a particular case appointment of a master is appropriate, and secondly, if appropriate, what effect is to be given to the master's findings. The first of these points was considered in *Mann v. Mann*.<sup>300</sup> Pursuant to rule 171<sup>301</sup> the court appointed a master, co-master, and auditor in a divorce proceeding to determine the value of the community estate. The appointments were made because the husband's salvage business was unique in nature and the court would have had great difficulty in valuing the community property assets. The Texas Supreme Court pointed out that the request for a jury trial did not preclude the appointment of a master as the lower court had, in effect, held.<sup>302</sup> In *Cameron v. Cameron*<sup>303</sup> the trial judge referred the property issues in a divorce suit to a master under authority of rule 171.<sup>304</sup> After hearing the evidence, the master prepared a written report with recommendations as to division of the property. Objections were made to the report, but no evidence was offered to rebut the master's findings. The appellate court concluded that when issues are referred to the master under rule 171, his report is conclusive on the matters considered by him in the absence of proper objection accompanied by supporting evidence.<sup>305</sup> Further, the court stated that in the absence of an offer to present evidence, the trial court is not required to elicit evidence in support of the objections.<sup>306</sup> The appellate court also observed:

Perhaps the judge, as well as counsel, had the erroneous impression that the property division was subject to review on appeal on the basis of sufficiency of the evidence before the master to support his findings and recommendations and that the objections allowed would provide a basis for such review. Or, perhaps, the judge anticipated that one of the parties might complain of lack of opportunity to offer evidence on the property division. In any event, no objection was made to the effect that the appellant . . . was denied an opportunity to present evidence in support of her objections to the master's report before the report was adopted by the court . . . .

. . . She apparently acquiesced in the court's ruling that the master's findings and recommendations would be adopted, subject to review on appeal on the basis of the evidence before the master. Since that remedy is not available to her, she cannot complain on appeal that the court erred in denying her the right to present evidence in support of her oral objections, a right she failed to assert in the trial court.<sup>307</sup>

It is notable, perhaps, that in *Cameron* the court not only adopted the master's finding of fact but also his recommendations with respect to the

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300. 607 S.W.2d 243 (Tex. 1980), *rev'g* 592 S.W.2d 4 (Tex. Civ. App.—Beaumont 1979).

301. TEX. R. CIV. P. 171.

302. 607 S.W.2d at 246.

303. 601 S.W.2d 814 (Tex. Civ. App.—Dallas 1980, no writ).

304. TEX. R. CIV. P. 171.

305. 601 S.W.2d at 815.

306. *Id.*

307. *Id.* at 816.

property division. In such a situation, if a party is dissatisfied with the master's recommendations, that party has the responsibility of offering evidence in support of his objections.

In another case<sup>308</sup> the husband contended that the trial court had abused its discretion in appointing a receiver to make an immediate sale of the community home. The appellate court noted that in a divorce proceeding the trial court is not limited by the provisions of article 2293,<sup>309</sup> governing the appointment of a receiver, but also can utilize the appointment powers granted by the Family Code.<sup>310</sup> Under the circumstances presented in the case, the husband was unable to show an abuse of discretion on the part of the trial court in appointing a receiver; he owed large debts and there was a seeming inability on his part to make temporary support payments for his wife and children, as well as an inability on the part of both spouses to make payments on the home. In *Harrington v. Schuble*<sup>311</sup> the question in issue was not the propriety of appointing a receiver, but instead, the issues addressed were what level of competency must be exercised by a receiver in discharging his responsibilities in selling the family home and what is the proper role of the courts in supervising a receiver's acts. In almost every respect matters seem to have been ineptly handled. The court offered some useful suggestions with respect to the standard of conduct that a receiver and a trial court should exercise when dealing with such transactions.<sup>312</sup>

*Evidence of Grounds for Divorce.* Although the situation in *Austin v. Austin*<sup>313</sup> is certainly atypical, the court's holding is a precedent for the proposition that the parties to a divorce proceeding may stipulate as to what a petitioner's testimony would be, that such stipulation may be introduced into evidence, and that it may be considered in determining the grounds for divorce.<sup>314</sup> The testimony, however, is still subject to being controverted by opposing evidence and its probative value is a question for the trier of fact.<sup>315</sup> The stipulation, therefore, is not an admission of the facts testified to by the absent witness-party. In this particular case, the other party was present and, therefore, the supreme court did not address the issue of whether it would be permissible for both parties to stipulate to their prospective testimony. Nothing was said by the court, however, that would preclude the granting of the divorce if both parties were absent and presented their evidence by stipulation. Thus, the way seems to be open in

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308. *Sparr v. Sparr*, 596 S.W.2d 164 (Tex. Civ. App.—Texarkana 1980, no writ).

309. TEX. REV. CIV. STAT. ANN. art. 2293 (Vernon 1971).

310. 596 S.W.2d at 165.

311. 608 S.W.2d 253 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

312. *Id.* at 256-57.

313. 603 S.W.2d 204 (Tex. 1980). In *In re Glaze*, 605 S.W.2d 721, 725-26 (Tex. Civ. App.—Amarillo 1980, no writ), the court relied on *Austin* in giving effect to testimony "phrased largely in ultimate terms," as in *Austin*, with respect to the ground for divorce.

314. 603 S.W.2d at 206-07.

315. *Id.* at 207.

proper cases of hardship for a divorce to be granted on the stipulation of the parties without an appearance by either of them.

*Cervantes v. Cervantes*<sup>316</sup> also enunciates a precedent that is at variance with old ways of doing things. In this case, the wife filed for divorce alleging the ground of insupportability under section 3.01 of the Family Code.<sup>317</sup> The husband contended that the evidence was insufficient to establish the ground asserted by his wife because the parties had lived together up to the time of the hearing. The wife's testimony at the trial, however, was that although the parties lived under the same roof following her petition for divorce there was no "marital interaction"<sup>318</sup> during that time. The appellate court ruled that the evidence presented was sufficient to support a finding of insupportability.<sup>319</sup> Although this is not a case of continued cohabitation until the granting of the divorce, it is, nonetheless, authority for the proposition that parties may continue to live under the same roof without necessarily jeopardizing a cause of action for insupportability, provided that normal marital cohabitation has ceased.

*Other Evidentiary Issues.* In *Crisp v. Security National Insurance Co.*<sup>320</sup> the Texas Supreme Court stated that in determining the value of insured household goods destroyed by fire, the value of the goods to their owner should be the measure of the loss rather than the replacement cost or second-hand market value of the items destroyed.<sup>321</sup> In a recent divorce case<sup>322</sup> the court relied on this authority to exclude the testimony of an expert witness called to appraise the personal property of the parties.<sup>323</sup> In so ruling, the appellate court emphasized that the expert witness indicated that he would use standards such as market value in his evaluation:

In *Crisp*, the [supreme] court stated that actual value must be determined without resort to market value, but [the witness's] appraisals were based, in part, upon prices that would be brought at a forced or distressed sale which is not a relevant criterion in determining either fair market value or actual value to the owner. Therefore, the court did not err in excluding his opinion as evidence of either fair market value or actual value.<sup>324</sup>

*Trick v. Trick*<sup>325</sup> involved a dispute as to the value of stock in a professional medical association. The wife sought to introduce the testimony of a banker as an expert witness as to the value of the stock. The trial court refused to allow him to testify as an expert; even though the witness had made loans to many companies, he did not have any experience with re-

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316. 591 S.W.2d 332 (Tex. Civ. App.—Corpus Christi 1979, no writ).

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

318. 591 S.W.2d at 334.

319. *Id.*

320. 369 S.W.2d 326 (Tex. 1963).

321. *Id.* at 328-29.

322. *Wendlandt v. Wendlandt*, 596 S.W.2d 323 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

323. *Id.* at 325.

324. *Id.*

325. 587 S.W.2d 771 (Tex. Civ. App.—El Paso 1979, writ *dism'd*).

spect to valuing professional associations. The appellate court affirmed the ruling of the trial court.<sup>326</sup>

*Myklebust v. Myklebust*<sup>327</sup> concerned the fraudulent concealment of community property in a divorce proceeding. The suit was filed after the divorce proceeding had terminated. The evidentiary point involved in the case, however, is equally applicable to a divorce proceeding. In preparation for the divorce hearing, the husband's employer resisted discovery attempts by interposing a motion for protection under rule 186(b),<sup>328</sup> which the court granted. By the time of this proceeding, the employer seemed to have answered the interrogatories that the wife's counsel originally had propounded. The court concluded that the wife had a right to the information concerning community benefits earned by the husband and that the employer had the duty to supply this information.<sup>329</sup>

In another case<sup>330</sup> the divorce court denied a post-trial motion to reopen for admission of additional evidence prior to judgment. The appellate court held that this denial constituted an abuse of discretion in that the evidence that was sought to be offered would have shown changed circumstances of the parties and damage to their property.<sup>331</sup>

*Finality of Judgment.* In *In re Johnson*<sup>332</sup> the point was once more reiterated<sup>333</sup> that the issues of divorce and property division cannot be severed in a divorce proceeding.<sup>334</sup> Hence, until both issues are adjudicated, an appeal cannot be taken from a part of the cause of action because the matter is interlocutory in nature.<sup>335</sup>

*Horlock v. Horlock*<sup>336</sup> involved the issue of when a divorce decree becomes final for purposes of characterization of property acquired by one of the parties. After the trial court had entered judgment granting the divorce and dividing the property, the ex-husband acquired title to further property. The trial court then entered an amended judgment with respect to the property division. On appeal, this order was further modified. In approaching the chronology of events, the appellate court first concluded that the amended judgment of the trial court had the effect of adding something that was omitted inadvertently, so that the original judgment was not truly replaced, but merely corrected.<sup>337</sup> The amended judgment, therefore, related back to the date on which the divorce was orally rendered and the property acquired after judgment constituted an acquisition

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326. *Id.* at 773.

327. 605 S.W.2d 397 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

328. TEX. R. CIV. P. 186(b).

329. 605 S.W.2d at 398.

330. *Musick v. Musick*, 590 S.W.2d 582 (Tex. Civ. App.—Tyler 1980, no writ).

331. *Id.* at 584-85.

332. 595 S.W.2d 900 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

333. See McKnight, *supra* note 113, at 142 n.243.

334. 595 S.W.2d at 903.

335. *Id.* at 902-03.

336. 593 S.W.2d 743 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

337. *Id.* at 745.

of separate rather than community property.<sup>338</sup>

*Burrell v. Cornelius*<sup>339</sup> involved the extent to which a decree of divorce applies to transactions of the husband with third persons who are not parties to the divorce proceeding. In the suit for divorce the wife alleged that the husband had fraudulently concealed the proceeds of a sale of the community homestead shortly before the filing of the divorce petition. In the decree, the court divided the property, which included the proceeds from the sale of the home. After the rendition of the decree, the ex-wife initiated a new suit against her former husband and others involved in the sale. The appellate court held that because the issue of misappropriation of the homestead proceeds was raised in the divorce proceeding, the husband was entitled to judgment as a matter of law in that the issue was barred from being relitigated under the doctrine of res judicata.<sup>340</sup>

*Motion for a New Trial.* Although the period of ten days for filing a motion for a new trial has been extended to thirty days of the signing of the judgment,<sup>341</sup> some cases decided under the old rule may still have some relevance. The motion for a new trial was not only tardily filed in *Lott v. Lott*,<sup>342</sup> but there was also some uncertainty on the part of the movant as to the relief that he sought to obtain. At the hearing that was held on the thirtieth day after the final judgment was rendered, the movant assured the court repeatedly that he was not asking for a new trial, but instead was only seeking to have the judgment corrected in certain respects.<sup>343</sup> The order that was entered after the hearing, however, granted a new trial. Sometime afterward an amended judgment responding to some of the movant's requests was also entered. On appeal the appellant-movant urged that the amended judgment was void because the lower court had failed to hear any evidence after it had granted a motion for a new trial. The appellate court concluded that the appellant was precluded from making such an assertion because the relief granted was essentially that which he had sought.<sup>344</sup> In so holding, the court stated:

After appellant argued to the trial court that if his motion was granted a new trial would not be necessary, and obtained a ruling based upon this assertion, he cannot change his position. A party who takes a position successfully in a judicial proceeding cannot then take an inconsistent position, especially if his adversary is thereby prejudiced.<sup>345</sup>

Under the old rule the Texas Supreme Court held in *McCormack v. Guillor*<sup>346</sup> that the granting of a tardy motion for a new trial had to be in

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338. *See id.*

339. 588 S.W.2d 403 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

340. *Id.* at 405.

341. TEX. R. CIV. P. 329b. *See* Pope & McConnico, *supra* note 278, at 496-98.

342. 605 S.W.2d 665 (Tex. Civ. App.—Dallas 1980, writ diss'd).

343. For the new rule on modification of a judgment, see TEX. R. CIV. P. 329b(g)-(h); Pope & McConnico, *supra* note 278, at 499-500.

344. 605 S.W.2d at 667.

345. *Id.*

346. 597 S.W.2d 345 (Tex. 1980).

writing and signed by the judge within thirty days after the decree is rendered or else it was not effective.<sup>347</sup> Thus, the court concluded that the mere oral granting of a motion within that period was a nullity even though oral rendition was followed by a written order beyond the thirty day period.<sup>348</sup> Under rule 329b as it now stands,<sup>349</sup> a motion for a new trial shall be filed within thirty days of the signing of the judgment. If such a motion has been so filed, the trial court has power to grant a new trial or to modify the judgment until thirty days after any such motion is overruled.<sup>350</sup> If a motion for a new trial is not determined by a *written order signed within seventy-five days* after the judgment is signed, it is overruled by operation of law.<sup>351</sup>

The determination of whether to grant a motion for a new trial is within the sound discretion of the trial court. Even if a movant has shown that a failure to answer or appear was not intentional or the result of conscious indifference, the movant must still allege facts that would constitute a meritorious defense and show that granting the motion would not occasion delay or otherwise harm the plaintiff.<sup>352</sup>

Under new rule 356(a)<sup>353</sup> an appeal must be perfected within thirty days from the date the judgment is signed if there is no motion for new trial. It must be perfected within ninety days from the date the judgment is signed if there is a timely motion for a new trial filed by any party.<sup>354</sup> In *Garza v. Garza*<sup>355</sup> neither party was satisfied with the judgment. The husband filed a formal motion for a new trial, and the wife wrote a letter to the judge expressing her displeasure with the judge's conclusion. The husband's motion was overruled. Had the wife filed a motion for a new trial? She argued that her letter had that effect. In rejecting this argument, the court concluded that the letter could not be treated as a motion for a new trial because it did not request that the judgment be set aside or that the case be retried.<sup>356</sup>

*Appeal.* The niceties of the law with respect to time limits and other intricacies of perfecting an appeal will continue to plague forgetful members of the bar in spite of some simplification of the rules.<sup>357</sup> The lawyer who

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347. *Id.* at 346. *See also* *Sanchez v. Sanchez*, 609 S.W.2d 307, 308 (Tex. Civ. App.—El Paso 1980, no writ).

348. *See* 597 S.W.2d at 346.

349. TEX. R. CIV. P. 329b.

350. TEX. R. CIV. P. 329b(e).

351. TEX. R. CIV. P. 329b(c).

352. *Martinez v. Martinez*, 608 S.W.2d 719, 721-22 (Tex. Civ. App.—San Antonio 1980, no writ). *See also* *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966); *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 393, 138 S.W.2d 124, 126 (1939).

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

354. *Id.*

355. 608 S.W.2d 260 (Tex. Civ. App.—San Antonio 1980, writ *dism'd*).

356. *Id.* at 262.

357. *See* *Pope & McConnico*, *supra* note 278, at 500-07.



ignores these procedural details will be defeated by them.<sup>358</sup>

Once before a court of civil appeals, however, the careless lawyer may again be thwarted by the state of the record. For example, if during a trial a party states in open court that he has no objection and would agree to an award of twenty-five percent of certain disability retirement benefits to his spouse, he is estopped from changing his position on appeal.<sup>359</sup>

If there are no findings of fact in the record, the appellate court makes all reasonable inferences that may be drawn from the record in support of the judgment.<sup>360</sup> In cases of an incomplete record due to the absence of the reporter during part of the trial, the appellant who was present at the trial is deemed to have waived the lack of a complete record.<sup>361</sup> The appellant who did not participate in the trial and through no fault of his own finds himself before the appellate court without a complete record or virtually no record at all, however, will find the law more solicitous of his situation.<sup>362</sup> Even the appellant who has defaulted in appearing is entitled to a new trial if no record has been made by which the appellate court can adjudge even-handedly between the parties. In *Fly v. Fly*,<sup>363</sup> a certain amount of deception apparently was practiced upon an unsuspecting wife. After the husband had filed his suit for divorce in 1977, the parties were reconciled, and the wife was made to understand, or so she alleged under oath, that her husband's attorney had dismissed the original divorce proceeding. After the parties separated again, and without any further notice to the wife, the husband obtained a default divorce on the basis of the pleading still on file. The record indicated that the court reporter appeared and started taking down testimony in the case some time after the trial had begun. Although the wife's attorney tried to get a complete statement of facts for appeal under rule 377(d),<sup>364</sup> the trial judge filed a statement of facts merely stating that the proceedings had been taken down by the reporter with the exception of questions concerning venue.<sup>365</sup> Although the trial judge's recollection may have been faulty in this regard, the verbatim

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358. See *Costello v. Costello*, 608 S.W.2d 238 (Tex. Civ. App.—San Antonio 1980, no writ) (filing of appeal bond is jurisdictional requirement).

359. *McGinty v. McGinty*, 592 S.W.2d 34, 35 (Tex. Civ. App.—Beaumont 1979, writ dismissed).

360. *Barcelo v. Barcelo*, 603 S.W.2d 276, 277 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ dismissed); *Robbins v. Robbins*, 601 S.W.2d 90, 91 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); *Cousins v. Cousins*, 595 S.W.2d 173, 174 (Tex. Civ. App.—Tyler 1980, no writ); *Cervantes v. Cervantes*, 591 S.W.2d 332, 335 (Tex. Civ. App.—Corpus Christi 1979, no writ). See also *Grothe v. Grothe*, 590 S.W.2d 238, 239-40 (Tex. Civ. App.—Austin 1979, no writ) (partial statement of facts).

361. *Erger v. Erger*, 590 S.W.2d 186, 187 (Tex. Civ. App.—Fort Worth 1979, writ dismissed).

362. See, e.g., *Rogers v. Rogers*, 561 S.W.2d 172 (Tex. 1978) (husband entitled to new trial on ground that he was unable to obtain statement of facts from trial court proceeding); *Smith v. Smith*, 544 S.W.2d 121 (Tex. 1976) (error to affirm judgment of trial court when one party was unable to obtain statement of facts from lower court).

363. 590 S.W.2d 179 (Tex. Civ. App.—Corpus Christi 1979, no writ).

364. TEX. R. CIV. P. 377(d). For the purpose of this situation, rule 377(d), though altered in some respects, has not been changed significantly.

365. 590 S.W.2d at 181.

transcript of the court reporter supplemented by the judge's recollection would seem to satisfy precedent on this point.<sup>366</sup> The real problem, therefore, was the deception that was practiced on the wife and not the state of the record. The Corpus Christi court of civil appeals concluded: "The . . . wife was not required to rely on the unaided memory of the trial judge, who decided the merits of the case, in order to obtain a complete statement of facts."<sup>367</sup> Thus, by characterizing the supplementary statement of facts as "mere conclusions of law," the court was able to hold in favor of the wife.<sup>368</sup> Even though the court concluded that the judge's recollection was faulty in that he failed to mention a restraining order, concerning which the court conjectured that he must have questioned the husband, the court's holding seems unjustified in light of the authorities.<sup>369</sup> The appellate court alluded to the implication of fraud involved in the matter, but rather than pursuing this line of reasoning, it rested its remand for a new trial on dubious suppositions respecting the state of the record.

In view of results in similar situations, the practical soundness of the appellant's approach in *Fly* is illustrated by two other cases. In *Ferguson v. Ferguson*<sup>370</sup> the situation was virtually the same as in *Fly*, except that it was the wife who had filed for divorce against the husband, and there was no intimation that she had misled him to believe that she had dismissed her petition after a purported reconciliation. She proceeded with her suit, and a divorce was granted upon the husband's default. The attempted reconciliation was brought to the court's attention. On appeal the court pointed out rather disingenuously that the husband might have pleaded condonation.<sup>371</sup> If he had done so, however, he would have had to show that there was "a reasonable expectation of reconciliation," which in most circumstances is beside the point.<sup>372</sup> The husband might have fared better by way of a bill of review. That course, however, did not aid a wife in *Sanders v. Jefferson*.<sup>373</sup> There, the wife complained that the divorce was procured by fraud, that she and her attorney did not receive notice of the divorce hearing, and that there was no record upon which the court could proceed. With regard to this last allegation, the court rejected the wife's contention in that the rule with respect to the lack of a record applies only to appeals and not to bills of review.<sup>374</sup> The court explained that "[i]f she was entitled to a bill of review, she would have no need for a statement of facts because the action itself would be retried in the bill of review."<sup>375</sup>

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366. See McKnight, *supra* note 61, at 125-26; McKnight, *Family Law: Husband & Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 111-12 (1978); McKnight, *supra* note 15, at 110.

367. 590 S.W.2d at 181.

368. *Id.*

369. See note 366 *supra*.

370. 610 S.W.2d 559 (Tex. Civ. App.—Beaumont 1980, no writ).

371. See *id.* at 560.

372. TEX. R. CIV. P. 308(b).

373. 599 S.W.2d 663 (Tex. Civ. App.—Texarkana 1980, writ *dism'd*).

374. *Id.* at 664.

375. *Id.*

*Equitable Bill of Review*. Two cases dealt with the effects of a petitioner's remarriage when a bill of review is sought merely to set aside property and custody aspects of a divorce decree procured by the other spouse. In *Vinklarek v. Vinklarek*<sup>376</sup> the appellate court concluded that, although a petitioner who remarries cannot attack the dissolution of the marriage itself because of the benefits bestowed upon him by the decree, he may nevertheless attack the ancillary elements of the decree with respect to the division of property and matters affecting the parent-child relationship.<sup>377</sup> The court reached this same conclusion in *Rose v. Rose*.<sup>378</sup> *Rose* differs from *Vinklarek* only in the fact that the petitioner in *Rose* had entered into an informal marriage, rather than a ceremonial one. The defendant also urged in *Rose* that the petitioner had accepted financial benefits under the decree that barred him from attacking the property division. The court concluded that this argument was inappropriate because the petitioner was in necessitous circumstances and had to use whatever benefits were awarded to him to relieve that condition.<sup>379</sup>

In *Risk v. Risk*<sup>380</sup> the petitioner complained of intrinsic fraud that allegedly induced him to enter into a property settlement agreement in anticipation of divorce. Apart from the fact that the petitioner appears to have deceived himself in this case, the court ruled that he could not have relied on the intrinsic fraud of the other party in this instance because allegations of intrinsic fraud are insufficient grounds for setting aside such agreements.<sup>381</sup> Furthermore, because the petitioner had availed himself of substantial advantages of the property division by way of tax benefits, the court held that he was barred by that fact from seeking relief by bill of review.<sup>382</sup>

## V. DIVISION ON DIVORCE

*Property Settlement Agreements*. The most significant development in the law of property settlement agreements is the amendment of the Texas Constitution,<sup>383</sup> which makes it clear that a property settlement agreement may effectively provide that particular future income of either spouse from any source will be the separate property of a spouse as partitioned,<sup>384</sup> without any judicial implementation. Hence if a divorce decree is not entered,

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376. 596 S.W.2d 197 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

377. *Id.* at 200.

378. 598 S.W.2d 889, 893 (Tex. Civ. App.—Dallas 1980, writ dismissed). See also *Bragdon v. Bragdon*, 594 S.W.2d 561 (Tex. Civ. App.—Amarillo 1980, no writ) (remarried spouse barred from asserting that prior divorce was void).

379. 598 S.W.2d at 893.

380. 601 S.W.2d 743 (Tex. Civ. App.—Fort Worth 1980, writ dismissed).

381. *Id.* at 744. See also *Chapman v. Chapman*, 591 S.W.2d 574 (Tex. Civ. App.—Fort Worth 1979, no writ); *Bankston v. Bankston*, 251 S.W.2d 768 (Tex. Civ. App.—Dallas 1952, mand. overr.).

382. 601 S.W.2d at 745.

383. TEX. CONST. art. XVI, § 15; see note 59 *supra*; Comment, *The Legal Effect of Marital Separation Agreements Upon Community Property Status: Is It Time to Amend the Constitutional Definition of Wife's Separate Property?*, 12 ST. MARY'S L.J. 159 (1980).

384. On this point the authorities were closely divided prior to passage of the amend-

but the agreement is not made contingent on entry of a decree, the contract finally governs the rights of the parties. If the agreement is made a part of a divorce decree, however, the terms of settlement are merged into the judgment, and the independent standing of the agreement for purposes of enforcement disappears.<sup>385</sup> The most significant exception to this rule is the divorce decree that incorporates an agreement that goes beyond the power of the court to order. The most common example is a contractual undertaking of one spouse to support the other following divorce. Because this support term of the agreement maintains its contractual integrity whether or not incorporated into the decree, it is enforceable by subsequent suit.<sup>386</sup> Any other contractual term of a property settlement agreement not incorporated in the decree also is enforceable contractually.<sup>387</sup>

The contractual nature of the settlement agreement involving post-divorce periodic support payments is well illustrated by *Sorrels v. Sorrels*.<sup>388</sup> There the parties' divorce was accompanied by a settlement agreement in which the husband obligated himself to support the ex-wife until her remarriage. The parties subsequently remarried each other but were later divorced a second time. Thereafter the ex-wife sought to enforce the property settlement agreement entered into prior to the first divorce. No contention was made that remarriage to each other was intended to be covered by the specific terms of the agreement. Rather, the ex-husband argued that as a matter of law the terms of the agreement were dissolved by the second marriage. The court, nonetheless, found the contractual terms unaffected by the subsequent marriage.<sup>389</sup>

In *Wade v. Wade*<sup>390</sup> the ex-spouses disputed the construction of a provision of their property settlement agreement under which the husband was to pay the wife a fixed percentage of his subsequent "taxable income."<sup>391</sup> In this instance the ex-husband had since remarried, and he and his new wife had filed a joint income tax return. The appellate court concluded that, by applying objective standards, the settlement agreement referred to the ex-husband's one half of adjusted gross income for income tax purposes.<sup>392</sup>

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

385. *Ex parte Gorena*, 595 S.W.2d 841, 844 (Tex. 1979); see McKnight, *supra* note 113, at 146-47.

386. See *Myrick v. Myrick*, 601 S.W.2d 152, 153 (Tex. Civ. App.—Waco 1980, no writ); *Tewell v. Tewell*, 599 S.W.2d 351, 354-55 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

387. See *Pierson v. Pierson*, 596 S.W.2d 176, 179 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

388. 592 S.W.2d 692 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

389. *Id.* at 695-96. Community property undivided in divorce becomes a tenancy in common. Remarriage of the parties does not affect this result. *Spencer v. Spencer*, 589 S.W.2d 174, 176 (Tex. Civ. App.—El Paso 1979, no writ).

390. 592 S.W.2d 698 (Tex. Civ. App.—Austin 1980, no writ).

391. See I.R.C. § 63(b).

392. 592 S.W.2d at 700-01.

In another case<sup>393</sup> the ex-wife sued for damages for breach of a property settlement agreement whereby the ex-husband had agreed to discharge certain marital debts that were apparently joint liabilities of the parties. The ex-husband had since become a bankrupt and the debts as to him had been discharged. After continued harassment by creditors, the ex-wife was successful in recovering a money judgment against her former spouse for the amount of the debts he had agreed to discharge.<sup>394</sup>

*Power to Divide Separate Property.* As originally enacted, the Texas statute of 1841<sup>395</sup> excluded from division all significant separate property: lands and slaves.<sup>396</sup> The language of the divorce act, however, was not kept current with the new definition of separate property in the constitution of 1845.<sup>397</sup> After the reference to slaves was omitted,<sup>398</sup> only lands were specifically excluded by statute from the court's power of division. The general rule for division of property had been laid down in *Fitts v. Fitts*:<sup>399</sup>

As the parties in marriage, in this State, very often have each separate property, and as very generally there is some community property, the most obvious construction of the Statute is, that the separate property should be restored to its owner respectively, and that such division of the community property be made as may seem just and right . . .<sup>400</sup>

Later in its opinion the supreme court stated that "there would be no necessity for trenching on the separate property of either partner, for the benefit of the other," because "[b]oth [spouses] would often have separate property."<sup>401</sup> The court was referring to the Texas population of the mid-nineteenth century, mostly immigrants, each of whom frequently had separate property brought with them from other states. But as the population became more generally native-born, most, if not all, of the assets of a divorcing couple would be community property, and it was very frequently divided disproportionately in favor of the wife, who by conventional usage, in almost every instance, was the petitioner and was awarded custody of any minor children. Her grounds for divorce were the fault of the husband, generally cruelty, and the disproportionate division was justified by the husband's fault. When community property was inadequate to meet the wife's needs, the court would occasionally invade the husband's separate personalty, if he had separate personalty. This approach gave the divorce courts great flexibility in dividing the property. If the facts seemed to justify giving the husband a disproportionate share of the community

393. *Smith v. Smith*, 595 S.W.2d 631 (Tex. Civ. App.—Fort Worth 1980, no writ).

394. *Id.* at 652-53.

395. 1841 Tex. Gen. Laws, An Act Concerning Divorce and Alimony, § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 483, 484 (1898).

396. The wife's paraphernalia went unmentioned, presumably because it was regarded as unthinkable that she would be deprived of such property.

397. TEX. CONST. art. VII, § 19 (1845).

398. Tex. Civ. Stat. art. 2864 (1879).

399. 14 Tex. 443 (1855).

400. *Id.* at 450.

401. *Id.* at 453.

estate because it constituted the means of his livelihood, in that case also the wife might be provided for from the husband's separate personalty. As often as not, however, the division was based principally on the comparative needs of the wife, an alimony-based criterion, rather than on the husband's fault.

In 1969 the reference to separate realty was omitted from section 3.63<sup>402</sup> as part of the general statutory revision. Thereafter, some courts began to divide separate realty as well as separate personalty. In *Eggemeyer v. Eggemeyer*,<sup>403</sup> however, the court concluded that the legislative history of the statute showed that the legislature had not intended to change the law with respect to separate realty.<sup>404</sup> The Texas Supreme Court also there relied on the specific statutory reference to division of the estate of the parties,<sup>405</sup> that is, the community, in concluding that separate realty was excluded from division.<sup>406</sup> The court also found support for this conclusion in section 14.05 of the Family Code,<sup>407</sup> noting the provision therein that a spouse's property may be administered, not divested, to provide for the support of children.<sup>408</sup> Finally, the court relied on constitutional grounds to support its conclusion.<sup>409</sup> The court's reliance on the "due course of law" clause of the Texas Constitution<sup>410</sup> is not easily comprehended.<sup>411</sup> In *Eggemeyer* the court also placed reliance on the constitutional definition of separate property<sup>412</sup> to deny a court the power to convert the separate property of one spouse into the separate property of the other. When faced with the question of the division of separate personalty, the supreme court, persuaded by the force of the constitutional arguments and the doctrine of stare decisis, reached a consistent conclusion in *Campbell v. Campbell*<sup>413</sup> and remanded the case for further proceedings. After a motion for rehearing had been filed, however, the parties decided to settle their dispute without further litigation. Contrary to its usual practice of simply dismissing the motion for rehearing,<sup>414</sup> the supreme court withdrew its opinion and judgment in the case and set aside the judgments of the courts below.<sup>415</sup> One is, therefore, left with the feeling that the court had decided that resting its conclusion on constitutional grounds was perhaps ill-advised. The realization that deciding the case on constitutional grounds made its conclusions impervious to legislative

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

403. 554 S.W.2d 137 (Tex. 1977).

404. *Id.* at 139.

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

406. 554 S.W.2d at 139, 142.

407. TEX. FAM. CODE ANN. § 14.05(a) (Vernon 1975).

408. 554 S.W.2d at 139.

409. *Id.* at 140-41.

410. TEX. CONST. art. I, § 19.

411. *See* 554 S.W.2d at 140-41.

412. TEX. CONST. art. XVI, § 15.

413. 23 Tex. Sup. Ct. J. 391, 393 (June 7, 1980).

414. *See Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978), *motion for rehearing dismissed*, 21 Tex. Sup. Ct. J. 500 (July 22, 1978).

415. 24 Tex. Sup. Ct. J. 79, 80 (Nov. 22, 1980).

change may also have seemed too strict an approach. Two events then occurred that will affect the adjudication of a subsequent case similar to *Campbell*: (1) the electorate adopted the constitutional amendment allowing spouses and persons about to marry to alter the character of their future acquisitions of earnings and profits, and (2) the composition of the Texas Supreme Court was significantly changed with the election of two new members.

A writ of error has been filed in *Cameron v. Cameron*.<sup>416</sup> The property under consideration in this case consisted of military retirement benefits and personalty acquired with military pay. Following *Campbell*, the appellate court reversed the trial court's award to the wife of the husband's separate personalty interests, acquired through the husband's employment when the spouses made their home in a common law jurisdiction.<sup>417</sup> A dissenting judge in another case,<sup>418</sup> however, again expressed the view that such income does not constitute separate property within the Texas constitutional definition and, thus, for purposes of division on divorce.<sup>419</sup>

Wages earned by a domiciliary of a separate property state while temporarily residing in a community property state demand an entirely different analysis. The character of marital acquisitions is regulated by the law of domicile,<sup>420</sup> but where that domicile may be is a threshold question of fact and law that must be determined before the court takes up the question of division. If the wage earner clearly was domiciled in the non-community-property state, his earnings while temporarily residing in Texas would be his separate property. The contrary conclusion in *Gaudion v. Gaudion*<sup>421</sup> is, therefore, mistaken. The modern concept of domicile<sup>422</sup> does not require the court to conclude that a prior domicile has *not* been lost by a serviceman long-stationed in Texas merely because the serviceman realized that he might be reassigned and also nursed a hope of returning to the place of his childhood to retire.

Since its enactment in 1841, the property-division statute<sup>423</sup> has provided that the rights of children shall be considered in making the division. This factor had been given little attention since *Rice v. Rice*,<sup>424</sup> until it was resuscitated in *McKnight v. McKnight*.<sup>425</sup> In *Young v. Young*<sup>426</sup> the Texas

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416. 608 S.W.2d 748 (Tex. Civ. App.—Corpus Christi 1980, writ filed).

417. *Id.* at 751.

418. *Coote v. Coote*, 592 S.W.2d 52 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (Hughes, J., dissenting).

419. *Id.* at 55-56; see *Muns v. Muns*, 567 S.W.2d 563, 564 (Tex. Civ. App.—Dallas 1978, no writ). See also Sampson, *Common Law Property in a Texas Divorce: After Eggeneyer, the Deluge?*, 42 TEX. B.J. 131, 134 (1979).

420. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 257 (1971).

421. 601 S.W.2d 805, 807 (Tex. Civ. App.—Austin 1980, no writ).

422. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971).

423. 1841 Tex. Gen. Laws, An Act Concerning Divorce and Alimony, § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 483, 484 (1898).

424. 21 Tex. 58 (1858).

425. 535 S.W.2d 658, 661 (Tex. Civ. App.—El Paso), *rev'd on other grounds*, 543 S.W.2d 863 (Tex. 1976).

426. 609 S.W.2d 758 (Tex. 1980).

Supreme Court held that the right of support of a disabled, unmarried adult child in the care of a spouse could be considered in making a division of property on divorce.<sup>427</sup> Apparently, therefore, occupancy of the separate home of one spouse may be given to the other who has the care of such a child. Thus, a point left open in *Eggemeyer* may be resolved.

Another issue left open in *Eggemeyer* is the propriety of putting a lien on a spouse's separate property to secure payment of an amount ordered by the court to achieve a proper division of property. In *Buchan v. Buchan*<sup>428</sup> and again in *Day v. Day*<sup>429</sup> the Tyler court of civil appeals concluded that fixing a lien on separate property is proper in this situation.<sup>430</sup> Although the separate property on which the lien was placed in *Buchan* was a homestead, the lien was for improvements and owelty.<sup>431</sup> In *Day* the property on which the lien was fixed later became a homestead, and the homestead claim was therefore irrelevant.<sup>432</sup>

A separate property problem not yet tackled by the Texas Supreme Court is that of the characterization and disposition on divorce of separate corporate shares, the value of which has significantly appreciated during marriage due to retention of corporate profits that might have been declared as dividends and hence received by the owner of the shares as community property. Some courts once tended toward an alter ego analysis<sup>433</sup> in cases involving wholly owned or substantially controlled separate corporate entities, with the result that the shares were treated as community property on divorce. This approach has seemingly given way to an entity analysis under which the appreciation in value of the separate shares may constitute a basis for a community property claim for reimbursement in the process of property division.<sup>434</sup> In *Humphrey v. Humphrey*,<sup>435</sup> for example, the appellate court ruled that the trial court had properly refused to submit to the jury the issue of alter ego of the wholly owned separate corporation in the absence of evidence of a fraudulent purpose to which the corporation was put.<sup>436</sup>

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427. *Id.* at 760.

428. 592 S.W.2d 367 (Tex. Civ. App.—Tyler 1979, writ *dism'd*).

429. 610 S.W.2d 195 (Tex. Civ. App.—Tyler 1979, writ *ref'd n.r.e.*).

430. *Id.* at 198-200; 592 S.W.2d at 371. *But see* *Duke v. Duke*, 605 S.W.2d 408, 412 (Tex. Civ. App.—El Paso 1980, writ *dism'd*) (applying *Eggemeyer*, deed of trust lien on husband's separate property deemed invalid).

431. 592 S.W.2d at 371-72.

432. 610 S.W.2d at 198-99; *cf.* *Spence v. Spence*, 455 S.W.2d 365, 369-70 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ *ref'd n.r.e.*) (where property became a valid homestead before abstract of judgment was filed, property was exempt from judgment lien).

433. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 81 (1976); McKnight, *supra* note 384, at 448-49.

434. *See* McKnight, *supra* note 61, at 136-37. *See also* *Holt v. Holt*, 5 FAM. L. REP. (BNA) 2476, 2477 (Cal. Ct. App. Mar. 3, 1979) (husband not entitled to additional separate property award for increase in value of his separate investment in incorporated business because husband had no equity in investment prior to marriage).

435. 593 S.W.2d 824 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ *dism'd*).

436. *Id.* at 826. For a discussion of the alter ego theory in the context of a community corporate interest, *see* *Duke v. Duke*, 605 S.W.2d 408, 410-12 (Tex. Civ. App.—El Paso 1980, writ *dism'd*).



*Exercise of Discretion.* The trial court's exercise of its discretion in dividing property ordinarily will not be disturbed by the appellate court,<sup>437</sup> but a particularly one-sided disposition may be. There are three recent cases of the latter type. In *Musick v. Musick*<sup>438</sup> neither spouse had any separate property and the value of the community estate was about \$97,000. The couple had three minor children, and the husband was totally disabled. The trial court awarded \$80,000 in assets to the husband along with virtually all the debts, totaling approximately \$63,000, but he was not ordered to support the children. The net value of the award to the husband, which included all productive assets of the estate, amounted to \$17,000. The net value of the award to the wife was also \$17,000, but included a \$13,000 money judgment against the husband, a mobile home that had been repossessed by the mortgagee prior to the entry of the judgment, and a car that the husband had allowed to become undrivable. Although the trial court had endeavored to achieve a seeming balance between the spouses, the appellate court ruled that the property division was "inequitable and manifestly unjust and unfair" to the wife and accordingly set aside the division and remanded the case.<sup>439</sup> In contrast, in *Aronson v. Aronson*<sup>440</sup> the division very much favored the wife. Out of a community estate of \$140,000 the wife received assets valued at \$93,000 and liabilities of \$4,500, whereas the husband was awarded \$37,000 in assets but liabilities amounting to \$48,500. The disparity in the award of assets and liabilities was too great for the appellate court to regard as fair.<sup>441</sup> The facts that the husband had a present capacity to earn \$12,000 a year and the wife had no reasonable expectation of employment were offset by the husband's age (69) as compared to that of the wife (55). The wife also owned over \$7,000 worth of separate securities and other separate property that produced an income of \$400 a year. The husband had a mere life income of about \$1,600 a year. The court concluded that these facts could not justify such an uneven division of the community assets.<sup>442</sup>

*Erger v. Erger*<sup>443</sup> is somewhat similar to *Aronson*. Both spouses were in their early forties and they had one minor child. No fault was pleaded or proved. The wife's separate estate was significantly larger than that of the husband's, and she had a greater earning capacity. The husband had military retirement benefits of \$900 a month, of which the trial court awarded him \$600 a month. He was also required to pay \$250 a month for the support of the child. The total of the valued assets awarded to the wife was \$46,000, whereas that awarded to the husband was \$29,000, including a note of \$17,500 that the husband had executed to the wife for a loan of

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437. *Gaston v. Gaston*, 608 S.W.2d 332, 336 (Tex. Civ. App.—Tyler 1980, no writ); *Walker v. Walker*, 608 S.W.2d 326, 328 (Tex. Civ. App.—Eastland 1980, no writ).

438. 590 S.W.2d 582 (Tex. Civ. App.—Tyler 1980, no writ).

439. *Id.* at 586.

440. 590 S.W.2d 189 (Tex. Civ. App.—Dallas 1979, no writ).

441. *Id.* at 190.

442. *Id.*

443. 590 S.W.2d 186 (Tex. Civ. App.—Fort Worth 1979, writ *dism'd*).

her separate property. The appellate court held that this disparity of division, without "some reasonable basis," constituted an abuse of discretion.<sup>444</sup>

An order to pay a sum of money in an instance in which there is no property, or at least not as much property, to divide must be termed an alimony award and is hence invalid as against public policy. *Cordell v. Cordell*<sup>445</sup> is an example of this rare phenomenon. As a general rule, however, a money judgment is clearly referable to the property division and the alimony argument is not made.<sup>446</sup>

In *Young v. Young*<sup>447</sup> the Texas Supreme Court concluded that the trial court may consider the fault of either of the parties in dividing the property in a fault-based divorce.<sup>448</sup> The Corpus Christi court of civil appeals had already applied this concept in a no-fault divorce context, ruling that "[o]nce the trier of facts has determined that the statutory grounds for divorce have been met, it is discretionary on the trial judge's part to permit additional evidence in . . . regard [to the cause of marital difficulties]."<sup>449</sup> In effect the Austin court also allowed the consideration of fraud or bad faith in making a property division in *Colley v. Colley*.<sup>450</sup> There the appellate court speculated that the trial court had concluded that the husband had not accounted fully for all his property interests and would not discharge his financial obligation to the couple's minor child.<sup>451</sup> The appellate court, therefore, sustained the division of property substantially in favor of the wife.<sup>452</sup>

More active fraud was practiced in *Grothe v. Grothe*.<sup>453</sup> In that case the husband admitted converting community funds to his personal use with the intention of depriving the wife of her interest in them. The court ruled that this conduct on the husband's part supported the disparate division of the estate in favor of the wife.<sup>454</sup>

The Dallas court of civil appeals acknowledged in *Murff v. Murff*<sup>455</sup> that a trial court may consider the necessitous circumstances of the parties in making a division of property.<sup>456</sup> The court found, however, that a court

444. *Id.* at 188.

445. 592 S.W.2d 84, 85 (Tex. Civ. App.—Texarkana 1979, no writ).

446. *See* *Price v. Price*, 591 S.W.2d 601, 603 (Tex. Civ. App.—Tyler 1979, no writ). A money judgment entered against a party as a part of the division of property is not treated as includable in the recipient's gross income for income tax purposes, nor is it deductible from the gross income of the paying spouse. *Gammill v. Commissioner*, 73 T.C. 921, 932 (1980); I.R.C. §§ 71(a)(1), 215(a).

447. 609 S.W.2d 758 (Tex. 1980).

448. *Id.* at 761-62.

449. *Brown v. Brown*, 599 S.W.2d 135, 137 (Tex. Civ. App.—Corpus Christi 1980, no writ).

450. 597 S.W.2d 30 (Tex. Civ. App.—Austin 1980, no writ).

451. *Id.* at 32.

452. *Id.*

453. 590 S.W.2d 238 (Tex. Civ. App.—Austin 1979, no writ).

454. *Id.* at 239-40; *see* *Reaney v. Reaney*, 505 S.W.2d 338, 340 (Tex. Civ. App.—Dallas 1974, no writ).

455. 601 S.W.2d 116 (Tex. Civ. App.—Dallas 1980, writ granted).

456. *Id.* at 118 (citing *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974)).

lacks authority to cure a disparity of income between the spouses.<sup>457</sup> Because the trial court below had given consideration "to 'disparity of income' rather than to the respective 'necessities' of the spouses" the court in *Murff* ruled that the property division was manifestly unjust.<sup>458</sup> Although these factors are sometimes spoken of as independent criteria, in the context of the trial court's division they are intimately related. What is referred to as disparity of income most commonly refers to a spouse's ability to fulfill future needs, which in turn are related to the circumstances of the marriage.

*Foreign Realty.* In *In re Glaze*<sup>459</sup> we are supplied with yet another authority for the proposition, until recently unsupported by reported precedent,<sup>460</sup> that a Texas divorce court with personal jurisdiction over a party may order that party to convey foreign real property in a manner appropriate to achieve an equitable division of the community estate.<sup>461</sup>

*Reimbursement.* A claim for reimbursement is neither absolute nor for a fixed amount because it may be reduced or rejected altogether when the claimant has taken or will take a substantial benefit in the property that itself has been benefited.<sup>462</sup> In dealing with estate tax matters the Internal Revenue Service often seems entirely oblivious of this rule.<sup>463</sup> The principle of equitable reduction for benefit to the claimant, however, may be very significant as between spouses in a divorce context.<sup>464</sup> In the case of a divorce as well as the death of a spouse, a spouses's separate estate may be reimbursed for capital contributions made to the welfare of family fortunes.<sup>465</sup> Purporting to achieve reimbursement, a divorce court may not, however, take the fee to separate real property of one spouse and give it to the other spouse, as such an approach constitutes a divestiture of separate realty.<sup>466</sup>

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457. 601 S.W.2d at 118.

458. *Id.* In *Murff* the court also held that a money judgment should not be employed in lieu of a division of property when property is available for division. *Id.* at 121. Such a conclusion seems lacking in the flexibility necessary to produce a just and right division in many instances.

459. 605 S.W.2d 721 (Tex. Civ. App.—Amarillo 1980, no writ).

460. See McKnight, *supra* note 113, at 150-51.

461. 605 S.W.2d at 724.

462. See Colden v. Alexander, 141 Tex. 134, 147-48, 171 S.W.2d 328, 334 (1943); accord, Tester v. Tester, 5 FAM. L. REP. (BNA) 2737, 2737-38 (Ariz. Ct. App. May 18, 1979).

463. As an example, in formulating Rev. Rul. 80-242, 1980-36 I.R.B. 11, the IRS treated the community right to reimbursement for payment of premiums on a separate life insurance policy as a fixed amount, without reduction for the benefit that the community claimant, as named beneficiary, had received. In this instance the discrepancy was of no practical concern to the executor, because any reduction in the community claim would merely have swelled the separate part of the value of the policy.

464. See Harrell v. Harrell, 591 S.W.2d 324, 326 (Tex. Civ. App.—Corpus Christi 1979, no writ); Horlock v. Horlock, 533 S.W.2d 52, 56-58 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed).

465. Schmidt v. Huppman, 73 Tex. 112, 116, 11 S.W. 175, 176 (1889).

466. Bell v. Bell, 593 S.W.2d 424, 426 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

Proof of a community claim to reimbursement for improvement of separate property is not discharged by merely showing a depletion of community funds, even though the owner of the separate property admitted that some community funds were used for improvement on the separate property.<sup>467</sup> In fixing the measure of reimbursement for improvements paid by one marital estate for the benefit of another, there has been a wide disparity in judicial conclusions.<sup>468</sup> In *Pruske v. Pruske*<sup>469</sup> the court enunciated the rule that the measure of reimbursement is cost or enhancement, whichever is less.<sup>470</sup> Thus, in order to recover reimbursement, both amounts must be proved. In *Day v. Day*<sup>471</sup> the court appears to have measured reimbursement merely by cost.<sup>472</sup>

Although it was once said that a right of reimbursement could not be secured by a lien put upon a homestead for its own improvement,<sup>473</sup> such a conclusion seems against principle. The constitution allows the fixing of a lien upon a homestead for purchase money, as well as taxes and improvements.<sup>474</sup> Although the constitutional provision goes on to specify that in the case of improvements, a lien shall fix "only when the work and material are contracted for in writing with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead,"<sup>475</sup> that provision is referable to transactions with third persons and not between the spouses. In *Buchan v. Buchan*,<sup>476</sup> prior to the marriage, the husband had leased a tract of the wife's property for fifteen years and had constructed a house on the property as part of the consideration for the lease. The house became the couple's homestead. In dividing the property, the court put a lien of \$45,000 on the land, that is, for the value of the husband's leasehold interest that was terminated.<sup>477</sup> Under the circumstances, the lien on the homestead may be characterized as for improvements and owelty.<sup>478</sup>

*Attorney's Fees.* The rendering of an award of attorney's fees to one party as against the other and the fixing of the amount of that award are incidents<sup>479</sup> of the division of property and, as such, are within the sound dis-

467. *Gaston v. Gaston*, 608 S.W.2d 332, 334-35 (Tex. Civ. App.—Tyler 1980, no writ).

468. See McKnight, *Is There a Right of Reimbursement in Texas?*, in MARRIAGE DISSOLUTION IN TEXAS ch. C, at 19-27 (State Bar of Texas 1979).

469. 601 S.W.2d 746 (Tex. Civ. App.—Austin 1980, writ dismissed).

470. *Id.* at 748-49.

471. 610 S.W.2d 195 (Tex. Civ. App.—Tyler 1980, writ refused n.r.e.).

472. *Id.* at 198.

473. *Barber v. Barber*, 223 S.W. 866, 867-68 (Tex. Civ. App.—Fort Worth 1920, writ dismissed). In *Howle v. Howle*, 422 S.W.2d 252, 256 (Tex. Civ. App.—Tyler 1967, no writ), the ex-wife, who had occupied the premises as a homestead under a divorce decree, sought to abandon the homestead and claimed a right of reimbursement with a lien on the property for its payment.

474. TEX. CONST. art. XVI, § 50.

475. *Id.*

476. 592 S.W.2d 367 (Tex. Civ. App.—Tyler 1979, writ dismissed).

477. *Id.* at 371-72.

478. *Id.*

479. *Carle v. Carle*, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950).

cretion of the trial judge.<sup>480</sup> In this context, a reasonable fee as a quantum meruit may be granted to an attorney discharged prior to trial, apart from the attorney actually involved in prosecuting the suit to judgment.<sup>481</sup> In fixing the amount of the fee<sup>482</sup> the court must determine a fee that is reasonable under the circumstances of the parties and not merely one that is within the normal and customary charges of an attorney for the services performed. Thus, in *Saums v. Saums*<sup>483</sup> the appellate court reversed an award of an attorney's fee of \$7,500 for the representation of a woman who earned \$1,000 a month.<sup>484</sup> Although the attorney testified that the case had taken more time than usual to prepare and that the normal and customary fee for a contested divorce case before a jury was between \$5,000 and \$10,000 in the county in which the case was tried, the appellate court concluded that the fee was in excess of a reasonable amount.<sup>485</sup>

In *Thomas v. Thomas*<sup>486</sup> the appellate court ordered a remittitur of part of the award of the wife's attorney's fees to be paid by the husband.<sup>487</sup> The wife had advanced her attorney \$2,500 toward his fees, which were agreed as to amount for time of preparation and trial time. The total amount charged was \$4,050. The court ordered the husband to pay attorney's fees in the amount of \$3,000. Because this amount in addition to that already paid by the wife exceeded the bill for services by \$950, a remittitur of the latter amount was ordered by the appellate court.<sup>488</sup>

*Division After Divorce.* Community property not divided on divorce becomes a tenancy in common between the former spouses and is therefore subject to partition.<sup>489</sup> In *Bloom v. Bloom*<sup>490</sup> the appellant argued that the

480. *Blaylock v. Blaylock*, 603 S.W.2d 254, 255 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *Grandinetti v. Grandinetti*, 600 S.W.2d 371, 373 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *Cordell v. Cordell*, 592 S.W.2d 84, 86 (Tex. Civ. App.—Texarkana 1979, no writ). In *Murff v. Murff*, 601 S.W.2d 116, 119 (Tex. Civ. App.—Dallas 1980, writ granted), the court concluded that the award of attorney's fees must be an integral part of the discretionary division of property.

481. *Bass v. Bryan*, 609 S.W.2d 652, 654 (Tex. Civ. App.—San Antonio 1980, no writ).

482. The 1979 amendment to TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1980-1981), stating that a court should take judicial notice of the "usual and customary fees in such cases," does not appear to be applicable to divorce cases. Attorney's fees, however, may be awarded to a claimant in a suit for breach of a property settlement agreement pursuant to a 1977 amendment to art. 2226, which provides for the recovery of attorney's fees in claims arising from a written or oral contract. *Id.*; *Brophy v. Brophy*, 599 S.W.2d 345, 347 (Tex. Civ. App.—Texarkana 1980, no writ).

483. 610 S.W.2d 242 (Tex. Civ. App.—El Paso 1980, writ dismissed).

484. *Id.* at 243-44. See also *Paugh v. Paugh*, 579 S.W.2d 38, 40 (Tex. Civ. App.—Waco 1979, no writ).

485. 610 S.W.2d at 243-44.

486. 603 S.W.2d 356 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

487. *Id.* at 358-59.

488. *Id.* at 359. For a case involving a suit against an attorney for fraudulently proceeding against a levying officer and his surety in connection with the recovery of a fee awarded, see *Hennigan v. Harris County*, 593 S.W.2d 380 (Tex. Civ. App.—Waco 1979, writ refused n.r.e.).

489. *Busby v. Busby*, 457 S.W.2d 551, 554-55 (Tex. 1970); *Ex parte Williams*, 160 Tex. 314, 316, 330 S.W.2d 605, 606 (1960); *Gray v. Thomas*, 83 Tex. 246, 251, 18 S.W. 721, 723 (1892).

490. 604 S.W.2d 393 (Tex. Civ. App.—Tyler 1980, no writ). See also *Arrambide v. Arrambide*, 601 S.W.2d 197 (Tex. Civ. App.—El Paso 1980, no writ).

disposition of unvested military retirement benefits in 1972, prior to the Texas Supreme Court's decision in *Cearley v. Cearley*,<sup>491</sup> was a nullity and hence that the benefits should be partitioned. The court in *Bloom* invoked the doctrine of *res judicata* to bar the proceeding.<sup>492</sup> In *Green v. Doakes*<sup>493</sup> the divorce decree had been entered in 1971. The decree provided that the family home should be sold on such terms as the spouses should find mutually agreeable. After a long lapse of time, however, the parties were unable to agree, and the ex-wife brought a suit to partition the property. *Res judicata* was argued, but was not pleaded as a defense. The appellate court, therefore, treated the defense as waived, but stated that even if it had been pleaded, it would not have been a bar to the proceeding.<sup>494</sup> The appellate court concluded that all fees and expenses of the sale might be paid from the proceeds of the sale, before partitioning the remainder, and that the trial court might adjust the equities bearing on the parties' property interest.<sup>495</sup> The court, however, could find no ground for allowing any of the funds to be paid for attorney's fees.<sup>496</sup> In making a partition after divorce, as opposed to an equitable division on divorce, the only equities that may be taken into consideration are those affecting a partition as between the parties as cotenants.<sup>497</sup>

If the decree of divorce does not divide the property, but division is by a property settlement agreement, no subject matter exists to support a partition proceeding,<sup>498</sup> even though the agreement was not filed with the papers of the divorce proceeding as provided in rule 11.<sup>499</sup> The agreement is independently enforceable as a contract, and fulfillment of its terms is a bar to a subsequent proceeding.<sup>500</sup>

The statute of limitation has been raised frequently in response to a petition for partition of retirement benefits not divided in a divorce decree. If there has been no repudiation of the petitioner's claim in the interim, however, a period of limitation cannot begin to run;<sup>501</sup> nor can laches be pleaded as a defense in the absence of any repudiation of the claim.<sup>502</sup>

491. 544 S.W.2d 661 (Tex. 1976).

492. 604 S.W.2d at 396. *See also* *Harris v. Harris*, 605 S.W.2d 684, 687 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

493. 593 S.W.2d 762 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

494. *Id.* at 764.

495. *Id.* at 765.

496. *Id.*

497. *Disbrow v. Thibodeaux*, 596 S.W.2d 174, 175-76 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

498. *Pierson v. Pierson*, 596 S.W.2d 176, 178-79 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

499. TEX. R. CIV. P. 11.

500. *Pierson v. Pierson*, 596 S.W.2d 176, 178-79 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

501. *Mooney v. Glasspool*, 602 S.W.2d 364, 366 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.). *See also* *Terrell v. Terrell*, 609 S.W.2d 841, 843 (Tex. Civ. App.—San Antonio 1980, no writ); *Trahan v. Trahan*, 609 S.W.2d 820, 822-23 (Tex. Civ. App.—Texarkana 1980, no writ).

502. *Mooney v. Glasspool*, 602 S.W.2d 364, 366 (Tex. Civ. App.—Beaumont 1980, writ

Mere passage of time is irrelevant to both defenses. This point is nicely illustrated by *Terrell v. Terrell*.<sup>503</sup> In *Terrell* the husband had been receiving benefits for more than eight years. In the meantime the ex-wife made no claim to the benefits, but there had also been no repudiation of her rights. The court ruled that her claim was therefore unaffected by the lapse of time.<sup>504</sup>

In *Trahan v. Trahan*<sup>505</sup> the parties were divorced in 1963 and remarried in 1970. Their second marriage ended in divorce in 1971. The husband retired from military service between the first divorce and the second marriage. In neither divorce proceeding was the community part of the military retirement benefits divided. A money judgment with interest running from a month after rendition was made against the pensioner for one-half of the community share of the retirement benefits he had received, reduced by the amount of federal income taxes the ex-wife would have been obligated to pay on her share of the benefits. The ex-husband was also ordered to pay a fixed amount of his monthly benefits to discharge the money judgment. The appellate court reversed that portion of the trial court's order that directed the pensioner to make monthly payments, because violation of the order could not be enforced by contempt in that those payments were "not from a particular source."<sup>506</sup>

If the parties are first divorced in a foreign state, remarry, and seek a second divorce in Texas, the Texas court will apply the foreign law with regard to property left undisposed in the first divorce.<sup>507</sup> Under Oklahoma law, however, a divorce decree is a bar to a claim for property not dealt with in the decree.<sup>508</sup> Hence that property is not subject to division in the second divorce in Texas.<sup>509</sup> In *Danforth v. Danforth*<sup>510</sup> the parties were divorced in Kansas in 1963, but remarried there in 1964. They entered into a property settlement agreement, incorporated in the Kansas decree, that provided that the parties would share equally any assets omitted from their agreement. The military retirement benefits earned by the husband were omitted in the Kansas decree, as they were in a subsequent Texas divorce in 1967. The court granted the wife a partition of the retirement benefits, including those accrued prior to the Kansas divorce.<sup>511</sup> The court reasoned that the settlement agreement had the effect of superseding Kansas law, which would have foreclosed a claim to omitted assets.<sup>512</sup>

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ref'd n.r.e.). See also *Trahan v. Trahan*, 609 S.W.2d 820, 824 (Tex. Civ. App.—Texarkana 1980, no writ).

503. 609 S.W.2d 841 (Tex. Civ. App.—San Antonio 1980, no writ).

504. See *id.* at 844-45.

505. 609 S.W.2d 820 (Tex. Civ. App.—Texarkana 1980, no writ).

506. *Id.* at 824.

507. See McKnight, *supra* note 61, at 143.

508. *Shipp v. Shipp*, 383 P.2d 30, 33 (Okla. 1963).

509. *Cousins v. Cousins*, 595 S.W.2d 172, 175 (Tex. Civ. App.—Tyler 1980, writ dismissed).

510. 610 S.W.2d 182 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

511. *Id.* at 184.

512. *Id.* at 184-85.

*Enforcement.* In order to achieve enforcement of arrears of temporary alimony and child support, a divorce court in 1973 adjudged the husband in contempt and ordered him to pay the arrears at the rate of \$100 a month. Several years later the ex-wife brought suit to reduce this order to a money judgment. The ex-husband argued that the divorce decree was res judicata as to this action. The appellate court concluded that reduction to judgment was an appropriate mode of enforcement.<sup>513</sup> For jurisdictional purposes such enforcement may be pursued by a separate suit elsewhere than in the divorce court because it is not "a matter incident to divorce or annulment proceedings" as that phrase is used in acts defining the jurisdiction of family courts. In *Day v. Day*<sup>514</sup> an ex-wife sought to foreclose a lien for a money judgment that the divorce court had fixed on realty of the ex-husband. The Texas Supreme Court pointed out that the judgment creditor might either seek a writ of execution from the trial court to enforce the lien or proceed in a separate suit to foreclose it.<sup>515</sup>

In *Ex parte Gorena*<sup>516</sup> the Texas Supreme Court held that an agreed judgment with respect to division of property and child support payments "is no longer merely a contract between private individuals but is the judgment of the court."<sup>517</sup> Hence, the court concluded that the agreement merges into the judgment for purposes of enforcement.<sup>518</sup> Further, the court made abundantly clear the point that the exercise of contempt power to enforce such agreed judgments is not limited to matters related to child support.<sup>519</sup> The court also approved<sup>520</sup> the decision of the San Antonio court of civil appeals in *Ex parte Anderson*<sup>521</sup> to the effect that an order to pay the ex-spouse directly is just as enforceable as one to pay money into the registry of the court. The supreme court had previously held in *Ex parte Sutherland*<sup>522</sup> that an order to pay money into the registry of the court is enforceable by contempt.<sup>523</sup>

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513. *Fowler v. Stone*, 600 S.W.2d 351, 353 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (dictum). Because res judicata had not been pleaded, the court properly stated that the issue was waived. *Id.* A checklist of steps by which enforcement of temporary alimony, child support, and foreign alimony awards may be achieved by garnishment of federal military retirement pay is provided in Shovlin, *Guidelines for Garnishment of Military Retirement Pay*, 43 Tex. B.J. 215 (1980). For an instance of enforcement of a foreign alimony decree in Texas, see *Parker v. Parker*, 593 S.W.2d 857, 859 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

514. 603 S.W.2d 213 (Tex. 1980).

515. *Id.* at 215-16.

516. 595 S.W.2d 841 (Tex. 1979). See also *McCray v. McCray*, 584 S.W.2d 279 (Tex. 1979).

517. *Id.* at 844.

518. See *id.*

519. *Id.* at 844-45.

520. *Id.* at 847.

521. 541 S.W.2d 286 (Tex. Civ. App.—San Antonio 1976), discussed in *McKnight*, *supra* note 15, at 123-24.

522. 526 S.W.2d 536 (1975).

523. *Id.* at 539. In *Gorena* the court also explained that "the controlling factor" in *Ex parte Yates*, 387 S.W.2d 377 (Tex. 1965), was the fact that the contemnor "was required to pay money that he had not yet earned." 595 S.W.2d at 846; accord, *Ex parte Chacon*, 607 S.W.2d 317, 319 (Tex. Civ. App.—El Paso 1980). The facts and order in *Yates* were very



In any case, a judgment must be final in the sense that no appeal from it has been taken before civil contempt proceedings may be used to enforce it. In *Ex parte Bible*<sup>524</sup> the husband was ordered to execute a deed to certain realty in favor of his wife within ten days of the signing of the decree. The court ruled that his appeal from the judgment effectively foreclosed a contempt citation for his willful disobedience of the order.<sup>525</sup>

In *Ex parte Weatherly*<sup>526</sup> the relator was confined for failure to obey a temporary order of a divorce court to pay a sum into the registry of the court for the discharge of certain debts, including mortgage installments on the family home. In *Ex parte Chacon*<sup>527</sup> the husband was jailed for failure to comply with the court's decree ordering him to pay past-due income taxes. In both instances the relator was ordered discharged because his confinement constituted imprisonment for debt in violation of the Texas Constitution.<sup>528</sup>

In *Chacon* the trial court awarded the wife all the household furnishings at a particular address.<sup>529</sup> In the absence of a further order directing delivery of particular furnishings to her, however, the court held that the husband could not be held in contempt for failure to comply.<sup>530</sup> *Ex parte Austin*<sup>531</sup> also involved a citation for contempt of a nonexistent order. In the divorce decree the wife was awarded a particular amount of money on deposit in a savings account that the husband maintained at his place of employment. The parties later agreed that the ex-husband would withdraw the funds in the account, deposit them into a checking account and then give his ex-wife a check on the latter account. All this was done, but on presentation of the check by the ex-wife there were insufficient funds in the checking account to pay the check. The ex-husband was jailed for contempt. In releasing him, the court said that in carrying out the ex-wife's directions to procure the funds awarded to her by the decree, the ex-husband was not in violation of the court order, even that part of it that ordered him to "execute all instruments necessary to effect this decree."<sup>532</sup> To achieve the results intended, the decree could have ordered the husband to procure checks from his savings account made payable to his wife,

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peculiar, and this observation by the supreme court should not be construed to mean that any order to make periodic payments to achieve an equitable division of property is not enforceable by contempt. See *McKnight*, *supra* note 113, at 156. Such an overbroad reading is reflected in *Ex parte Weatherly*, 605 S.W.2d 661, 663 (Tex. Civ. App.—Amarillo 1980).

524. 596 S.W.2d 207 (Tex. Civ. App.—Houston [14th Dist.] 1980).

525. *Id.* at 207-08; *accord*, *Ex parte Valdez*, 521 S.W.2d 724, 727 (Tex. Civ. App.—Houston [14th Dist.] 1975).

526. 605 S.W.2d 661 (Tex. Civ. App.—Amarillo 1980).

527. 607 S.W.2d 317 (Tex. Civ. App.—El Paso 1980).

528. *Id.* at 318-19; 605 S.W.2d at 663; *see* TEX. CONST. art. I, § 18.

529. In a different context, *Henderson v. Priest*, 591 S.W.2d 635 (Tex. Civ. App.—Dallas 1979, no writ), held that if realty awarded to a spouse is described only by street address and number, that description is sufficiently definite to pass title to the property. *Id.* at 636.

530. 607 S.W.2d at 319.

531. 597 S.W.2d 453 (Tex. Civ. App.—Fort Worth 1980).

532. *Id.* at 454-55.

or to procure one made payable to him that he would in turn be ordered to endorse to his wife for payment. Failure to comply with either order would have subjected the husband to coercion for compliance.

*Effects of Bankruptcy on Property Division.* Bankruptcy judges are very careful to see that bankruptcy proceedings do not interfere with the efforts of a divorce court to divide property, although one of the spouses may attempt to use a divorce proceeding for that purpose. *In re Moore*<sup>533</sup> involved such an effort. Immediately following the divorce decree that awarded her a farm, the ex-wife leased the farm to a tenant. The husband perfected his appeal and thereupon moved onto the land and dispossessed the tenant. The divorce court then granted a restraining order against the ex-husband for interfering with the property and set an injunction hearing. The ex-husband responded by filing a petition in bankruptcy and sought removal of the dispute to the bankruptcy court.<sup>534</sup> The bankruptcy court remanded the case to the state court for an orderly completion of its proceeding.<sup>535</sup>

Bringing a proceeding in bankruptcy may not succeed in snarling the division of property on divorce, but such a proceeding has been used in an attempt to undo obligations with respect to property imposed by the divorce court. In *Day v. Day*<sup>536</sup> the divorce court fixed a lien on the husband's separate realty to pay a money judgment to the wife for the adjustment of equities in the property division.<sup>537</sup> The ex-husband then sought to have his unsecured debts discharged in bankruptcy. The bankruptcy court, however, deferred to the state court for a determination of whether the obligation was secured or unsecured.<sup>538</sup> In the ex-wife's concurrent proceeding for enforcement of her claim, her interest was adjudged secured.<sup>539</sup>

If the ex-spouse is not named as a creditor in the bankruptcy proceeding following divorce, the bankruptcy decree has no effect with respect to obligations imposed by the divorce court in regard to the other ex-spouse, although the bankrupt's liability to other creditors that the bankrupt may have been ordered by the decree to pay may have been discharged.<sup>540</sup> If the ex-husband's liability to his ex-wife is properly before the bankruptcy court, however, the effect of the court's decree is to discharge property obligations between them. These obligations may be embodied in a divorce

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533. 5 B.R. 67 (Bankr. Ct. N.D. Tex. 1980).

534. 28 U.S.C. § 1478 (Supp. II 1978).

535. 5 B.R. at 69; see *In re Tidwell*, 4 B.R. 100 (Bankr. Ct. N.D. Tex. 1980); Cowgill v. White, 543 S.W.2d 437 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.). See also *In re Washington*, 623 F.2d 1169 (6th Cir. 1980).

536. 610 S.W.2d 195 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

537. See notes 429-32 *supra* and accompanying text.

538. 610 S.W.2d at 197.

539. *Id.* at 199.

540. *Smith v. Smith*, 595 S.W.2d 631, 632-33 (Tex. Civ. App.—Fort Worth 1980, no writ).

decree or a property settlement; but if the obligation created by either means was created to provide support rather than merely to achieve a division of property, the liability is not dischargeable.<sup>541</sup>

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541. *In re Fox*, 5 B.R. 317, 320-21 (Bankr. Ct. N.D. Tex. 1980) (court ordered division of military retirement benefits); *Harris v. Harris*, 605 S.W.2d 684, 687 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (property settlement agreement); see *In re Robinson*, 634 F.2d 258 (5th Cir. 1981); *In re Crist*, 632 F.2d 1226 (5th Cir. 1980); *Melichar v. Ost*, 7 B.R. 951 (D. Md. 1980); *In re Allen*, 4 B.R. 617 (Bankr. Ct. E.D. Tenn. 1980); Foltz, *The Bankruptcy Reform Act of 1978 and the Discharge of Texas Property Division Awards*, 43 TEX. B.J. 873 (1980). See also *Rule v. Rule*, 612 F.2d 1098 (8th Cir. 1980).

Although probably attributable to the state of the pleadings in that case, it is difficult to understand the court's conclusion in *Harris*, 605 S.W.2d at 688, that the bankruptcy discharge was effective as to payments due before bankruptcy in spite of the court's reasoning that those becoming due subsequently were not affected by the discharge.