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Family Law: Husband and Wife

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FAMILY LAW: HUSBAND AND WIFE

by

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I. STATUS

Informal Marriage. The essential elements of an informal marriage are (1) an agreement between a man and a woman to be married, (2) their subsequent cohabitation as husband and wife, and (3) their representation to the public that they are married.[1] In *Estate of Claveria v. Claveria*[2] the Texas Supreme Court reversed a court of civil appeals decision that held there was no evidence of an informal marriage.[3] The primary issue in *Claveria* was the validity of the ceremonial marriage between the alleged surviving husband and his deceased spouse. In deciding in favor of the validity of the later ceremonial marriage, the intermediate appellate court found that there had never been a prior informal marriage. The court began its analysis by applying the presumption of section 2.01 of the Family Code,[4] that the most recent marriage is valid until one who asserts the continuing validity of a prior marriage proves its validity.[5] Both parties to the alleged prior undissolved informal marriage testified that they had not been married, but evidence was introduced that they had executed and acknowledged a deed of trust as husband and wife to secure the purchase price of a house. The alleged husband had also given a deposition in a prior judicial proceeding in which he stated that he was married to the woman. Thus the supreme court found two significant instances of public holding out of a marriage by a cohabiting couple that the court deemed to be direct evidence of the informal marriage,[6] rather than the single instance, referred to by the lower court, which might have been regarded as a fraudulent misrepresentation. The court also noted that section 1.91(b) of the Family Code[7] allows the agreement to be married to be inferred from such evi-

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1. TEX. FAM. CODE ANN. § 1.91(a)(2) (Vernon 1975); *see* Comment, *Common-Law Marriage in Texas*, 21 SW. L.J. 647, 648 (1967).

2. 615 S.W.2d 164 (Tex. 1981).

3. Claveria v. Estate of Claveria, 597 S.W.2d 434, 438 (Tex. Civ. App.—Dallas 1980), *rev'd and remanded*, 615 S.W.2d 164 (Tex. 1981).

4. TEX. FAM. CODE ANN. § 2.01 (Vernon 1975).

5. 615 S.W.2d at 165.

6. 615 S.W.2d at 167. In reaching this conclusion, the court relied on the Oklahoma Supreme Court decision in Red Eagle v. Cannon, 201 Okla. 511, 208 P.2d 557 (1949).

7. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1975) provides that the requisite agree-

dence.[8] Although the parties to the purported informal marriage testified that they had not agreed to be married, their testimony as to not being married could have been understood to refer only to a *ceremonial* marriage. The supreme court further noted that a subsequent ceremonial marriage by an alleged spouse of an undissolved informal marriage tends to discredit the validity of a purported prior informal marriage.[9] As decided by the supreme court, the *Claveria* case plows no new ground.

In another case the court pointed out that a woman's retention of her former name, instead of that of her alleged husband, and her failure to change her social security number[10] were not admissions that no informal marriage existed.[11] In still another case it was noted that if immediately after being divorced, former spouses resume living together in the same manner as they did during their previous marriage, such actions are evidence of an agreement to be informally married.[12] Even though the testimony of a purported party to an informal marriage concerning the alleged agreement to be informally married is otherwise inadmissible because of the dead man's statute, the testimony becomes admissible when that testimony is elicited by the opposite party.[13] The existence of the informal marriage must be established only by a preponderance of the evidence,[14] and once it is established, the spouse's rights are, in all respects, exactly the same as if there had been a formal marriage.[15] Therefore, a surviving spouse of an informal marriage is entitled to the same share of the community estate in intestate succession as the surviving spouse of a ceremonial marriage would receive.[16] Moreover, once an informal marriage comes into existence, it may be terminated only by the same means as a formal marriage may be terminated, that is, by death or court decree.[17] Subsequent denials of the marriage by spouses of an informal marriage can not constitute a "common law divorce" of that marriage.[18]

In *Franklin v. Smalldridge* a purported informal marriage was deemed invalid due to a prior, undissolved, Mexican, ceremonial marriage.[19] The

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ment to be married may be inferred if it is established that the man and woman lived together as husband and wife and represented to others that they were married.

8. 615 S.W.2d at 167. The court remanded the case to the court of civil appeals to determine the sufficiency of the evidence to establish an informal marriage. *Id.* at 168.

9. *Id.* at 166.

10. Such retention is not dispositive of the common law marriage issue. *See* McIlveen v. McIlveen, 332 S.W.2d 113, 116 (Tex. Civ. App.—Houston 1960, no writ).

11. *In re* Glasco, 619 S.W.2d 567, 571 (Tex. Civ. App.—San Antonio 1981, no writ). The alleged wife's failure to adopt the husband's surname, however, may be some evidence to refute an agreement to be married. *See* Drummond v. Benson, 133 S.W.2d 154, 160 (Tex. Civ. App.—San Antonio 1939, writ ref'd).

12. *See* Smith v. Smith, 607 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1980, no writ).

13. *Id.* at 621.

14. 619 S.W.2d at 571.

15. *Id.*

16. *Id.*

17. Estate of Claveria v. Claveria, 615 S.W.2d 164, 167 (Tex. 1981).

18. *Id.*

19. 616 S.W.2d 655, 657-58 (Tex. Civ. App.—Corpus Christi 1981, no writ). The court noted that the plaintiff had established all of the elements of a valid informal marriage in Texas except for the removal of the impediment of a prior undissolved marriage. *Id.* at 657.

alleged wife of the informal marriage brought suit seeking a divorce and to set aside the conveyance of alleged community property without her joinder. The trial court adjudged that there was no marriage to dissolve. On appeal the plaintiff contended that the grantee of the property had failed to prove the continued validity of the prior marriage.[20] Ordinarily, the party relying on the validity of the prior marriage has the burden to plead and prove its validity,[21] but in *Franklin* the plaintiff admitted the existence of the previous marriage and the lack of a divorce to dissolve it. Although the prior marriage might nonetheless have been dissolved by the death of the other party, the court of civil appeals held that, due to the plaintiff's admission, the burden shifted to the plaintiff to prove the absence of the impediment to the subsequent informal marriage.[22] The court was mistaken in this conclusion. The burden of showing the impediment to the later marriage remained on the party asserting the continued existence of the prior marriage.[23] Under section 2.01 of the Family Code it was incumbent on the defendants to prove that the husband of the first marriage remained alive during the whole of the second marriage.[24]

Entering Into Marriage. In *Penna-Urrutia v. Immigration & Naturalization Service*[25] the Ninth Circuit Court of Appeals addressed the issue of a sham marriage entered into for the purpose of avoiding federal immigration laws. A foreign man and an American woman voluntarily agreed to be and were ceremonially married under Nevada law, but the purpose of the ceremony was avoidance of the man's deportation. The couple never lived together or had sexual relations. The court held that their lack of intent to establish a life together resulted in merely a sham marriage, and the defendant was therefore deportable.[26] The validity of the marriage for purposes of state law was not addressed in the case, but it can also be concluded that the ceremonial marriage was invalid under state law.[27]

As a general rule parties to a divorce cannot marry within thirty days following the date of divorce unless they remarry each other.[28] The thirty-day period begins when the divorce becomes effective.[29] In *Galbraith v.*

A prior undissolved marriage is clearly an impediment to a subsequent formal marriage as well as a subsequent informal marriage. *See* Comment, *supra* note 1, at 655.

20. During the pendency of the trial the husband died and the divorce action was dismissed. 616 S.W.2d at 656.

21. *See* TEX. FAM. CODE ANN. § 2.01 (Vernon 1975); Estate of Claveria v. Claveria, 615 S.W.2d 164, 165 (Tex. 1981); *In re* R. L. & S. M. L., 622 S.W.2d 660, 662 (Tex. Civ. App.—Fort Worth 1981, no writ).

22. 616 S.W.2d at 657.

23. *See* Estate of Claveria v. Claveria, 615 S.W.2d 164, 167 (Tex. 1981).

24. TEX. FAM. CODE ANN. § 2.01 (Vernon 1975).

25. 640 F.2d 242 (9th Cir. 1981).

26. *Id.* at 244-45.

27. An example of an issue that may arise in this context is whether an alien spouse has any property rights upon the death of a Texas spouse in any of the property that would be the Texas spouse's separate property but for the marriage.

28. TEX. FAM. CODE ANN. § 3.66 (Vernon 1975).

29. *See* Galbraith v. Galbraith, 619 S.W.2d 238, 240 (Tex. Civ. App.—Texarkana 1981, no writ).

Galbraith the court of civil appeals concluded that the divorce became effective when a non-interlocutory oral pronouncement of divorce was made by the trial court.[30] A marriage within the thirty-day period is voidable unless the party seeking the annulment knows, or a reasonably prudent person would have known, of the prior divorce.[31]

Separation. The court in *Pilot Life Insurance Co. v. Koch*[32] considered a group life insurance contract that afforded coverage for the husband-employee's life and included coverage for his wife's life unless they were judicially separated. The husband and wife were living separately pursuant to a temporary order in a pending divorce suit. The temporary order divided much of their property and provided for the payment of their debts. Subsequently, the wife died and the insurance company brought suit seeking a declaratory judgment that the wife's death was not covered by the policy because, at the time of her death, the couple was separated within the terms of the policy. The court held that Texas does not recognize the concept of legal separation and construed the phrase "legally separated or divorced" to require a final judgment.[33]

Interspousal Torts. Texas law has recognized the concept of interspousal tort immunity among spouses in negligence and negligent wrongful death actions.[34] In *Byrd v. Byrd*, however, the Fourth Circuit held that interspousal tort immunity does not apply within the federal admiralty jurisdiction.[35] The plaintiff wife brought suit against her husband to recover for her injuries sustained while in navigable waters due to her husband's negligent maintenance of a pleasure craft. In this question of first impression the court overruled the application of Virginia law providing for interspousal immunity.[36] The court reasoned that because admiralty law provides that the negligent operation of a vessel creates a federal right of recovery for all those who receive injuries therefrom,[37] the application of interspousal immunity would defeat the plaintiff's established federal right of recovery.[38] Moreover, the court determined that the establishment of a federal rule concerning interspousal immunity for all admiralty cases rather than the application of the widely divergent state laws in individual cases, would promote the goal of uniform admiralty law.[39] The Fourth

30. *Id.*
31. TEX. FAM. CODE ANN. § 2.46 (Vernon 1975); 619 S.W.2d at 240.
32. 617 S.W.2d 786 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).
33. *Id.* at 788.
34. *See* Robertson v. Estate of McKnight, 609 S.W.2d 534 (Tex. 1980); Bounds v. Caudle, 611 S.W.2d 685, 687 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.); Bruno v. Bruno, 589 S.W.2d 179 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.). This doctrine does not, however, apply to intentional torts. Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977); Mogford v. Mogford, 616 S.W.2d 936, 938-40 (Tex. Civ. App.—San Antonio 1981, no writ).
35. 657 F.2d 615, 621 (4th Cir. 1981).
36. *Id.*
37. *See* St. Heloise Moye v. Henderson, 496 F.2d 973, 980-81 (8th Cir. 1974).
38. 657 F.2d at 618, 620.
39. *Id.* at 618.

Circuit, however, distinguished situations in which local law is applied in admiralty cases because the local law involves a set of intricate and interrelated rules that Congress has not specifically chosen to preempt.[40] The rules concerning interspousal immunity, however, were not as intricate and interrelated as the laws of familial status and insurance contracts, and therefore, deference to local law was not required on the issue of interspousal immunity.[41]

Persons Entitled to Conduct Marriage Ceremonies. In 1981 the legislature once again snubbed Texas municipal judges. Section 1.83 of the Family Code, enumerating persons authorized to conduct marriage ceremonies, was amended to include federal magistrates.[42] Municipal judges remain conspicuously absent from the list of qualified officiants. Are municipal judges less worthy than other types of judges to preside over the formal institution of marriage because of their predominantly revenue-collecting function of adjudicating motor vehicle violations? These judges should be added to the list of those authorized to perform marriage ceremonies.

Interspousal Testimony. In *Ex parte Le Blanc*[43] a wife testified against her husband during a hearing to rescind an order allowing bond pending appeal. The wife testified that she had been beaten by her husband and her mother testified that she overheard the husband threaten to kill his wife. Finding that the husband would be likely to commit another offense if released, the trial court[44] rescinded the bail. Although in a criminal case a spouse may voluntarily testify against the other spouse only in cases involving an assault[45] committed by one spouse against the other or against a child under sixteen of either spouse,[46] the court did not commit error in hearing the wife's testimony because the judge, sitting without a jury, is presumed to have disregarded the testimony if it was inadmissible.[47] Moreover, the mother's testimony was sufficient to establish that the husband was likely to commit another crime while on bail.[48] A spouse may testify, however, as to communications made between the spouses during marriage if a third person was present during the conversation, because those statements are not privileged statements under article 38.11.[49] If a couple is divorced before the trial, article 38.11 is not applicable, and a former spouse is competent to testify against the other former spouse.[50]

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40. *Id.* at 619-20.
41. *Id.* at 620.
42. TEX. FAM. CODE ANN. § 1.83 (Vernon Supp. 1982).
43. 615 S.W.2d 724 (Tex. Crim. App. 1981).
44. *See* TEX. CODE CRIM. PROC. ANN. art. 44.04(a) (Vernon Supp. 1982).
45. The question whether an assult is in issue within article 38.11 is determined by the circumstances of the particular case and not by the allegations. Nelson v. State, 612 S.W.2d 605, 606 (Tex. Crim. App. 1981).
46. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979).
47. 615 S.W.2d at 726.
48. *Id.*
49. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979).
50. Bear v. State, 612 S.W.2d 931, 932 (Tex. Crim. App. 1981).

An Iowa federal district court in *Vance v. Rice*[51] addressed the issue of whether the state could prevent a defendant and a pregnant material witness to a major crime from marrying and thus invoke the state's spousal-incompetence statute[52] to bar the witness's testimony. The court recognized that although there was a fundamental right to marry,[53] the right may be subject to state regulation in appropriate circumstances.[54] The court stated that the policy of preserving marital harmony would not prevail over the state's interest in presenting highly relevant evidence in a serious criminal trial if the prospective spouses were not yet married.[55] Further, the court stated that the state's actions advanced the state's legitimate and compelling interest in preserving the availability of this evidence.[56] Because the accused refused the state's proposal to solve the problem by allowing the couple to marry if the accused would stipulate that the witness's deposition would be admissible at trial and there were no other viable alternatives of resolving the evidentiary problems, the court found that the state's action was the least intrusive means available to accommodate the state's compelling interest.[57] The court therefore ruled that the state's action in prohibiting the marriage was constitutional.[58]

II. CHARACTERIZATION OF MARITAL PROPERTY

Antenuptial Agreements and Spousal Partitions. The most significant development in this area of the law during this survey period was the enactment of legislation implementing the November 1980 constitutional amendment.[59] In general language sections 5.41 and 5.42 of the Family Code authorize bilateral partition or exchange by antenuptial agreement,[60] marital partition[61] or exchange[62] of both existing community property or that to be acquired in the future.[63]

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51. 524 F. Supp. 1297 (S.D. Iowa 1981).

52. IOWA CODE ANN. § 622.7 (West 1950).

53. *See generally* Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967).

54. 524 F. Supp. at 1299 (citing a dictum in Zablocki v. Redhail, 434 U.S. 374, 386 (1978)).

55. 524 F. Supp. at 1300.

56. *Id.* at 1301.

57. *Id.* at 1302.

58. *Id.*

59. TEX. CONST. art. XVI, § 15. For a further discussion of article XVI, § 15, as amended, see McKnight, *Family Law: Husband and Wife*, 35 SW. L.J. 93, 98-102 (1981) [hereinafter cited as McKnight, 1981 *Survey*]; McKnight, *Family Law: Husband and Wife*, 34 SW. L.J. 115, 119-20 (1980) [hereinafater cited as McKnight, 1980 *Survey*].

60. TEX. FAM. CODE ANN. § 5.41 (Vernon Supp. 1982).

61. *Id.* § 5.42.

62. *Id.* A spousal partition may serve the function of a property settlement agreement in anticipation of divorce and may be presented to the court as a prerequisite to its full effectiveness for approval as fair and just. *See* Morgan v. Morgan, 622 S.W.2d 447, 449-50 (Tex. Ct. App.—Beaumont 1981, no writ).

63. The ability to partition or exchange property to be acquired in the future represents a significant change from the old law. *See* McKnight, 1981 *Survey*, *supra* note 59, at 114. Franzina v. Estate of Franzina, 618 S.W.2d 570 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.), is illustrative of the proposition that spouses could not agree to establish the

Section 5.41 is designed to allow spouses to enter into antenuptial agreements and is phrased in terms of marital property agreements.[64] Counsel who draft such agreements should nonetheless take care to track the language of the constitution which, in describing antenuptial transactions, refers only to the process of partition.[65] Section 5.43 reflects the constitutional distinction permitting *spouses* to agree in writing that all of the future income or property derived from the separate property then owned or to be acquired in the future by only one of them shall be the separate property of that spouse.[66] Section 5.44, requiring all agreements and partitions to be in writing and signed by all parties, applies to antenuptial agreements, spousal partitions, and spousal agreements[67] and does not change the existing law.

The scope of allowed transactions is slightly different for antenuptial agreements and spousal partitions in several instances. Because separate property interests are all that are being dealt with in the case of antenuptial agreements, a joint tenancy with right of survivorship in property that would otherwise be community property should be capable of creation without any problem. The constitution, however, does not authorize an antenuptial agreement providing merely that income from the separate property of only one spouse will be that spouse's separate property.[68] Such a result can only be achieved as part of a bilateral antenuptial partition.

Section 5.45[69] is an addition to the Family Code and represents a significant change in the existing law. Under this section when the validity of any provision of an antenuptial agreement, spousal partition or exchange is challenged, the party relying on its validity has the burden of proof in rebutting any fraud in the agreement.[70] The proponent must "prove by clear and convincing evidence that the party against whom enforcement of the agreement is sought gave informed consent and that the agreement was not procurred by fraud, duress, or overreaching."[71] Because these issues

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character of property yet to be acquired. *See* Williams v. Williams, 569 S.W.2d 867, 870 (Tex. 1978); Burton v. Bell, 380 S.W.2d 561, 566 (Tex. 1964); Gorman v. Gause, 56 S.W.2d 855, 858 (Tex. Comm'n App.—1933, judgm't adopted). All of these decisions were decided under the old provision that did not allow the partition or exchange of property to be acquired in the future. *See* TEX. CONST. art. XVI, § 15.

64. TEX. FAM. CODE ANN. § 5.41 (Vernon Supp. 1982).

65. *See* TEX. CONST. art. XVI, § 15.

66. TEX. FAM. CODE ANN. § 5.43 (Vernon Supp. 1982).

67. *Id.* § 5.44. *See also* Tatum v. Tatum, 606 S.W.2d 31, 33 (Tex. Civ. App.—Corpus Christi 1980, no writ). The husband orally agreed *before marriage* that if the other spouse would marry him and take care of him until death, he would leave all of his property to her upon his death. They subsequently executed a joint will, but prior to his death, the deceased spouse revoked that will and executed a different one naming others as his beneficiaries. The court of civil appeals held that oral contracts made in consideration of marriage were unenforceable, and that the rendition of promised services was not sufficient part performance to take the oral contract out of the statute of frauds. *Id.*

68. *See* TEX. CONST. art. XVI, § 15.

69. TEX. FAM. CODE ANN. § 5.45 (Vernon Supp. 1982).

70. *Id.* To the extent that such an agreement is being offered to rebut the community property presumption, the offering party already has the initial burden to produce and authenticate evidence of the agreement. *See* notes 97-98 *infra* and accompanying text.

71. TEX. FAM. CODE ANN. § 5.45 (Vernon Supp. 1982). For a discussion of § 5.45, see

are normally plead as affirmative defenses,[72] this section runs contrary to the general rule that the party relying on an affirmative defense has the burden of pleading and proof on that issue.[73]

Prior to the 1980 constitutional amendment, preexisting creditor's rights in community property were widely regarded as not being affected by a partition of that property.[74] Section 5.46 reflects the changed constitutional position by recognizing preexisting creditor's rights in former community property that has been partitioned only if the partition was carried out with the intention to defraud such creditors.[75] This may denote a significant change in the law. However, the provision does not specifically extend to cases when the spouse's community property is partitioned merely by a decree of divorce.[76] Thus, the safest way to protect the nondebtor spouse is to have the spouses, in good faith without the intent to defraud any preexisting creditors, execute a pre-divorce partition of the community property.[77]

Under Texas law it has become axiomatic that spouses cannot convert community property into property held as joint tenants with rights of survivorship without first converting it into separate property.[78] This requirement was recently reaffirmed by the Supreme Court of Texas in *Maples v. Nimitz*.[79] The case involved a dispute over the ownership of funds in a savings and loan account after the successive deaths of both spouses. The bank agreement, purporting to create a joint account with a right of survivorship, was initially funded with presumptively community property. The deposit agreement made no reference to a partition of community property. Both spouses had children of previous marriages but no children of their marriage. The wife died in 1977 and the husband died one year later. Relying on article 852a, section 6.09 of the Savings and Loan Act,[80] the executor of the husband's estate argued that the account agreement was sufficient to effectuate a valid one-step partition and creation of joint tenancy with the right of survivorship, thereby entitling the husband's es-

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Brink, *I Do . . . I Do? Spouses Face New Choices After Constitutional Amendment Concerning Marital Property Agreements*, 20 ST. B. NEWSLETTER REAL EST., PROB. & TR. L. 26, 27 (1981).

72. *See* TEX. R. CIV. P. 94.

73. *See* Neuhaus v. Kain, 557 S.W.2d 125, 136 (Tex. Civ. App.—Corpus Christi 1977, no writ). *See also* Rich v. McMullan, 506 S.W.2d 745, 748 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); Navarro v. Secret Harbor Farms, Inc., 506 S.W.2d 337, 339 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

74. Stewart Title Co. v. Huddleston, 598 S.W.2d 321, 323 (Tex. Civ. App.—San Antonio), *writ ref'd n.r.e. per curiam*, 608 S.W.2d 611 (Tex. 1980).

75. TEX. FAM. CODE ANN. § 5.46 (Vernon Supp. 1982). This comports with the fraudulent transfer provisions of the Texas Business and Commerce Code. TEX. BUS. & COM. CODE §§ 24.02, 24.03 (Vernon 1968).

76. Stewart Title Co. v. Huddleston, 598 S.W.2d 321, 323 (Tex. Civ. App.—San Antonio), *writ ref'd n.r.e. per curiam*, 608 S.W.2d 611 (Tex. 1980).

77. *See* McKnight, 1981 *Survey*, *supra* note 59, at 114.

78. Maples v. Nimitz, 615 S.W.2d 690, 695 (Tex. 1981); Williams, v. McKnight, 402 S.W.2d 505, 508 (Tex. 1966); Hilley v. Hilley, 161 Tex. 569, 579, 342 S.W.2d 565, 571 (1961); *see* McKnight, 1981 *Survey*, *supra* note 59, at 110.

79. 615 S.W.2d 690 (Tex. 1981).

80. TEX. REV. CIV. STAT. ANN. art. 852a, § 6.09 (Vernon 1964).

tate to all of the funds remaining in the account. Article 852a, section 6.09 provides that spouses may enter into a contract involving a savings account consisting of community funds under which those funds plus all future additions to them will be held as a joint tenancy with a right of survivorship, and such a contract will be considered as a partition of their community funds.[81] The court of civil appeals held that the agreement and the statute were insufficient to satisfy the requirement laid down in *Hilley v. Hilley*[82] and *Williams v. McKnight*[83] that the parties should first partition their community property into shares of separate property before rejoining it as property to be held in joint tenancy with a right of survivorship.[84] The Texas Supreme Court affirmed the lower appellate court in concluding that the execution of the agreement under the authority of article 852a, section 6.09 was not sufficient to accomplish a one-step partition of community funds and their effective rejoinder.[85] The court reasoned that the statutory partition provision was merely a fictional partition similar to those rejected by the court in *Hilley* and *Williams*.[86] Further, the court noted that the agreement itself made no reference to a partition.[87]

Section 46 of the Probate Code was amended by the legislature in 1981 to permit spouses to agree with financial institutions that funds on deposit with that institution "shall by that agreement be partitioned into separate property and may further provide that the property partitioned by that agreement be held in joint tenancies and pass by right of survivorship."[88] One commentator has suggested that the language of the constitutional amendment alone, applied to the facts of *Maples*, would not be enough to uphold the agreement in that case.[89] Arguably now, if an agreement contains language consistent with that of section 46(b), the agreement will be upheld as a valid one-step partition agreement.[90] Although this result is appealing since it would simplify the manner in which spouses can agree to deal with their property,[91] it is uncertain that section 46(b) will withstand a constitutional challenge. It is still uncomfortably true that an account card merely reciting a partition of community property and an agreement to create a joint tenancy of funds deposited and any additions thereto are not any less fictitious partitions than those rejected in *Maples*, *Williams*, and *Hilley*. A far more efficacious procedure is to add a step in

81. *Id.*
82. 161 Tex. 569, 579, 342 S.W.2d 565, 571 (1961).
83. 402 S.W.2d 505, 508 (Tex. 1966).
84. Maples v. Nimitz, 610 S.W.2d 794, 797-99 (Tex. Civ. App.—Beaumont 1980).
85. 615 S.W.2d at 695.
86. *Id.* at 694-95.
87. *Id.* at 695.
88. TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1982).
89. *See* McLaughlin, *Joint Accounts, Totten Trusts, and the Poor Man's Will*, 44 TEX. B.J. 871, 873 (1981).
90. *Id.* at 873.
91. Providing spouses with greater latitude in dealing with their marital property was one of the principal purposes of the constitutional amendment. *See* McKnight, 1981 *Survey*, *supra* note 59, at 110.

the deposit process to achieve a two-step partition in the creation of a joint tenancy. If there are two separately subscribed agreements, one declaring a partition and a second creating the joint tenancy,[92] the objective can be easily achieved.

In *Maples* the Supreme Court of Texas noted that the constitutional amendment was already approved by the voters but was inapplicable to the facts of the case before it.[93] Assuming that section 46(b) provides a constitutionally permissible means of achieving a one-step partition-creation process, one should note that such partition only applies to funds or securities on deposit.[94] Static property such as real property and securities issued to an owner are covered only by section 46(a)[95] that stands unchanged. Clearly the two-step process is still required before items of static property can be converted from community property to property held as joint tenants with a right of survivorship.

Assuming that both section 46(b) of the Probate Code and section 5.45 of the Family Code are constitutional, the question to consider is whether the latter has any bearing on the former, i.e. whether the new provision with respect to burden of proof to rebut fraud has any impact on the creation of joint tenancy deposits. Although section 5.45 refers to partitions made under "this subchapter," one wonders how the partition *between spouses* can be made as the first step in a joint tenancy deposit without compliance with the requirements of *that* subchapter unless a different process is to be inferred from the enactment of section 46(b) of the Probate Code.

Commingling and Tracing. In determining the character of property acquired during marriage the community property presumption provides the initial point of departure.[96] This presumption can be rebutted by proving that the property was acquired before the marriage, that it was acquired either by gift or inheritance during the marriage, or that it can be traced to any of those types of property.[97] The party seeking to rebut the community presumption has the burden of proof.[98] Special problems arise when separate property funds are deposited in a joint account containing community assets. If the funds are so commingled that their proper identity is impossible to determine, the community presumption prevails.[99] In sev-

92. *See* McLaughlin, *supra* note 89, at 873.
93. 615 S.W.2d at 693 n.3.
94. TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1982).
95. *Id.* § 46(a).
96. *See* TEX. REV. CIV. STAT. ANN. § 5.02 (Vernon 1975).
97. *See* McKnight, 1981 *Survey*, *supra* note 59, at 103. The character of property as separate or community is fixed at the time of its acquisition. Villarreal v. Villarreal, 618 S.W.2d 99, 100 (Tex. Civ. App.—Corpus Christi 1981, no writ).
98. Cockerham v. Cockerham, 527 S.W.2d 162, 167 (Tex. 1975); Horlock v. Horlock, 614 S.W.2d 478, 480 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *In re* York, 613 S.W.2d 764, 767 (Tex. Civ. App.—Amarillo 1981, no writ); Purser v. Purser, 604 S.W.2d 411, 413 (Tex. Civ. App.—Texarkana 1980, no writ).
99. McKinley v. McKinley, 496 S.W.2d 540, 543 (Tex. 1973); Latham v. Allison, 560 S.W.2d 481, 485 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

eral instances, however, the courts have allowed a liberal application of the tracing rules to accounts of this type by application of the identical sum inference or the family purpose doctrine to withdrawals.[100] In *Gibson v. Gibson*[101] the proceeds from the sale of the husband's separate property were deposited into a joint account containing an unspecified amount of community funds. Subsequently the couple used funds from the account to purchase a house. This house was later sold and the proceeds were placed in the account. A car and a second house were then purchased using funds from the same joint account. On divorce a dispute arose over the character of the car and the house. The court of civil appeals reversed the trial court's determination that this property was the husband's separate property.[102] Because there was no evidence of the amount of community funds in the account at the time the separate funds were deposited,[103] the husband failed to identify his separate funds in the account on his initial deposit, apart from later transactions.[104]

Tracing the extent of separate property in an account upon the dissolution of the marriage is an easier task when the account contains only the separate funds of one of the spouses before the marriage and that spouse can establish the balance in the account as of the date of marriage. In *Snider v. Snider*[105] the husband, prior to the marriage, deposited separate funds in a savings account containing his funds only. Shortly after the marriage, but before any deposits were made or interest was posted, withdrawals were made bringing the balance down to $19,642. After that time various transactions in the account took place but the balance never went below $19,642. Later an additional $10,000 of his separate funds were deposited in the account. From that time until he died the balance in the account never went below $29,642. All of this was shown by his bank book that was introduced into evidence. The court held that this was sufficient tracing to establish the husband's separate property interest in the account in the amount of $29,642.[106] The court applied the same analysis to an outstanding debt owed to the husband by a closely-held corporation.[107] The balance of funds on hand on the corporate books never dropped below the amount that was shown to have been due to him on the date of marriage. The court also held that dividends on the husband's separate stock in his corporation that were declared and distributed to the successors in title to the stock after the dissolution of the community were

100. *See* Latham v. Allison, 560 S.W.2d 481, 484 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.); Sibley v. Sibley, 286 S.W.2d 657, 659 (Tex. Civ. App.—Dallas 1955, writ dism'd.).

101. 614 S.W.2d 487 (Tex. Civ. App.—Tyler 1981, no writ).

102. *Id.* at 489.

103. The court's opinion focused on the second deposit, but there was also little evidence of the amount of community funds in the account at the initial deposit. *Id.* at 490.

104. *Id.*; *see* Snider v. Snider, 613 S.W.2d 8, 10 (Tex. Civ. App.—Dallas 1981, no writ).

105. 613 S.W.2d 8 (Tex. Civ. App.—Dallas 1981, no writ).

106. *Id.* at 11.

107. *Id.*

not part of the community estate.[108] The court so held despite the fact that the directors of the corporation, for tax purposes, stated that the dividends were for the period of time in which the community estate was in existence.[109]

In *Vallone v. Vallone*[110] the husband received a gift from his father consisting of business assets worth $9,365. Shortly thereafter these assets, along with others for a combined total of $19,663, were transferred to a corporation in exchange for all of its capital stock. The separate assets constituted approximately forty-seven percent of the assets shown to have been transferred to the corporation for stock. On divorce the trial court valued the entire amount of the stock at $1,000,000 and determined that forty-seven percent of the stock was the husband's separate property. The court of civil appeals noted that if the assets were initially received as a gift, the stock received in exchange for these assets would be the husband's separate property.[111] The wife argued that the husband had failed to prove specifically which assets were received as a gift, that the same assets were transferred to the corporation, the value of the assets, and the exact proportion of stock received for them. The court rejected this onerous burden and stated that the husband had to show merely that his separate property had been transferred for a certain portion of the corporation's stock and that he continued to hold the stock until the time of divorce.[112]

More difficult problems arise when a divorce court attempts to deal with business or professional goodwill. Clearly when an ongoing business or professional practice is involved and the goodwill is the result of an individual's own particular skills and abilities and is so associated with him as an individual that it would not exist without him, such goodwill is not property that is divisible.[113] If on the other hand, the goodwill attaches to the business or practice independent of the individual, however, it is divisible.[114] Somewhat different considerations are involved when a business or a practice is sold.[115] In that case the proceeds from the sale, including those attributable to goodwill, are presumed to be community property.[116] The party claiming a portion of the such proceeds as his separate property must show the value of the goodwill, if any, that was acquired before marriage or the value of a noncompetition clause.[117]

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108. *Id.* at 12.
109. *Id.*
110. 618 S.W.2d 820 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ granted).
111. *Id.* at 822.
112. *Id.* at 822-23. In *In re* York, 613 S.W.2d 764 (Tex. Civ. App.—Amarillo 1981, no writ), the court, faced with a similar situation, without articulating the extent of the husband's burden of proof, appears to have adopted an assets-to-portion-of-stock test without requiring a showing of the exact amount of assets involved. *Id.* at 770.
113. Nail v. Nail, 486 S.W.2d 761, 763-64 (Tex. 1972).
114. Geesbreght v. Geesbreght, 570 S.W.2d 427, 435-36 (Tex. Civ. App.—Fort Worth 1978, writ dism'd.).
115. *See* Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972).
116. Austin v. Austin, 619 S.W.2d 290, 292 (Tex. Civ. App.—Austin 1981, no writ).
117. *Id.*; *see* Dillion v. Anderson, 358 S.W.2d 694, 695-96 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

The bifurcated characterization of personal injury recoveries is well established. Compensation for injuries to the body (not measured by loss of earning power) and pain and suffering are the separate property of the injured spouse; recovery for medical expenses contracted for as community obligations and loss of earning capacity are community property.[118] In *Huls v. Huls*,[119] a divorce case, the couple had previously received funds in settlement of a suit to recover for the personal injuries of the wife. In the personal injury proceeding recovery had been sought for certain amounts that would have been the wife's separate property and others that would have been community property. The settlement was for an amount significantly below the amounts sought, and the settlement agreement failed to recite any allocation of the proceeds for the various items of damages plead. In an appeal taken from the division of property on divorce in which the funds received from the tort action and their alleged mutations were not treated as the wife's separate property, the court noted that it could not assume that the amounts received in settlement were proportional to the amounts prayed for and therefore affirmed the trial court's conclusion that securities purchased with the proceeds of the settlement were a mixture of community and separate property of the wife.[120] The court also rejected the wife's argument that the husband's intention to make a gift of his one half community interest to her was established because the account in which the securities were held was in her name only and because the bank kept separate ledgers for the interest and dividends from the securities she had and for the proceeds of the sale of such securities.[121] The court stated that establishing the account in her name did not have the same effect as in cases involving the purchase of land.[122] Furthermore, although the keeping of separate ledgers may have been sufficient to satisfy the tracing requirements if all of the initial funds had been separate property, here the settlement proceeds and the securities subsequently bought with them were a commingled mass of community and separate property. The maintenance of separate ledgers without further proof that the separate accounting procedures were followed for all of this account's transactions failed to establish an intent by the husband to make a gift of his community interest.[123]

Retirement Benefits. The United States Supreme Court in *McCarty v. McCarty* held that military retirement benefits cannot be divided on divorce pursuant to state community property law.[124] The Court stated that such a

118. Graham v. Franco, 488 S.W.2d 390, 396 (Tex. 1972).

119. 616 S.W.2d 312 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

120. *Id.* at 315-16.

121. *Id.* at 316.

122. *Id.*; *see* Purser v. Purser, 604 S.W.2d 411, 415 (Tex. Civ. App.—Texarkana 1980, no writ) (recital of both spouses' names as grantees raises presumption of gift of one-half interest when property is paid for with husband's separate property).

123. 616 S.W.2d at 316.

124. 101 S. Ct. 2728, 2743, 69 L. Ed. 2d 589, 608 (1981). The court applied a two part analysis in deciding whether state community property law was preempted: the asserted

division was inconsistent with Congress' expressed intent that the pensioner receive all the benefits provided.[125] Moreover, the Court found that division of the benefits on divorce would be injurious to the objectives of federal programs by disrupting (1) the system of providing an optional annuity for a surviving spouse and dependent children[126] and (2) the military's personnel management scheme designed to create " 'youthful and vigorous' military forces."[127] The Court noted that these statutory benefits do "not embody even a limited 'community property concept.' "[128] Once again the Supreme Court chose to look at division of federal benefits from the point of view of congressional intent rather than examining their character as earnings as the Texas courts have analyzed them.[129]

Recognizing that the conclusion in *McCarty* was dispositive of the issue, Texas appellate courts have since held that the nonpensioner spouse is not entitled to any part of the other spouse's military retirement benefits upon divorce.[130] Because these benefits are not divisible on divorce and terminate on death of the retiree, their treatment on divorce may be analogized to that of separate property.[131]

Texas courts had previously established that Veterans Administration benefits are not community property.[132] This is so even if the recipient was receiving benefits that were community property prior to divorce and following divorce elected to receive the Veterans Administration benefits instead.[133] The result was deemed the same regardless of whether the election was made before[134] or after the divorce.[135] The rationale for allowing

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community property interest must conflict with the express terms of the statute and such a conflict must sufficiently injure the objectives of the federal program so as to require the nonrecognition of the state law. *Id.* at 2735, 69 L. Ed. 2d at 598. This approach was also articulated in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (federal railroad retirement benefits are not divisible on divorce). Texas courts had previously held that military retirement benefits were community property subject to division on divorce. *See* Trahan v. Trahan, 609 S.W.2d 820, 823 (Tex. Civ. App.—Texarkana 1980), *rev'd*, 626 S.W.2d 485 (Tex. 1981); Taggart v. Taggart, 552 S.W.2d 422, 425 (Tex. 1977); Cearley v. Cearley, 544 S.W.2d 661, 663 (Tex. 1976).

125. 101 S. Ct. at 2739, 69 L. Ed. 2d at 603.

126. *Id.* at 2741, 69 L. Ed. 2d at 606. Although the benefits usually terminate at the retiree's death, there are two separate plans under which the retiree can take reduced pay and provide an annuity for a surviving spouse or dependent children. *See* 10 U.S.C. §§ 1434, 1450 (Supp. III 1979).

127. 101 S. Ct. at 2742, 69 L. Ed. 2d at 606-07. The Court noted that the military retirement program has always been designed as a personnel management device. *See id.* at 2731, 69 L. Ed. 2d at 593.

128. *Id.* at 2737, 69 L. Ed. at 601.

129. *See also* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

130. *See, e.g.*, Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981); Mattern v. Mattern, 624 S.W.2d 400 (Tex. Ct. App.—Fort Worth 1981, no writ); Jeffrey v. Kendrick, 621 S.W.2d 207 (Tex. Ct. App.—Amarillo 1981, no writ); Powell v. Powell, 620 S.W.2d 253 (Tex. Ct. App.—Waco 1981, writ ref'd n.r.e.).

131. Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977).

132. *See Ex parte* Burson, 615 S.W.2d 192, 194 (Tex. 1981); *Ex parte* Pummill, 606 S.W.2d 707, 709 (Tex. Civ. App.—Fort Worth, 1980); *Ex parte* Johnson, 591 S.W.2d 453, 455 (Tex. 1979); McKnight, 1980 *Survey*, *supra* note 59, at 122-23.

133. *Ex parte* Burson, 615 S.W.2d 192, 196 (Tex. 1981).

134. *Ex parte* Pummill, 606 S.W.2d 707, 708-09 (Tex. Civ. App.—Fort Worth 1980, no writ).

such an election was that federal law preempts the area and that a state court cannot prevent a recipient from choosing federal benefits that are protected from division on divorce.[136] Conversely, if a recipient is receiving nondivisible benefits, he cannot be required to change those for other benefits that are divisible.[137] On the other hand Texas appellate courts have found *McCarty* no barrier to treating either federal civil service retirement benefits[138] or federal worker's compensation benefits taken in lieu of civil service retirement benefits as community property.[139]

Although retirement benefits arising from employment by the state are clearly community property, some confusion exists as to the proper procedure for dividing such benefits upon divorce. A division of such benefits may be made by court order if the funds are currently payable at the time of the divorce.[140] In *Wilson v. Teacher Retirement System*, however, the court struck down portions of a settlement agreement incorporated in a divorce decree that purported to make an immediate assignment of the husband's unvested interest in a retirement fund to the wife and instructed the trustees of the fund to make payments directly to the wife as the pension became payable.[141] The court noted that such settlement agreements were in the nature of contracts, and that the parties could not agree to accomplish a result that was forbidden under the statute[142] that prohibited the assignment or alienation of the benefits.[143] The court distinguished *Teacher Retirement System v. Neill*[144] and *Collida v. Collida*[145] as cases of a *court-ordered* division of funds that were payable at the time of the decree.[146] In so ruling, the court overlooked the conclusion of the Supreme Court of Texas in *McCray v. McCray* that terms of a settlement contract incorporated in a decree have the same force as terms of a decree in the absence of a settlement. The former terms, therefore, lose their contractual character when they are incorporated in a decree.[147] The court in *Wilson* also ignored the analysis in *Collida* that recognized that the wife was not the type of assignee from whom the statutory anti-alientation provisions

135. 615 S.W.2d at 196.

136. *Id.*

137. Bonar v. Bonar, 614 S.W.2d 472, 473 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.).

138. Adams v. Adams, 623 S.W.2d 500 (Tex. Ct. App.—Fort Worth 1981, no writ). For an earlier conclusion to the same effect, see Cowan v. Plask, 592 S.W.2d 422 (Tex. Civ. App.—Waco 1979, no writ).

139. Anthony v. Anthony, 624 S.W.2d 388 (Tex. Ct. App.—Austin 1981, no writ).

140. Teacher Retirement Sys. v. Neill, 563 S.W.2d 873, (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.); Collida v. Collida, 546 S.W.2d 708, 710 (Tex. Civ. App.—Beaumont 1977, writ dism'd).

141. 617 S.W.2d 329, 332 (Tex. Civ. App.—Amarillo 1981, no writ).

142. TEX. EDUC. CODE ANN. § 3.07 (Vernon 1972) (anti-alienation provision).

143. 617 S.W.2d at 331-32. *See generally* Francis v. Francis, 412 S.W.2d 29, 33 (Tex. 1967); Firestone v. Firestone, 567 S.W.2d 889, 891 (Tex. Civ. App.—Dallas 1978, no writ).

144. 563 S.W.2d 873 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

145. 546 S.W.2d 708 (Tex. Civ. App.—Beaumont 1977, writ dism'd).

146. 617 S.W.2d at 332.

147. 584 S.W.2d 279, 281 (Tex. 1979). *See also Ex parte* Gorena, 595 S.W.2d 841, 844 (Tex. 1979).

were designed to shield the benefits.[148] The two cases are better distinguished by the fact that the issue of assignability was not raised in *Collida*. The court did not express any opinion as to the validity of an alternative provision of the agreement declaring the husband as trustee for the benefit of the wife of any of the funds that he might receive.

Private pension plan benefits are clearly community property.[149] *Bankston v. Taft*[150] addressed the issue of whether a former employer's substitution of a new plan in the place of a plan existing at the time of the divorce terminates the non-employee ex-spouse's continuing right to share in the pensioner's benefits. The wife brought suit to partition the husband's retirement benefits that were not dealt with in the decree of divorce. The husband argued that the plan under which he currently was receiving benefits was a different plan from that which existed at the time of divorce and, therefore, the wife was not entitled to any benefits from it. In the alternative, he asserted that she was entitled to share only to the extent that she could have done so if the ex-husband had been retired at the time of their divorce. The court rejected both arguments and concluded that the wife's interest was based on the amount of benefits actually received after the husband retired.[151]

Loss of Consortium. In *Whittlesey v. Miller* the Texas Supreme Court held that if either spouse was injured through the negligence of a third person, the other spouse had a cause of action against that person for his or her deprivation of consortium with the impaired spouse.[152] The court in *Whittlesey* noted, however, that loss of consortium in Texas does not include deprivation of usual household responsibilities by the impaired spouse.[153] Although loss of consortium is a derivative action because it requires an injury to the impaired spouse before the deprived spouse has a cause of action,[154] the deprived spouse's cause of action is a separate and independent cause of action from the impaired spouse's claim for personal injuries.[155] If the impaired spouse's claim is defeated, then the deprived spouse's cause of action is similarly defeated.[156] On the other hand, if both actions are successful, a double recovery for the same injury does not result.[157] In *American Export Lines, Inc. v. Alvez* the United States Supreme

148. 546 S.W.2d at 710.

149. Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976); Bankston v. Taft, 612 S.W.2d 216, 217 (Tex. Civ. App.—Beaumont 1980, no writ).

150. 612 S.W.2d 216 (Tex. Civ. App.—Beaumont 1980, no writ).

151. *Id.* at 218. *See also* Sprott v. Sprott, 576 S.W.2d 653 (Tex. Civ. App.—Beaumont 1978, writ dism'd).

152. 572 S.W.2d 665, 668 (Tex. 1978); *see* Brown v. Arlen Management Corp., 663 F.2d 575, 583 (5th Cir. 1981).

153. 572 S.W.2d at 666 n.2. The court defined loss of consortium as primarily consisting "of the emotional or intangible elements of the marital relationship." *Id.* at 666. *But see generally* Skarsten v. United States, 517 F. Supp. 40, 44 (D. Minn. 1981).

154. *See* White v. United States, 510 F. Supp. 146, 149 (D. Kan. 1981).

155. Reed Tool Co. v. Copelin, 610 S.W.2d 737, 738 (Tex. 1981); Whittlesey v. Miller, 572 S.W.2d 665, 667 (Tex. 1978).

156. 572 S.W.2d at 668.

157. *Id.* at 669; Skarsten v. United States, 517 F. Supp. 40, 44 (D. Minn. 1981).

Court recently held that loss of consortium is a recoverable claim in maritime cases.[158] But this right of recovery, like that in *Whittlesey*, has been held not to apply retroactively.[159]

In *Stanford v. McLean Trucking Co.* a federal district court held that the right of recovery for loss of consortium defined in *Whittlesey* is applicable to claims under the Texas Wrongful Death Act.[160] The court noted that no distinction should be made between a spouse who suffers loss because of the other's incapacity and one whose loss is the consequence of the other's wrongful death.[161] Relying on language in *Whittlesey v. Miller*[162] and *Bedgood v. Madalin*[163] that the law should respond to modern social and economic realities, the court predicted that when faced with the question, the Texas Supreme Court would allow a recovery for loss of consortium in a wrongful death action.[164]

III. MANAGEMENT AND LIABILITY

Interspousal Transfers. In *Dyer v. Dyer*[165] the wife conveyed her interest in the community home to her husband as his separate property. In a subsequent suit for divorce, brought more than four years after the conveyance, the wife sought to set aside the deed claiming it was obtained by duress. The court noted that a deed regular on its face procured by duress is merely voidable and not void.[166] Hence the wife's suit to set the deed aside was barred by the four year statute of limitations[167] regardless of the validity of the deed.[168]

A significant development during the survey period regarding interspousal transfers was the addition of section 5.04 of the Family Code.[169] This section is a codification of the new language in article XVI, section 15 of the Texas Constitution creating a presumption that a gift of property from one spouse to the other includes the future income that may arise from that gift.[170] These additions to the Constitution and the Family Code were designed to give effect to the probable intent of the donor and thus to

158. 446 U.S. 274 (1980).

159. Engle v. Ellis Corp., 509 F. Supp. 630, 635 (S.D. Tex. 1980). In Minyard Food Stores v. Newman, 612 S.W.2d 198 (Tex. 1980) (per curiam), the Texas Supreme Court reaffirmed the proposition that *Whittlesey* does not apply retroactively to causes of action arising before its effective date. *Id.* at 199; *see* 572 S.W.2d at 669.

160. 506 F. Supp. 1252, 1258 (E.D. Tex. 1981); TEX. REV. CIV. STAT. ANN. arts. 4672-4677 (Vernon 1952), arts. 2678, 4671, 4675a (Vernon Supp. 1982).

161. 506 F. Supp. at 1258.

162. 572 S.W.2d 665, 668 (Tex. 1978).

163. 600 S.W.2d 773, 777 (Tex. 1980) (Spears, J., concurring).

164. 506 F. Supp. at 1257, 1258.

165. 616 S.W.2d 663 (Tex. Civ. App.—Corpus Christi 1981, no writ).

166. *Id.* at 665.

167. TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958).

168. 616 S.W.2d at 665.

169. TEX. FAM. CODE ANN. § 5.04 (Vernon Supp. 1982).

170. TEX. CONST. art. XVI, § 15. Although no such presumption exists regarding gifts to a spouse from a third person, the donor may so define the gift to include income or the gift in trust may merely consist of income. McClelland v. McClelland, 37 S.W. 350 (Tex. Civ. App.—Austin 1896, writ ref'd.); *see* Counts, *Trust Income—Separate or Community Prop-*

facilitate more effective estate planning.[171] Previously the Internal Revenue Service argued that a gift from one spouse to the other was only partially effective for estate and gift tax purposes because under community property law that income from the donated property would be community property in which the donor spouse would have a half interest.[172] Although the Fifth Circuit Court of Appeals had rejected the Service's argument on this point in *Estate of Wyly v. Commissioner*,[173] one of the objectives of the changes in the Texas Constitution and Family Code was to put this issue to rest. Concurrently, Congress also did its part by providing an effectively unlimited marital deduction for gift and estate tax computations involving interspousal transfers.[174]

Intestate Succession and Community Administration. When one spouse[175] dies intestate, the other spouse may qualify as the community administrator[176] and as such exercise a broad, but not unlimited, range of management authority over the former community estate.[177] A qualified community administrator has the power to manage the former community estate as if all of the property is his separate property (including the right to use the community estate to discharge all community debts)[178] provided he does not appropriate the benefits to his own benefit.[179] The community administration may be terminated one year after the survivor files the bond as community administrator,[180] but *In re Jackson*[181] illustrates that the community administration can continue considerably longer than a year, if no action is taken to terminate it. At the time of the first spouse's death in 1949, the community estate in *Jackson* consisted mainly of a small farm. The surviving spouse qualified as the community administrator but no evidence demonstrated that he ever made any accounting or distribu-

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erty?, 30 TEX. B.J. 851 (1967). *See also* Commissioner v. Porter, 148 F.2d 566 (5th Cir. 1945); Commissioner v. Terry, 69 F.2d 969 (5th Cir. 1934).

171. For a more thorough discussion of the purpose of these changes, see McKnight, 1980 *Survey*, *supra* note 59, at 129-31.

172. The Tax Court had adopted this position in several cases. *See* Estate of Wyly v. Commissioner, 69 T.C. 227 (1977); Estate of Castleberry v. Commissioner, 68 T.C. 682 (1977); Estate of McKee v. Commissioner, 37 T.C.M. (CCH) 35,049 (1978).

173. 610 F.2d 1282 (5th Cir. 1980) (reversing the Tax Court's decisions in Estate of Wyly v. Commissioner, 69 T.C. 227 (1977) and Estate of Castleberry v. Commissioner, 68 T.C. 682 (1977)).

174. I.R.C. § 2056.

175. Spouses of informal marriages have exactly the same rights in intestate succession as do the spouses of formal marriages. *In re* Glasco, 619 S.W.2d 567, 571-72 (Tex. Civ. App.—San Antonio 1981, no writ). *See* note 16 *supra* and accompanying text.

176. TEX. PROB. CODE ANN. § 161(c) (Vernon 1980).

177. *Id.* § 167.

178. *Id.* This includes the right to sell former community real estate, *In re* Jackson, 613 S.W.2d 80, 83 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam sub nom.* Harrison v. Parker, 620 S.W.2d 102 (Tex. 1981), or the former community homestead, Brunson v. Yount-Lee Oil Co., 122 Tex. 237, 239, 56 S.W.2d 1073, 1074 (1933).

179. TEX. PROB. CODE ANN. § 167 (Vernon 1980); Gray v. Gray, 424 S.W.2d 309, 311 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.).

180. TEX. PROB. CODE ANN. § 175 (Vernon 1980).

181. 613 S.W.2d 80 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam sub nom.* Harrison v. Parker, 620 S.W.2d 102 (Tex. 1981).

tion to the takers of the estate. The farm was sold in two parcels in 1963 and 1964, but no distribution of the proceeds was made. The community administrator died in 1978. At no time before his death did the community administrator or any takers of the estate request a termination of the administration. After the administrator's death, one of the takers filed a claim against the former administrator's estate for a share of the proceeds of the sale of the land. The district court concluded that this claim was barred by the two year statute of limitation.[182] The court of appeals, however, held that the Probate Code[183] permits the administrator to continue to manage the community estate as trustee for the owners of the estate until the administration is terminated.[184] Thus the statute of limitation for claims against the estate did not begin to run unless the trustee acted in repudiation of the trust and the beneficiaries knew or should have known of that act.[185] The court stated that the community administrator had never taken any action inconsistent with the community administrator's duties and that no evidence of any notice to the claimant that those duties were repudiated was presented.[186] The claim, therefore, was not barred by the statute of limitation.[187] In refusing a writ of error, the Texas Supreme Court pointed out that the authority of *Wingo v. Rudder*,[188] under which the sale would have constituted a repudiation of the taker's claim, could no longer stand alongside the current provisions of section 167.[189] Although the court did not address the validity of the deed conveyed by the community administrator, the result in *Jackson* is difficult to square with that reached in *Gray v. Gray* in which such a deed of former community realty granted by the qualified community administrator was held to be void.[190] Neither the court of civil appeals nor the Texas Supreme Court addressed the conflicting opinion in *Gray*. The conflict, therefore, is unresolved, although the supreme court's opinion can be construed to overrule *Gray sub silentio*.

Transfers for Limited Purposes. In *Uriarte v. Petro*[191] an ailing wife transferred community property to her sister with instructions to use the assets to take care of the wife. Following his wife's death, the husband brought suit to recover the property remaining in the sister's hands. The jury found that no gift was made from the deceased spouse to her sister. The trial court therefore concluded that the sister held the assets as trustee under a resulting trust with the husband as the beneficiary. In affirming this con-

182. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1982).
183. TEX. PROB. CODE ANN. § 167 (Vernon 1980).
184. 613 S.W.2d at 83.
185. *Id.*
186. *Id.* at 84.
187. *Id.*
188. 103 Tex. 150, 124 S.W. 899 (1910).
189. 620 S.W.2d at 102; *see* TEX. PROB. CODE ANN. § 167 (Vernon 1980); Harrison v. Parker 620 S.W.2d 102 (Tex. 1981).
190. 424 S.W.2d 309, 311 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.).
191. 606 S.W.2d 22 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

clusion, the court of civil appeals stated that because the limited purpose of the transfer had been fulfilled, the remainder of the property reverted to the deceased wife's estate and consequently to the surviving husband.[192]

The transfer of assets to be used for the care of the ailing wife in *Uriarte* presents facts similar to those in *Dulak v. Dulak*[193] in which the father established a joint account with his son for the limited purpose of enabling the son to take care of the father. Once the limited purpose came to an end the funds came under the exclusive control of the deceased father's estate and were distributed according to his will.[194] The transfer of funds for a limited purpose in *Uriarte* and *Dulak* are distinguishable from cases involving constructively fraudulent gifts[195] and illusory transfers[196] because the transfer for limited purposes is a valid transaction with an anticipated reversion of the property to the transferor.

Spousal Liability. *Brazosport Bank of Texas v. Robertson*[197] presents a difficult case of credit liability under section 5.61 of the Family Code.[198] The wife, who was employed at a substantial salary, desired to purchase an expensive automobile. At the time of the transaction the couple was separated. The husband informed the bank with which the wife was negotiating for a loan that he strenuously objected to the transaction and flatly refused to have any part in it. Despite knowledge of the husband's attitude toward the transaction, the bank extended credit to the wife to purchase the car. Title to the car, on which the bank was given a lien, was in the wife's name at her business address. Several years after the purchase, the couple was divorced, and the ex-wife defaulted on the loan. After selling the car, the bank brought suit against both former spouses to recover the deficiency owing on the note. Although a judgment was recovered against the ex-wife, the bank failed to obtain a judgment against the husband. The appellate court affirmed the trial court's decision and held that the course of the negotiations showed that the bank impliedly agreed to look solely to the wife's separate property for repayment, and therefore no liability fell on the husband.[199] In spite of the court's holding in *Robertson* that the seller looked to the buyer's separate property for payment, the facts suggest that the seller actually looked to the wife's earnings. Since prior to the transaction the husband expressly denied any involvement in the purchase, and the bank seemingly accepted his position, the bank could not later change its position as to the husband's liability.

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192. *Id.* at 25.

193. 496 S.W.2d 776 (Tex. Civ. App.—Austin 1973), *aff'd in part, rev'd in part*, 513 S.W.2d 205, 208 (Tex. 1974).

194. 496 S.W.2d at 783, 785-86.

195. *See* Horlock v. Horlock, 533 S.W.2d 52, 55 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); Givens v. Girard Life Ins. Co., 480 S.W.2d 421, 425-27 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

196. *See* Land v. Marshall, 426 S.W.2d 841, 849 (Tex. 1968).

197. 616 S.W.2d 363 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

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

199. 616 S.W.2d at 366.

The law is well settled that if property is bought on credit by either spouse during marriage, it is community property unless the creditor agrees to look only to the purchasing spouse's separate property for payment.[200] As a corollary to this rule it was therefore said that the liability constituted a "community debt,"[201] an observation that accurately indicated a source of satisfaction as long as the community was subject to the husband's management.[202] Once the purchase has been characterized as community property today, the question of liability for debt is more complex, and describing the debt as falling on "the community" is not very helpful. Under section 5.61 of the Family Code, community property subject to a spouse's sole or joint management is subject to liability for that spouse's debt.[203] The community property subject to the other spouse's sole management is not liable,[204] nor is that spouse's separate property.[205] Section 5.61 does not provide for the situation in which a creditor has agreed to look solely to the contracting spouse for repayment with either separate or community property. The court concluded in *Robertson* that the husband was not intended to be involved in this situation and he had no contractual liability apart from his interest in community property subject to the wife's sole or joint management.[206] Thus, once again, labeling the liability as a "community debt" is found to be misleading.

Employee Retirement Income Security Act Benefits. Section 206(d)(i) of ERISA mandates that all ERISA approved plans "shall provide that benefits provided under the plan may not be assigned or alienated."[207] Section 514(a) of the act further provides that ERISA preempts all state laws to the extent that they relate to any ERISA approved employee benefit plan.[208] These provisions raise serious questions as to the availability of ERISA benefits for the satisfaction of debts.

In *Operating Engineers' Local 428 Pension Trust Fund v. Zamborsky*[209] the Ninth Circuit Court of Appeals considered whether an ex-spouse could garnish the other ex-spouse's benefits in an ERISA approved trust to sat-

200. *See* Broussard v. Tian, 156 Tex. 371, 373, 295 S.W.2d 405, 406 (1956); Gleich v. Bongio, 128 Tex. 606, 607-08, 99 S.W.2d 881, 883 (1937). *See also* Ray v. United States, 385 F. Supp. 372, 377 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976).

201. *See, e.g.*, Cockerham v. Cockerham, 527 S.W.2d 162, 171 (Tex. 1975); Anderson v. Royce, 624 S.W.2d 621, 623 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).

202. *See* McKnight, 1981 *Survey*, *supra* note 59, at 114-16; McKnight, 1980 *Survey*, *supra* note 59, at 128-29; McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 138-39 (1978) [hereinafter cited as McKnight, 1978 *Survey*]; McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 81-82 (1974) [hereinafter cited as McKnight, 1974 *Survey*].

203. TEX. FAM. CODE ANN. § 5.61(c) (Vernon 1975); *see* TPEA No. 5 Credit Union v. Solis, 605 S.W.2d 381, 383 (Tex. Civ. App.—Waco 1980, no writ).

204. TEX. FAM. CODE ANN. § 5.61(b) (Vernon 1975).

205. *Id.* § 5.61(a). The contracting spouse's separate property is liable, however, by virtue of general contractual principles. *See generally* Cockerham v. Cockerham, 527 S.W.2d 162, 171 (Tex. 1975).

206. 616 S.W.2d at 367.

207. 29 U.S.C. § 1056(d)(1) (1976).

208. *Id.* § 1144(a).

209. 650 F.2d 196 (9th Cir. 1981).

isfy past-due support obligations. When the spouses were divorced, the benefits of the trust were awarded to the husband as his separate property, and the husband was ordered to make monthly payments for his ex-wife's maintenance. After the husband retired and began receiving benefits from the trust, he fell behind in his payments, and his ex-wife obtained a decree ordering the trust to pay her the amount of accrued payments due and the decreed amount of monthly payments in the future. The Federal District Court for the District of Arizona denied the husband's request for a permanent injunction preventing the enforcement of the decree.[210] On appeal, the Ninth Circuit Court held that even if ERISA did preempt garnishments generally,[211] an implied exception to ERISA allowed the garnishment of ERISA-approved benefits by an ex-spouse in order to satisfy court ordered spousal maintenance obligations.[212]

The court's assertion of an exception to the general preemption language of section 5.14(a)[213] for this type of case was based on presumed congressional intent.[214] The court noted that both Congress and the courts traditionally give strong deference to state law in family matters, thereby raising a presumption that federal statutes are not intended to interfere with state domestic relations law.[215] Moreover, the court stated that ERISA did not expressly require that this type of garnishment be preempted and "that these garnishments do not do 'major damage' to 'clear and substantial' federal interests."[216] Similarly, the Ninth Circuit rejected the argument that the anti-alienation language of section 206(d)(1)[217] prevents the ex-spouse from garnishing ERISA-plan benefits to satisfy spousal maintenance payments.[218] The court noted that the statute only requires the plan to contain the anti-alienation language, and that this garnishment did not make compliance with that provision impossible.[219] Furthermore, the court stated that Congress did not intend to create a means of avoiding court ordered spousal support obligations, but rather the main purpose of the statute was to ensure that the benefits were available upon retirement of the participant.[220] Although Texas law does not recognize permanent court ordered alimony,[221] the Fifth Circuit might adopt this approach to allow the garnishment of ERISA plan benefits to satisfy temporary support

210. Operating Eng'rs' Local 428 Pension Trust Fund v. Zambrosky, 470 F. Supp. 1174 (D. Ariz. 1979), *aff'd*, 650 F.2d 196 (9th Cir. 1981).

211. Operating Eng'rs' Local 428 Pension Trust Fund v. Zambrosky, 650 F.2d 196 (9th Cir. 1981). Although the court based its opinion on the assumption that ERISA prohibits garnishments generally, it did not so hold, and further it noted that there is a split of authority on the issue. *Id.* at 198 n.2.

212. *Id.* at 199. The court stated there is an assumption that the police powers of the states will not be superseded by federal statutes unless expressly stated.

213. 29 U.S.C. § 1144(a) (1976).

214. 650 F.2d at 199.

215. *Id.*

216. *Id.* at 199-200.

217. 29 U.S.C. § 1056(d)(1) (1976).

218. 650 F.2d at 201.

219. *Id.*

220. *Id.*

221. *See, e.g.*, Francis v. Francis, 412 S.W.2d 29, 32 (Tex. 1967).

orders and child support obligations.[222]

In *In re Turpin*[223] a trustee in bankruptcy sought to include as part of the debtor's estate his benefits in two ERISA approved retirement trusts that had accrued prior to the filing of the petition in bankruptcy. Applying section 70(a)(5) of the old Bankruptcy Act,[224] the Fifth Circuit Court of Appeals held that such future retirement benefits were not property that passed to the trustee.[225] The court stated that a purpose of bankruptcy proceedings was to allow a debtor a fresh start for the future and noted that the Bankruptcy Act provides a fresh start by allowing the bankrupt to be free of any prebankruptcy obligations, thus enabling him to accumulate future wealth.[226] The court also stated that the new Bankruptcy Code classifies the debtor's rights to receive pension benefits as exempt property to the extent reasonably necessary for the support of the debtor and any of his dependents.[227] Section 541(c)(2) of the new code also excludes from the bankrupt's estate property subject to "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law."[228] If sections 541(a)[229] and 206(d)(1)[230] of ERISA prevent ordinary creditors from reaching a debtor's benefits in an ERISA plan, such benefits should also be protected from a trustee in bankruptcy by those sections. The same result, therefore, should be reached under the new code as was reached under the old act.

Estate Tax Liability. Interesting questions of asset valuation for estate tax purposes are raised when the community estate owns a majority of the shares in a closely held corporation and one of the spouses dies. This problem was addressed by the Fifth Circuit Court of Appeals in *Estate of Bright v. United States*.[231] In *Bright* fifty-five percent of the stock of a closely held corporation had been owned as community property. Under the terms of the deceased spouse's will her interest in the stock passed to the surviving spouse as trustee for the benefit of their children. The Internal Revenue Service made two arguments concerning the valuation of the stock for estate tax purposes: (1) the value of the stock should be one-half of the value of the fifty-five percent plus a control premium; and (2) there should be an application of family attribution rules between the shares that the surviving spouse owned in his own right and those that he held as trustee for the benefit of his children. Recognizing that under Texas law

222. *But see* Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510, 516 (N.D. Tex. 1981) (ERISA exemption held to preempt a commercial creditor's claim).
223. 644 F.2d 472 (5th Cir. 1981).
224. 11 U.S.C. § 110(a)(5) (1976) (current version at 11 U.S.C. § 522(d)(10)(E) (Supp. III 1979). The case was controlled by the old law because the petition was filed before the new code was enacted. 644 F.2d at 474.
225. 644 F.2d at 474.
226. *Id.*
227. *Id.* at 474 n.1; *see* 11 U.S.C. § 522(d)(10)(E) (Supp. III 1979).
228. 11 U.S.C. § 541(c)(2) (Supp. III 1979).
229. 29 U.S.C. § 1144(a) (1976).
230. *Id.* § 1056(d)(1).
231. 658 F.2d 999 (5th Cir. 1981).

each spouse can exercise testamentary powers of disposition over the owned one-half interest in community property only and that fungible shares of stock are readily partitionable, the Fifth Circuit summarily rejected the Service's first argument and concluded that the estate's interest should be considered as only a 27.5 percent interest without any provision for a control premium.[232]

Several reasons were given for the court's rejection of the government's second argument for application of family attribution rules. First, the court determined that the weight of precedential authority was contrary to such a result.[233] Further, family attribution in that context would be inconsistent with the willing buyer-seller rule[234] provided in the regulations.[235] The *Bright* court noted that in applying this rule the buyer and seller should be viewed as individuals having reasonable knowledge of the facts, and that the interest to be taxed should be valued at the moment of death disregarding the interest that was held before death and the interest held by the legatee as trustee after the testatrix-spouse's death.[236] Noting that the value for estate tax purposes should not be determined by reference to the identity of the trustee to whom it is devised, the court concluded that the facts that the stock was previously held as part of the community estate and that it was bequeathed to the surviving spouse as trustee were irrelevant.[237] Furthermore, the court stated that the stock would be considered as if held by an unrelated hypothetical seller.[238]

Homestead: Nature of the Interest. The long history of homestead protection[239] under the Texas Constitution[240] dates back to laws passed under the Republic.[241] Two recent Fifth Circuit Court of Appeals decisions state that the weight of Texas authority is that a homestead is akin to an estate in land rather than merely an exemption from creditors' claims.[242] *United States v. Rogers*[243] illustrates a significant aspect of this distinction. The Internal Revenue Service sought to foreclose a federal tax lien on the homestead property of a surviving spouse. The couple acquired the prop-

232. *Id.* at 1001.
233. *Id.* at 1002.
234. Treas. Reg. § 20.2031-1(b), T.D. 6826, 1965-2 C.B. 367, 368.
235. 658 F.2d at 1005-06.
236. *Id.* at 1006-07.
237. *Id.* at 1007.
238. *Id.* The court also stated that an objective of its decision was to give stability and predictability to this area of the law. *Id.* at 1006.
239. *See* Williams v. Williams, 569 S.W.2d 867, 872-76 (Tex. 1978) (Chadick, J., dissenting) (discussion of the history of Texas homestead protection).
240. TEX. CONST. art. XVI, § 50.
241. *See* O. SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 453, at 543 (3d ed. 1929).
242. *See* United States v. Rodgers, 649 F.2d 1117, 1127 (5th Cir. 1981); Ingram v. Dallas Dep't of Housing & Urban Rehabilitation, 649 F.2d 1128, 1131 (5th Cir. 1981). The Supreme Court has consolidated these cases and granted certiorari. 102 S. Ct. 1748, 72 L. Ed. 2d 160 (1982). The early development of Texas homestead law, however, shows some confusion as to the property nature of the homestead. *See* O. SPEER, *supra* note 241, § 457, at 546-48.
243. 649 F.2d 1117 (5th Cir. 1981).

erty in 1955 and at that time established it as their homestead. In 1971 and 1972, the Service assessed the taxpayer-spouse for past due federal wagering taxes. The taxpayer-spouse subsequently died without paying the taxes. The surviving spouse, who had not been assessed a tax liability, continued to reside on the homestead property. The Fifth Circuit Court of Appeals pointed out that this was not a case in which both spouses had a tax liability[244] or one in which the community property levied upon was not homestead property.[245] Because the property was the homestead of the spouse who owed no federal tax liability, the court held that the Service could not foreclose on the homestead to satisfy the tax liability of the deceased spouse under Texas law.[246] The court noted, however, that had the homestead right been merely an exemption, the federal lien could have been foreclosed.[247] The court concluded that in Texas the homestead was a present possessory estate in land despite noting two early Texas Supreme Court and two similar civil appeals cases to the contrary.[248] The Fifth Circuit reached a similar result in *Ingram v. Dallas Department of Housing & Urban Rehabilitation*.[249] The court reaffirmed the proposition that the Texas homestead protection is subject to a federal tax lien if the tax liability is a joint liability of the spouses as opposed to a sole liability of one spouse.[250] Although the taxpayer spouse was deceased in *Rogers* and the spouses were divorced in *Ingram*, the result should be the same if the marriage is still continuing.

Homestead: Designation and Extent. Because the homestead is defined in terms of acreage (rural) or value (urban) exclusive of the value of any improvements thereon,[251] courts are not ordinarily concerned with the value

244. *Id.* at 1122. The law is well established that the state homestead laws would not prevent foreclosure on the homestead if both spouses had an outstanding federal tax liability. Ingram v. Dallas Dep't of Housing & Urban Rehabilitation, 649 F.2d 1128, 1131 (5th Cir. 1981); United States v. Estes, 450 F.2d 62, 65 (5th Cir. 1971); Shambaugh v. Scofield, 132 F.2d 345, 346 (5th Cir. 1942). For a discussion of federal tax lien priority, see Carroll, *Priorities and Subordination in the Bankruptcy Reform Act of 1978*, 17 HOUS. L. REV. 223, 236-41 (1980).

245. In Broday v. United States, 455 F.2d 1097 (5th Cir. 1972), the court allowed the federal government to foreclose on the non-taxpayer spouse's sole management nonhomestead community property to satisfy the obligation of the other spouse's prenuptial tax liability. *Id.* at 1100-01.

246. 649 F.2d at 1125.

247. *Id.*

248. *Id.*

249. *Id.* at 1126 n.16. The cases the court noted were Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935); Foster v. Johnson, 89 Tex. 640, 36 S.W. 67 (1896); White v. Glenn, 138 S.W.2d 914 (Tex. Civ. App.—Amarillo 1940, writ dism'd judgmt cor.); Lee v. McFarland, 46 S.W. 281 (Tex. Civ. App. 1898, writ ref'd).

250. 649 F.2d at 1127.

251. TEX. CONST. art. XVI, § 51; TEX. REV. CIV. STAT. ANN. art. 3833 (Vernon Supp. 1982). One commentator has recently suggested that there should be an increase in the land value exemption from $10,000 to $30,000. *See* McElroy, *Proposals For Revisions to Texas Civil Statutes*, 44 TEX. B.J. 257, 265 (1981). *See generally* TEX. CONST. art. XVI, § 51; TEX. REV. CIV. STAT. ANN. art. 3833 (Vernon Supp. 1982) ($10,000 lot for urban homestead). A resolution proposing a constitutional amendment to raise the lot value to $25,000 or any larger amount set was filed February 25, 1981, H.J.R. No. 69, but did not meet with legisla-

of improvements that are located on a homestead.[252] Once the homestead is established, the property may be sold, and the homestead protection covers the proceeds for six months so that they may be reinvested in another homestead.[253] In *Braden v. New Ulm State Bank*[254] a judgment creditor, after a request by the debtor, refused to release a judgment lien abstracted against the property and later filed suit to garnish the proceeds of the sale of the homestead that were being held in escrow by the title company pending release of the judgment lien. The debtor asserted that she had been prevented from reinvesting the funds in a new homestead because the escrow agent would not release the funds until the lien was removed. The funds were still in the agent's hands after six months had elapsed after the sale. This case raises the question of whether the creditor's failure to release the lien, despite the debtor's request for a release, amounted to an impermissible taking prohibited by article 3834. However, the issue was not before the court because of the debtor's failure to introduce summary judgment evidence on the point.[255] A judgment creditor is permitted to abstract a judgment that will reach all non-exempt real property of the debtor in a county while the debtor is still in possession of his homestead there.[256] Such filing is allowed because of the possibility that there may be a subsequent abandonment of the homestead as well as the possibility that not all of the property claimed as homestead is exempt. The same analysis can apply to the creditor's refusal to release a lien during the statutory grace period; otherwise, the creditor may lose the opportunity to satisfy the judgment when the six month period expires.

In *James Talcott, Inc. v. Valley Federal Savings & Loan Association*[257] a different sort of deposit was in issue. A judgment creditor sought to garnish tax and insurance funds held in escrow by a savings and loan association for the benefit of the judgment debtor. The court of appeals held that the funds in dispute, although relating to the ownership of the debtor's homestead, are not part of the homestead right.[258] The homestead argu-

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tive approval. A more practicable solution to the problem of matching realistic lot values for urban homesteads with inflationary demands would be to amend the Constitution to define the urban homestead in terms of square feet or a fraction of an acre. Once the urban homestead is defined on an area basis like the rural homestead, there would no longer by any need for continuous constitutional and statutory amendments to match the pressures generated by an inflationary economy.

252. *See* O. SPEER, *supra* note 241, § 466, at 562. For a discussion of whether mobile homes are chattels or part of the realty for homestead exemption purposes, see Dean, *What Is a Mobile Home? The Law and Manufactured Housing*, CASE & COMMENT, Sept.-Oct. 1981, at 10.

253. TEX. REV. CIV. STAT. ANN. art. 3834 (Vernon 1966) provides that the proceeds are exempt from garnishment for six months following the voluntary sale of a homestead.

254. 618 S.W.2d 780 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

255. *Id.* at 782.

256. *See generally* Hoffman v. Love, 494 S.W.2d 591, 593-94 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam*, 499 S.W.2d 295 (Tex. 1973). The lien does not, however, attach to the property at any time while it remains homestead property. 494 S.W.2d at 593-94. A purchaser of the property while maintained as a homestead, therefore, takes it clear of the judgment, as if the lien did not exist. *Id.* at 594.

257. 611 S.W.2d 692 (Tex. Civ. App.—Corpus Christi 1980, no writ).

258. *Id.* at 694.

ment alone, therefore, did not prevent their seizure.[259]

The initial burden of establishing that property is homestead property is on the claimant of the protection.[260] Once the claimant has established his homestead, the burden shifts to the creditor to disprove its continued existence.[261] The burden amounts to a presumption that the homestead continues to exist until its termination is proved.[262] The court in *Pace v. McEwen*[263] stated that the homestead claimant has the burden of proof on the issue of homestead status;[264] however, this does not mean that the claimant has the burden of proof for all homestead issues. In *Pace* the claimant failed to meet the initial burden of establishing a homestead because there was sufficient evidence to support a finding that the funds used to acquire the property had been fraudulently obtained by the claimant.[265] Investment in a home cannot be used as a shelter for ill gotten gains.[266]

The essential requirements for an effective abandonment are an intent to abandon permanently coupled with overt acts of abandonment.[267] The claimant's temporary renting of the homestead does not constitute an abandonment of it.[268] In *In re Root*[269] the debtor had purchased a tract of land and built a duplex thereon. After the construction was completed, the debtor's family moved into one-half and made it their residence. The other half was rented. The debtor subsequently filed a petition in bankruptcy. The trustee sought to prevent the rental portion of the property from being set aside to the debtor as exempt. The court held that because the debtor's predominant purpose in building the duplex was to provide a residential homestead, the rental of a portion of the residence did not reduce the homestead protection accorded to the entire lot.[270] The outcome, however, would be different if the debtor had built a detached rent house

259. *Id.* The court concluded that the deposit of escrow funds did not constitute a fund that was recoverable by the judgment debtor and therefore could not be garnished by the judgment creditor. *Id.*

260. *See* Burk Royalty Co. v. Riley, 475 S.W.2d 566, 568 (Tex. 1972); Gill v. Quinn, 613 S.W.2d 324, 326 (Tex. Civ. App.—Eastland 1981, no writ). In Kirchberg v. Feenstra, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981), the United States Supreme Court struck down Louisiana's former gender based community property management statute as unconstitutional. *Id.* at 1199, 67 L. Ed. 2d at 433-34. Because the Texas community property management and homestead statutes are gender neutral, this case does not represent a serious threat to Texas law.

261. Chalk v. Daggett, 257 S.W.228, 232 (Tex. Comm'n App. 1924, judgmt adopted).

262. *See* Sullivan v. Barnett, 471 S.W.2d 39, 43 (Tex. 1971); Welborne v. Downing, 73 Tex. 527, 530-31, 11 S.W. 501, 502 (1889); Gill v. Quinn, 613 S.W.2d 324, 326 (Tex. Civ. App.—Eastland 1981, no writ).

263. 617 S.W.2d 816 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

264. *Id.* at 818.

265. *Id.*

266. *See* Baucum v. Texam Oil Corp., 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).

267. Hudgins v. Thompson, 109 Tex. 433, 438, 211 S.W. 586, 587 (1919); Gill v. Quinn, 613 S.W.2d 324, 327 (Tex. Civ. App.—Eastland 1981, no writ).

268. TEX. CONST. art. XVI, § 51; TEX. REV. CIV. STAT. ANN. art. 3833(b) (Vernon Supp. 1982).

269. No. 281-00035 (Bankr. N.D. Tex., June 29, 1981).

270. *Id.*, slip op. at 2; *see* Thomas v. Tyler, 6 S.W.2d 350 (Tex. Comm'n App. 1928, judgmt adopted) (adopting the decision of the court of appeals, 297 S.W. 609, 610-11 (Tex.

on their urban property instead of a duplex.[271]

Prior to 1973, the Texas Constitution provided homestead protection for a family but none for a single adult except one who acted as head of a family or was a surviving family constituent.[272] A man and woman living together in a meretricious relationship did not constitute a family for homestead purposes.[273] In 1973, however, the Constitution was amended to permit single adults independent of any familial association to claim homestead protection.[274] Under this provision there is no reason why unmarried persons who are living together should not be allowed to claim a homestead as single adults. In *Tremaine v. Showalter*,[275] however, the court held that a homestead was not maintainable by an unmarried couple living together, when the claimant was not *single* but married to someone else.[276] The plaintiff, while his divorce from his first wife was still pending, purchased the disputed property and moved onto it with the woman who would subsequently become his second wife. Before the divorce from his first wife was granted, the plaintiff sold the property to his solely owned corporation so that he could mortgage the property to raise funds for the business. When the company defaulted on the note, the creditor sought to foreclose under the deed of trust. The plaintiff brought suit to enjoin this sale, claiming that the property was his homestead and that the sale to the corporation was void as a pretended sale[277] for the purpose of mortgaging homestead property. Although the case could have been disposed of by considering whether the sale to the corporation was merely a sham, the court of civil appeals chose first to consider the homestead character of the property. The court held that during the time prior to the sale to the corporation the plaintiff was still married to his first wife and hence the disputed property could not qualify as his homestead as either a single adult or head of a family.[278] The debtor's undivorced wife had continued to occupy the family home which was in all probability community property. Although the point was not clearly made, the court probably concluded

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Civ. App.—Galveston 1978), reaching the same result with a single building containing four separate apartments).

271. *See* Atwood v. Guaranty Constr. Co., 63 S.W.2d 685, 686 (Tex. Comm'n App. 1933, judgmt adopted). *But see* Hollifield v. Hilton, 515 S.W.2d 717, 720-21 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.) (construction of trailer park on portion of rural homestead not an abandonment of that portion as homestead).

272. TEX. CONST. art. XVI, § 52; Williams v. Williams, 569 S.W.2d 867, 869 (Tex. 1978); Woods v. Alvarado State Bank, 118 Tex. 586, 595, 19 S.W.2d 35, 38 (1929).

273. Lane v. Phillips, 69 Tex. 240, 241, 6 S.W. 610 (1887); Barker v. Lee, 337 S.W.2d 637, 639 (Tex. Civ. App.—Eastland 1960, no writ); Senegar v. LaVaughan, 230 S.W.2d 311, 312 (Tex. Civ. App.—Beaumont 1950, no writ).

274. TEX. CONST. art. XVI, § 50.

275. 613 S.W.2d 35 (Tex. Civ. App.—Corpus Christi 1981, no writ).

276. *Id.* at 37.

277. The constitution provides that all pretended sales for the purpose of mortgaging a homestead are void. TEX. CONST. art. XVI, § 50; *see* Toler v. Fertitta, 67 S.W.2d 229 (Tex. Comm'n App. 1934, judgmt adopted). In *Tremaine* the court did not have to address the issue of whether the sale was void as a pretended sale; rather the court held that the property was not the homestead of a single adult or of a family. 613 S.W.2d at 37.

278. 613 S.W.2d at 37.

that the debtor was attempting to claim two homesteads at once. The answer to that argument, however, is that the husband had abandoned his wife *and* his homestead claim to the family home.[279] The first wife, therefore, could claim the first property as her homestead and the husband could claim the new house as his.

As a general rule a lien does not result from a money judgment until the judgment has been properly abstracted.[280] If property already owned becomes a debtor's homestead after the judgment is rendered, but before it is abstracted or execution is levied, the property is entitled to homestead protection.[281] If, however, a judgment lien attaches before the property achieves its homestead quality, the judgment creditor can foreclose his lien.[282] As long as the law only recognized a family homestead, a divorce normally terminated a homestead of a childless couple.[283] But with the creation of the single-adult homestead, the homestead character of property is not necessarily destroyed by a divorce of a childless couple. If one of the parties continues to maintain the property as a homestead, it automatically becomes a single adult's homestead.[284] Moreover, the divorce does not create a gap in time during which a third-party creditor's lien may attach.[285] If, however, the lien is for a purpose for which a valid lien may be fixed on a homestead, the lien is valid. Thus, when the court creates an equitable lien on one spouse's separate homestead property in order to secure the other spouse's rights of reimbursement against the property arising on divorce,[286] or to secure payment of the amount awarded to the other spouse for that spouse's homestead interest,[287] the lien is valid. Although the court in *Day v. Day* emphasized that the equitable lien was created before the debtor spouse actually asserted the property as his

279. TEX. FAM. CODE ANN. § 5.85(a) (Vernon 1975) refers to this type of situation (community homestead) while *id.* § 5.83(a) deals with a related situation (separate homestead of the abandoned spouse).

280. Day v. Day, 610 S.W.2d 195, 197 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

281. *See id.*

282. *Id.* at 199; *In re* Dawkins, 11 Bankr. 213 (Bankr. N.D. Tex. 1981).

283. *See, e.g.*, Burk Royalty Co. v. Riley, 475 S.W.2d 566, 568 (Tex. 1972); Tanton v. State Nat'l Bank, 125 Tex. 16, 19, 79 S.W.2d 833, 834 (1935). In Henry S. Miller Co. v. Shoaf, 434 S.W.2d 243 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.), however, the homestead protection did not cease on the divorce of the childless couple because the wife's mother lived with her thus providing a new family relationship to support the continued homestead quality of the property. *Id.* at 244-45.

284. Wierzchula v. Wierzchula, 623 S.W.2d 730, 732 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); Eggemeyer v. Eggemeyer, 623 S.W.2d 462, 465 (Tex. Civ. App.—Waco 1981, no writ); *see* Day v. Day, 610 S.W.2d 195, 198-99 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.). Prior to the creation of single-adult homesteads, similar results could be reached only if the spouse was a remaining family constituent. Burk Royalty Co. v. Riley, 475 S.W.2d 566, 567 (Tex. 1972); Woods v. Alvarado State Bank, 118 Tex. 586, 595, 19 S.W.2d 35, 38 (1929).

285. Wierzchula v. Wierzchula, 623 S.W.2d 730, 732 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

286. Eggemeyer v. Eggemeyer, 623 S.W.2d 462, 466 (Tex. Civ. App.—Waco 1981, no writ); Day v. Day, 610 S.W.2d 195, 199 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

287. Wierzchula v. Wierzchula, 623 S.W.2d 730, 732 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

homestead,[288] the court in *Eggemeyer v. Eggemeyer* properly indicated that such a lien is valid regardless of when the debtor spouse claimed the homestead.[289] Although an equitable lien can be placed on a divorced spouse's separate property to secure the payment of marital reimbursement properly falling on that property, a court may not subject the exempt property to an equitable lien for the purpose of securing past-due child support payments or any other purpose for which exempt property cannot be burdened.[290]

The mere intention to establish a homestead on property is not sufficient to impress the property with homestead character.[291] An intention to reside thereon followed by overt acts of preparation evidencing that intent, however, has been held sufficient to impress the property with homestead character.[292] In *In re Weatherly*[293] the spouses owned two houses, one in which they had previously lived and a new one to which they had recently moved. In divorce proceedings the court entered an interlocutory order requiring the husband to make repairs to the first home for the wife's occupancy because a valid lien on the new home was about to be forclosed. The couple's new house was sold and the wife, after being abandoned by the husband, moved into an apartment waiting for the repairs to be completed on the old home. The husband, however, quit paying for the repairs and the wife had no money available with which to complete them. No judgment of divorce had been entered. Subsequently one of the husband's creditors abstracted a judgment against the property and sought foreclosure against it. The wife filed a petition in bankruptcy and sought relief from the bankruptcy court, claiming the property as the family homestead. Finding that the wife had standing to assert the homestead claim,[294] the court held, despite the fact that there was no actual occupancy of the property as a homestead, that there were sufficient overt acts of preparation evidencing an intent to establish a homestead on the property to impress it with a homestead character.[295] The court based its decision on the fact that the wife had claimed the old house as her homestead since the first house was sold, that the couple had never entirely abandoned the property when they originally moved from it, that repairs were commenced pursuant to the divorce court's temporary order, and that the wife sought to enforce that order against the husband when he ceased paying for the repairs.[296]

Homestead: Exemption in Bankruptcy. Section 522(b) of the Bankruptcy

288. 610 S.W.2d 195, 199 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).
289. 623 S.W.2d 462, 465 (Tex. Civ. App.—Waco 1981, no writ).
290. *Id.* at 466.
291. Gilmore v. Dennison, 131 Tex. 398, 400, 115 S.W.2d 902, 902 (1938).
292. Spence v. Spence, 455 S.W.2d 365, 368 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).
293. No. 281-00077 (Bankr. N.D. Tex., Oct. 1, 1981).
294. *Id.*, slip op. at 5.
295. *Id.* at 4.
296. *Id.* at 6.

Code allows a debtor to choose either the federal bankruptcy exemptions provided under section 522(d) of the Code[297] *or* the state and other federal exemptions to protect his property in a bankruptcy proceeding, unless state law otherwise prohibits such a choice.[298] Section 522(m) provides that each debtor in a joint bankruptcy case may choose exemptions individually.[299] In *In re Cannady*[300] a husband and wife filed a joint petition in bankruptcy. The husband chose to assert state exemptions: the community residence under article 3833(a)(3) and items of community personal property under article 3836(a).[301] The wife, however, chose to assert the alternative federal exemptions under section 522(d) of the Bankruptcy Code including several items of community personal property, some of which were the same as those that the husband had claimed as exempt. The bankruptcy court recognized the right of joint debtors to choose the state and federal exemptions but precluded the husband from claiming the *family* personal property exemption amounting to a total of $30,000 instead of a total of $15,000 allowed a single adult.[302] The court reasoned that if the family exemption was asserted, the wife was already afforded the protection of state law and a claim of the federal exemption would give the spouses an untoward advantage as against their creditors.[303] The Court of Appeals for the Fifth Circuit, however, held that the husband could select the family exemption under state law because Texas law[304] permits only one spouse to assert the family personal property exemption.[305] Moreover, the court noted that Congress knew that the Bankruptcy Code, as enacted, would permit such windfalls to occur but chose to leave it up to the states to pass legislation restricting that result.[306] The court was not required to address the issue of whether the husband could assert the full family homestead protection because the homestead was urban, and its extent is determined under Texas law by the same standard regardless of the marital status of the claimant.[307] Based on the Court of Appeals' interpretation of the Code's legislative history, however, the result should be the same for a husband asserting a full family rural homestead, the extent of which is determined by family status, while the wife claims other federal exemptions. Because of this potential windfall, a couple filing as joint bankrupts will so assert their exemption claims until the

297. 11 U.S.C. § 522(d) (Supp. III 1979).

298. *Id.* § 522(b).

299. *Id.* § 522(m). For a comparison of federal and Texas exemptions see Comment, *The New Bankruptcy Code: A Comparison of Texas and Federal Exemptions*, 17 HOUS. L. REV. 373 (1980).

300. 653 F.2d 210 (5th Cir. 1981).

301. *See* TEX. REV. CIV. STAT. ANN. arts. 3833(a)(3), 3836(a) (Vernon Supp. 1982).

302. 653 F.2d at 213.

303. *Id.* at 212, 213.

304. TEX. REV. CIV. STAT. ANN. art. 3859 (Vernon 1966). Cheeseman v. Nachman, 656 F.2d 60, 62 (4th Cir. 1981), illustrates a state law restricting the selection of the federal exemption.

305. 653 F.2d at 214; *see In re* Maitland, 13 Bankr. 923, 926 (Bankr. S.D. Tex. 1981).

306. 653 F.2d at 214.

307. TEX. CONST. art. XVI, § 51.

Congress responds to suggestions for better protection of creditors.[308]

In re Reed[309] involved a debtor who, prior to filing a petition in bankruptcy, liquidated several items of nonexempt personal property, some at prices significantly below their market values. Thereafter, the proceeds were used to reduce outstanding liens against his exempt homestead realty. The debtor and his wife subsequently filed a joint petition in bankruptcy and claimed homestead protection for their residence under Texas law. The trustee objected to the blatant prebankruptcy planning and challenged the debtor's entitlement to the homestead protection. The court upheld the debtor's claim to the homestead because the Texas Constitution only provides for the forced sale of the homestead to satisfy purchase money liens, improvement liens, and taxes.[310] The constitutional provision precludes the Texas Legislature from including language in article 3833[311] similar to that in article 3836(b),[312] preventing the conversion of non-exempt personalty into exempt personalty in order to defraud, delay, or hinder creditors.[313] The court noted that the result would have been different had the debtor converted the property into otherwise exempt personalty.[314] Although the debtor was able to protect the assets from forced sale by converting them into exempt realty, the court, in a separate opinion, held that his actions were sufficiently fraudulent to prevent his discharge in bankruptcy.[315] This conclusion is severely suspect.[316]

Taxation of Homesteads. On November 3, 1981, Texas voters approved a constitutional amendment allowing political subdivisions to exempt a percentage of the market value of the homestead residence of a married or single adult from ad valorem taxes.[317] Thus, as amended, Article VIII, section 1-6(e) of the Texas Constitution permits the creation of an exemption from ad valorem taxes of not more than forty percent of market value for the years 1982 through 1984, thirty percent for the years 1985 through 1987 and twenty percent thereafter.[318] Unless the legislature otherwise prescribes, the amount of the exemption may not be less than $5,000.[319] The amendment does not prevent the application of otherwise available exemptions.

Article VIII, Section 21(c) was amended to require the legislature to en-

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308. *See Record Statement of Claude Rice, Esq., Alvin O. Wiese, Jr., Esq., and Professor Jonathan M. Landers, On Problems of Consumer Creditors Under the Bankruptcy Reform Act, Before the Subcommittee on Courts of the Senate Committee on Judiciary*, April 3, 1981, 35 QUARTERLY REPORT 158, 166-67 (1981).

309. 12 Bankr. 41 (Bankr. N.D. Tex. 1981).

310. 12 Bankr. at 43-44; *see* TEX. CONST. art. XVI, § 50.

311. TEX. REV. CIV. STAT. ANN. art. 3833 (Vernon Supp. 1982).

312. *Id.* art. 3836(b).

313. *See* 12 Bankr. at 43.

314. *Id.*

315. *In re* Reed, 11 Bankr. 683, 689 (Bankr. N.D. Tex. 1981).

316. *But see* note 266 *supra*.

317. H.J.R. No. 81.

318. TEX. CONST. art. VIII, § 1-b(e).

319. *Id.*

act legislation providing that a property owner be given (1) notice of a revaluation of property for purposes of ad valorem taxation and (2) a reasonable estimate of the amount of taxes that would be imposed if the total amount of property taxes for the subdivision were not increased.[320] While revamping the Property Tax Code, the 1981 legislature made several other changes affecting homestead property.[321]

IV. DIVORCE PROCEEDINGS

Filing Fees. In *Brown v. Clapp*[322] the wife filed for divorce with a pauper's oath that she was destitute and unable to pay the filing fee. The plaintiff's only source of income at the time she signed the affidavit was a welfare check and food stamps. Finding that the trial judge abused his discretion in denying waiver of filing fees, the appellate court held that being dependent on public charity is prima facie evidence that a person is financially unable to pay court costs.[323] The court also noted that the right to proceed in forma pauperis depends on the affiant's inability to pay the costs at the time of making the oath rather than a possible future ability to do so.[324]

Jurisdiction and Venue. A waiver of service of process must be executed after suit is brought.[325] The requirement is jurisdictional, and hence a waiver executed prior to filing of the action is void. This statutory requirement is so well established in Texas law that it is sometimes thought to be constitutional. It is, therefore, surprising to find a case such as *Tidwell v. Tidwell*, in which the rule appears to have been violated, requiring appellate review.[326]

In *Waldron v. Waldron*[327] the wife filed suit for divorce in Potter County alleging that to be the residence of both parties. Service of process was attempted on the husband in Florida but the sheriff's return of the citation did not comply with Rule 108 of the Texas Rules of Civil Procedure.[328]

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320. *Id.* § 21(a),(c).

321. TEX. TAX CODE ANN. §§ 11.13(j) (defining the residence homestead), 11.27 (exempting solar or wind powered energy devices), 11.431 (Vernon Pam. 1981) (dealing with late applications for homestead tax exemptions).

322. 613 S.W.2d 78 (Tex. Civ. App.—Tyler 1981, no writ).

323. *Id.* at 80.

324. *Id.*

325. TEX. R. CIV. P. 119 provides:

> The defendant may accept service of process, or waive the issuance or service thereof by a written memorandum signed by him, or by his duly authorized agent or attorney, after suit is brought, sworn to before a proper officer other than an attorney in the case, and filed among the papers of the cause, and such waiver or acceptance shall have the same force and effect as if the citation had been issued and served as provided by law.

See TEX. REV. CIV. STAT. ANN. art. 2224 (Vernon 1981).

326. 604 S.W.2d 540, 541 (Tex. Civ. App.—Texarkana 1981, no writ).

327. 614 S.W.2d 648, 649 (Tex. Civ. App.—Amarillo 1981, no writ).

328. TEX. R. CIV. P. 108 provides:

> Where the defendant is absent from the State, or is a nonresident of the State, the form of notice to such defendant of the institution of the suit shall be the same as that prescribed for citation to a resident defendant; and such notice may be served by any disinterested person competent to make oath of the fact

The husband did not appear in the case and the plaintiff introduced no evidence at trial to prove his Texas residence. The court granted the divorce and awarded the plaintiff certain property. The wife subsequently instituted a proceeding to enforce the property rights granted her under the decree. The husband argued that the court never acquired in personam jurisdiction over him because his wife failed to prove his Texas residence and the service of process on him in Florida was defective. The husband went on to argue that because the court had subject matter jurisdiction of the cause for divorce, the judgment of the trial court should be affirmed except for the portion concerning the division of property.[329] The Amarillo court of civil appeals concluded that the trial court had subject matter jurisdiction to try *all* the issues in the case.[330] Nevertheless, until the court's jurisdictional power was properly invoked, the court was not authorized to exercise such power.[331] Although the trial court had potential jurisdiction to render judgment, it was never activated because of the defective service.[332] The court, therefore, refused to remand part of the case and affirm the rest because to do so would ignore the jurisdictional defect.[333] The trial court's actions were unauthorized, because neither in rem nor in personam jurisdiction had been set in motion.[334]

In a Dallas case[335] involving similar issues, the wife, who did not appear at the hearing, contended that the service of process on her was defective

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> in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be endorsed on or attached to the original notice, and shall be in the form provided in Rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.

329. The husband argued that the trial court could not award his ex-wife money from the community in his possession because that award was a money judgment to be paid from personal property in his possession outside of Texas. 614 S.W.2d at 649. The court rejected his argument because the record did not reflect the location of the property awarded to his wife. If he had been subject to personal jurisdiction of the court, he might have been ordered to transfer the property regardless of its location. *Id.* at 650.

330. 614 S.W.2d at 650; *see* TEX. CONST. art. V, § 8; TEX. REV. CIV. STAT. ANN. art. 1906 (Vernon 1964).

331. *See* Texas v. Olsen, 163 Tex. 449, 360 S.W.2d 398, 400 (1962).

332. 614 S.W.2d at 650.

333. *Id.*

334. *Id.* at 651. *Compare* Fox v. Fox, 559 S.W.2d 407 (Tex. Civ. App.—Austin 1977, no writ) *with* Risch v. Risch, 395 S.W.2d 709 (Tex. Civ. App.—Houston 1965, writ dism'd), *cert. denied*, 386 U.S. 10 (1967). The appellate court in *Fox* affirmed the trial court's divorce decree in part and reversed it in part. The trial court did not have *in personam* jurisdiction over the respondent because she lacked the requisite minimum contacts with Texas and therefore the court could not appoint her managing conservator or divide property located outside the state. The appellate court held that the trial court had jurisdiction over the marital relationship because its dissolution is an *in rem* proceeding and in this case, it fell under TEX. FAM. CODE ANN. § 3.23 (Vernon 1975). The appellate court in *Risch*, however, reversed the trial court's judgment as to matters *in personam* but affirmed as to matters *in rem*.

335. Owen v. Owen, 620 S.W.2d 669 (Tex. Civ. App.—Dallas 1981, no writ).

because a judgment was rendered on the plaintiff's amended petition but the officer's return recited that she was served with the original petition. The citation itself recited that the amended petition was delivered to the sheriff for service. The court concluded that it was not certain whether the wife was served with the original petition only or with the amended petition. Because the court was unable to correct the defect,[336] the court remanded the case for trial noting that the wife had subjected herself to the court's jurisdiction by pursuing her appeal.[337]

In *Berry v. Berry* the court upheld the constitutionality of Texas's requirement of six months' domicile in the state and ninety days' residence in the county before filing a suit for divorce.[338] The court held that while rights conferred by a venue statute may be waived by the parties,[339] waiver cannot be invoked to nullify this mandatory statutory restriction, especially when the restriction is enacted for the benefit of the general public as opposed to those benefits that inure to an individual.[340] The court remarked that the Texas durational domicile requirement implements a policy of not cultivating the business of those seeking quick divorces[341] and that the three months' county residence requirement provides an additional safeguard against a collateral attack.[342] Furthermore, this residence requirement must be met before a court may grant a temporary injunction ancillary to the divorce.[343]

Grounds. After the wife filed her petition for divorce in *Ferguson v. Ferguson*,[344] the parties resumed cohabitation and were still living together when the wife was granted a decree of divorce. The husband neither filed an answer nor appeared at trial but argued on appeal that additional service of process upon him was required because of the parties' resumption of their marital situation. The trial court had heard evidence on the attempted reconciliation as well as the grounds alleged for divorce and apparently was satisfied that no reconciliation had been achieved. The

336. *Id.* at 670.

337. *Id.*

338. 612 S.W.2d 213 (Tex. Civ. App.—Beaumont 1980, writ dism'd). TEX. FAM. CODE ANN. § 3.21 (Vernon 1975) states:

> No suit for divorce may be maintained unless at the time suit is filed the petitioner or the respondent has been a domiciliary of this state for the preceding six-month period and a resident of the county in which the suit is filed for the preceding ninety-day period.

339. *See* South Tex. Dev. Co. v. Williams, 130 Tex. 217, 107 S.W.2d 378, 379 (1937); 1 R. MCDONALD, TEXAS CIVIL PRACTICE § 4.40, at 556 (rev. 1965).

340. 612 S.W.2d at 215-16. *See also* Missouri Pac. R.R. v. American Statesman, 552 S.W.2d 99, 105-06 (Tex. 1977) ("Waiver cannot be invoked to nullify a mandatory statutory restriction especially when such restriction is enacted for the benefit of the general public as opposed to those benefits that inure to a private individual."); Sartin v. Hudson, 143 S.W.2d 817, 823 (Tex. Civ. App.—Fort Worth 1940, no writ) ("A right or privilege given by a statute may be waived or surrendered in whole or in part by the party to whom or for whose benefit it is given.").

341. 612 S.W.2d at 215.

342. *Id.*; *see* Sosna v. Iowa, 419 U.S. 393, 408 (1975).

343. Mlcoch v. Mlcoch 612 S.W.2d 682 (Tex. Civ. App.—Dallas 1981, no writ).

344. 610 S.W.2d 559 (Tex. Civ. App.—Beaumont 1981, no writ).

husband had not pled condonation because he evidently saw no purpose of pleading at all. The appellate court rejected the husband's argument and concluded that the parties' "purported reconciliation" did not deprive the trial court of jurisdiction.[345] Although the appellate court referred to the wife's decree as a default judgment, the wife clearly offered sufficient evidence of grounds for divorce. Hence, the appellate court's opinion seems to amount to no more than a dictum concerning whether the 1973 repeal of the requirement of section 3.64 that the petitioner offer "full and satisfactory evidence" of grounds for divorce allows a court to grant a default judgment for divorce. Nevertheless, the opinion provoked a strong dissent from Chief Justice Dies who stated that the wife had not met her burden of presenting facts entitling her to divorce because she testified that her husband had continued to live with her in ordinary marital circumstances after the filing of the divorce suit.[346] In the Chief Justice's view, if the spouses are living together under circumstances that one spouse thinks of as a marital relationship in apparent reliance on the conduct of the other spouse, the marriage cannot be insupportable as against him.[347]

Pleadings. The spouse seeking community reimbursement for improvement of property by enhancement of its value has the burden of pleading[348] and proving the amount of the community contribution and the enhanced value.[349] Although the wife's pleadings in *Wachendorfer v. Wachendorfer* suggested the existence of separate property of the husband that received a benefit, the trial court was found to have committed error in submitting a special issue on reimbursement when the pleadings contained no allegations as to reimbursement.[350] The pleading that "there are many equities in [the wife's] favor" and the allegation that she should be awarded a substantial portion of all property did not put the husband on notice of the wife's reimbursement claim.[351]

Fault need not be pled in order to be considered by the trial court in the division of marital property. Because the pleadings in *Bray v. Bray* did not allege fault, the defendant asserted that it should not be considered by the trial court in the property division.[352] The Corpus Christi court of civil appeals stated that although "[t]he better practice would be, of course, to plead 'fault', which would allow all such evidence to be admitted,"[353] the trial court had broad discretion in the division of property[354] and could in

345. *Id.* at 560. *See* Strange v. Strange, 464 S.W.2d 364 (Tex. 1971).
346. 610 S.W.2d at 561.
347. *Id.*
348. Frausto v. Frausto, 611 S.W.2d 656, 660 (Tex. Civ. App.—San Antonio 1981, writ dism'd).
349. Lindsay v. Clayman, 151 Tex. 593, 254 S.W.2d 777 (1952); Weatherall v. Weatherall, 403 S.W.2d 524, 525 (Tex. Civ. App.—Houston 1966, no writ).
350. 615 S.W.2d 852, 854 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).
351. *Id.*
352. 618 S.W.2d 93, 95 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd).
353. *Id.*
354. *See* Murff v. Murff, 615 S.W.2d 696 (Tex. 1981) (trial judge has broad discretion in dividing property and may look at many factors in its determination, including fault);

the exercise of that discretion consider fault.[355]

Continuance. The decision whether to grant a motion for continuance lies within the sound discretion of the trial judge.[356] A litigant, however, may not complain that trial commenced without adequate preparation time if he has made no motion for continuance.[357] The court in *Rylee v. McMorrough* emphasized that this rule applies to summary judgment hearings although an application for more time under rule 166A[358] does not require compliance with all the requirements of rule 252.[359] Although *Barber v. Barber*[360] does not appear to be a case involving a motion for continuance, an interval of over four months elapsed between the time the court heard evidence on the grounds for divorce and the hearing on division of property. The reason for the recess or continuance is not explained, but the appellant raised no objection at the time. The court found that without a timely objection "to trying the case in a piece-meal manner," the appellant had waived any grounds she might have had for complaining of an abuse of discretion by the trial court.[361]

Trial by Jury. A litigant must take affirmative action to avoid waiver of his right to a jury trial. On the other hand, the mere paying of a jury fee will not secure the right in the absence of a demand for a jury.[362] Calling upon the court to decide an issue of fact and then participating in the hearing without complaint will constitute a waiver of the right to a jury.[363] When the right to trial by jury is properly secured in a divorce suit, however, the verdict with respect to division of the estate is advisory only.[364]

Evidence Supporting Property Division. In passing upon a no evidence point, with respect to a division of property made by the trial court, an appellate court must consider only the evidence favorable to the judgment and disregard all evidence or inferences to the contrary.[365] When a judg-

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Young v. Young, 609 S.W.2d 759 (Tex. 1980) (fault may be considered but is not required to be considered in the property division).

355. 618 S.W.2d at 95.

356. Barber v. Barber, 621 S.W.2d 671, 674 (Tex. Civ. App.—Waco 1981, no writ).

357. Snell v. McCracken, 70 S.W.2d 488 (Tex. Civ. App.—San Antonio 1934, no writ).

358. TEX. R. CIV. P. 166A (summary judgment).

359. 616 S.W.2d 649, 653 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ dism'd). Tex. R. Civ. P. 252 requires the party seeking continuance on the ground of want of testimony to make an affidavit that the testimony is material, that he has used due diligence and that it cannot be obtained from another source. If the grounds are the absence of a witness, he must name the witness and what he expects to prove by him and must state that the continuance is not merely a delaying tactic.

360. 621 S.W.2d 671 (Tex. Civ. App.—Waco 1981, no writ).

361. *Id.* at 673-74.

362. Walker v. Walker, 619 S.W.2d 196, 198 (Tex. Civ. App.—Tyler 1981, no writ); *see* TEX. R. CIV. P. 216.

363. 619 S.W.2d at 198.

364. Rodriguez v. Rodriguez, 616 S.W.2d 383 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

365. 617 S.W.2d 285, 287 (Tex. Civ. App.—Tyler 1981, no writ); *see* Goodyear Tire & Rubber Co. v. Jefferson Constr. Co., 565 S.W.2d 916, 918 (Tex. 1978).

ment awards an item of property in accordance with an alleged agreement and no stipulation or evidence appears in the record to support that result, the judgment cannot be sustained.[366] An exception was made for judgments providing for equal division of an income tax refund when an equal division "would probably be effected as a matter of law."[367] No error has been found when a trial court awards a percentage equity share in the parties' homestead rather than a specific dollar amount, especially when the percentage approach was requested by the appellant in the special issues.[368]

Finality of Judgment. A trial court has plenary power within thirty days to modify, correct, or reform its judgment before it becomes final and may enter a different judgment in the final written form from that originally announced.[369] An attack on a final judgment on the ground that the prior judgment is erroneous constitutes a collateral attack and can succeed only if the judgment is void.[370] A judgment that erroneously divests a party of separate property is not void;[371] the remedy for such a judgment based on an error of substantive law is appeal, not collateral attack.[372]

A divorce decree rendered in June, 1975, awarded the wife, as part of the property partition, installment payments at the rate of $1,000 a month for a period of one hundred months beginning in April, 1975. In a subsequent suit[373] to recover for her husband's nonpayment of the installments, the court awarded the ex-wife all matured and unpaid installments and the discounted value of all remaining unmatured installments. In his appeal, the ex-husband contended that the attempt to accelerate future payments amounted to relitigation of the divorce decree in that his ex-wife sought, in effect, to alter its terms by accelerating the unmatured installments and obtaining judgment ahead of the payment schedule.[374] The appellate court agreed.[375] Put another way, it may be said that the principle of anticipatory breach is applicable to a contract but not to a judicial decree. It

366. 617 S.W.2d at 288. The judgment of the trial court recited that for consideration the wife had released her rights to a policy of insurance on her husband's life. The appellate court reformed the trial court's judgment to delete the reference to the insurance policy. *Id.*

367. *Id.*

368. Killpack v. Killpack, 616 S.W.2d 434, 436 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

369. TEX. R. CIV. P. 329(d) provides that a judgment does not become final until 30 days after the date of judgment. *See, e.g.*, Bray v. Bray, 618 S.W.2d 93 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd) (judge allowed to issue written judgment different from his oral judgment within period).

370. Templeton v. Ferguson, 89 Tex. 47, 33 S.W. 329 (1895). *Cf.* Waldron v. Waldron, 614 S.W.2d 648 (Tex. Civ. App.—Amarillo 1981, no writ) (lack of jurisdiction renders judgment void and subject to collateral attack).

371. Williams v. Williams, 620 S.W.2d 748 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

372. *Id.* at 749; King v. King, 291 S.W.2d 645 (Tex. Civ. App.—San Antonio 1927, writ dism'd).

373. Walker v. Walker, 619 S.W.2d 196 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

374. *Id.* at 198.

375. *Id. Cf.* Day v. Day, 603 S.W.2d 213, 215 (Tex. 1980) (final divorce decree cannot be collaterally attacked in a subsequent suit to partition nondisposed property).

was said elsewhere, however, that once the parties have agreed on a property settlement that contains a provision for periodic payments, a suit to recover missed payments does not involve matters incident to divorce but is instead more akin to an independent action on a contract.[376] But if such a settlement is incorporated in the decree, the contract is merged in the judgment[377] and may thereby be made impervious to the argument of acceleration.

McCarty v. McCarty[378] raises the question of validity of prior final judgments dividing military retirement benefits on divorce. When the United States Supreme Court concluded in *McCarty* that military retirement pay was not subject to division as community property, retired servicemen throughout the land ceased making payments under prior decrees. The existing condition of Texas law further encouraged this result, because on two occasions the Texas Supreme Court had already granted writs of habeas corpus to retired servicemen who had defied court orders dividing Veterans Administration benefits.[379] In the more recent of those cases, *Ex parte Burson*, the trial court was said to have committed fundamental error, and the court's judgment was therefore void.[380] The principle of res judicata does not appear to have been argued. When that issue was presented to the Fifth Circuit Court of Appeals, however, in an analogous case, *Erspan v. Badgett*, the court concluded that the former judgment had to stand.[381] In 1963 a Texas divorce court ordered the husband to pay his ex-wife one-half of his military retirement pay. He complied with the order until 1967. The ex-wife obtained a judgment for the unpaid benefits in 1971, and the ex-husband responded by filing a petition in bankruptcy. He listed his ex-wife's divorce judgment and the later judgment debt of his ex-wife among his debts. Although the ex-wife received notice of the proceeding, she did not object to a discharge that was granted. After several years, the ex-wife sued for later arrears under the divorce decree and the ex-husband sought to restrain her suit by an injunction from the bankruptcy court that had granted his discharge. In an appeal from a federal district court sitting in Texas, the Fifth Circuit refused to reverse the award of a money judgment against the ex-husband for the unpaid benefits and the restraint imposed upon him from seeking relief in the bankruptcy court.[382] *McCarty* was fully discussed, and the principle of res judicata was deemed applicable to the divorce court's award.

376. Underhill v. Underhill, 614 S.W.2d 178, 180 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). *Cf.* DeLeon v. Page, 611 S.W.2d 688 (Tex. Civ. App.—Corpus Christi 1980, no writ) (partition action in essence a suit to enforce prior divorce judgment).

377. *Ex parte* Gorena, 595 S.W.2d 841 (Tex. 1979).

378. 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

379. *Ex parte* Burson, 615 S.W.2d 192 (Tex. 1981); *Ex parte* Johnson, 591 S.W.2d 453 (Tex. 1979).

380. 615 S.W.2d 192 (Tex. 1981).

381. 659 F.2d 26, 28-29 (5th Cir. 1981) (en banc per curiam).

382. 647 F.2d 550, 553-56 (5th Cir. 1981). *Cf.* Ealy v. Ealy, 616 S.W.2d 420 (Tex. Civ. App.—Texarkana 1981, writ dism'd) (suit to force sale of husband's homestead barred because divorce decree gave homestead to husband as separate property, and thus it was res judicata).

Murray v. Murray[383] was another case dealing with military retirement benefits. The court held that an order of dismissal, because a settlement was reached, became a judgment on the merits and precluded a former wife's subsequent suit to partition her former husband's military retirement benefits.[384]

Motion for a New Trial. A new trial may not be granted on the ground of new evidence unless it is shown that the evidence was obtained after trial on the merits, and that with due diligence it could not have been discovered sooner.[385] In *Mushinski v. Mushinski*[386] a husband contended that a divorce court had improperly divided property that he could trace as his separate property and, therefore, a new trial should be granted. The appellate court refused to grant the husband a new trial. None of the evidence that was adduced at a hearing for a new trial in support of his contention of traceable separate funds[387] was newly discovered, because the evidence was known and available to him at the hearing on the merits.[388]

In *Givens v. Givens*[389] the denial of the appellant's motion for a new trial was sustained because there was no showing that the appellant's evidence could not have been discovered through the exercise of due diligence prior to trial.[390] In response to the appellant's contention that the evidence adduced had a substantial bearing on the equitable division of property, the court stated that the appellant did not show in what way or to what extent this evidence should affect a property division about which no specific complaint was made.[391] The trial court, therefore, did not abuse its discretion by overruling the motion for new trial.[392]

A different standard exists for granting a motion to set aside a default judgment. The rule in Texas is that

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to

383. 611 S.W.2d 172 (Tex. Civ. App.—El Paso 1981, no writ).

384. *Id.* at 174. *But see* Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981).

385. Givens v. Givens, 616 S.W.2d 450, 451-52 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

386. 621 S.W.2d 669 (Tex. Civ. App.—Waco 1981, no writ).

387. For discussion of the "tracing" concept in Texas, see notes 97-117 *supra* and accompanying text.

388. 621 S.W.2d at 670-71. *See also* Moore v. Moore, 616 S.W.2d 710 (Tex. Civ. App.—Fort Worth 1981, no writ).

389. 616 S.W.2d 450 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

390. The appellant's post-trial discovery indicated that medical expense incurred as a result of a beating by the appellee would not be covered by insurance, and that additional hospitalization was required. *Id.* at 451.

391. *Id.*

392. *Id.* at 452.

the plaintiff.[393]

The appellant has the burden of establishing his explanation for not filing an answer.[394] In *Roberts v. Roberts*[395] the appellant's alleged excuse was that he relied upon his wife's telling him that her divorce suit had been dismissed and that he need not hire an attorney and the couple had continued to cohabit. This account would have supported a finding in the appellant's favor, but it was refuted by the appellant's wife and her daughter. The court held that the movant had not met his burden of proof.[396] In *Mootz v. Mootz*[397] a motion for new trial was denied because the movant failed to set up a meritorious defense consisting of facts which in law would constitute a defense to the cause of action asserted by the plaintiff.[398]

Appeal. Generally a litigant cannot treat a judgment as both valid and invalid. If a litigant has voluntarily accepted the benefits of a judgment, he cannot afterward prosecute an appeal therefrom.[399] An exception to the general rule, however is recognized in situations when the litigant accepted and retained the benefits because of financial duress.[400] In *Gonzalez v. Gonzalez*[401] the appellant-wife filed an affidavit disclosing that she accepted the benefits of the judgment because she was destitute. The court held that the wife's affidavit showed that the husband had not discharged *his* burden of showing that her acceptance of benefits was voluntary.[402] The court accordingly allowed the wife's appeal to be considered on the merits.[403] In two other cases, however, appeal was foreclosed by the voluntary acceptance of benefits of the decree contested. In *Deskus v. Deskus*[404] voluntary acceptance of benefits was evidenced by both parties' prompt recordation of the deeds given to them in the property division. In *In re Rutherford*[405] the appellant-husband sold several items of community property awarded

393. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939); *see* Ivy v. Carrell, 407 S.W.2d 212, 213 (Tex. 1966); Roberts v. Roberts, 621 S.W.2d 835, 836 (Tex. Civ. App.—Waco 1981, no writ); Mootz v. Mootz, 615 S.W.2d 247, 248 (Tex. Civ. App.—Dallas 1981, no writ).

394. Ward v. Nava, 488 S.W.2d 736, 738 (Tex. 1973).

395. 621 S.W.2d 835 (Tex. Civ. App.—Waco 1981, no writ).

396. *Id.* at 836.

397. 615 S.W.2d 247 (Tex. Civ. App.—Dallas 1981, no writ).

398. *Id.* at 249. *See also* Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966).

399. Carle v. Carle, 149 Tex. 469, 472, 234 S.W.2d 1002, 1004 (1950); DeCluitt v. DeCluitt, 613 S.W.2d 777, 781 (Tex. Civ. App.—Waco 1981, writ dism'd).

400. Carle v. Carle, 149 Tex. 469, 472-73, 234 S.W.2d 1002, 1004 (1950); DeCluitt v. DeCluitt, 613 S.W.2d 777, 781 (Tex. Civ. App.—Waco 1981, writ dism'd). *Cf.* Vallone v. Vallone, 618 S.W.2d 820 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ granted) (appeal allowed when acceptance of some of benefits was out of practical necessity rather than voluntary).

401. 614 S.W.2d 203 (Tex. Civ. App.—Eastland 1981, writ dism'd).

402. *Id.* at 204. The court found that the affidavit disclosed an involuntary acceptance of benefits because of the financial duress. *Id.*

403. *Id.* at 205.

404. 614 S.W.2d 590 (Tex. Civ. App.—Texarkana 1981, no writ).

405. 614 S.W.2d 498 (Tex. Civ. App.—Amarillo 1981, writ dism'd).

to him in the judgment and used the proceeds of the sales for his benefit in non-necessitous circumstances.

A party is entitled to sue out of writ of error as an alternative method of invoking the appellate jurisdiction of a court of appeals if (1) the petition for writ of error is filed within six months after the final judgment is rendered,[406] (2) the petitioner did not participate in the actual trial of the case,[407] and (3) the invalidity of the judgment appears on the face of the record.[408] In *Garcia v. Garcia*[409] the husband, who was in prison at the time, failed to appear at trial in person or through his attorney, who had inadvertently noted the wrong trial date. After the husband's motion for new trial was overruled, a petition was filed for a writ of error. The appellate court held that although the husband had met the first two requirements for appeal by writ of error, he failed to establish a showing of the invalidity of the judgment from the face of the record.[410]

Bill of Review. Although a bill of review is an equitable proceeding designed to prevent manifest injustice, it nonetheless proceeds by very strict standards. Before a litigant can successfully set aside a final judgment by bill of review, he must allege and prove within the time allowed a meritorious defense to the cause of action alleged to support the judgment, which he was prevented from making by fraud, accident, or wrongful act of the opposite party, unmixed with any fault or negligence on his own part.[411] In *DeCluitt v. DeCluitt*[412] the ex-wife sought a bill of review to set aside the property-division portion of a divorce judgment[413] and sought a new trial on the grounds of extrinsic fraud, duress, and mental incompetence in the execution of a waiver of citation and property settlement agreement. She waited more than twenty months after the divorce to file the bill but asserted that she acted as soon as she recovered her mental health and learned she had been deceived about the extent of the community estate. Evidence was presented concerning her mental and physical illness and psychiatric care. In granting the bill and remanding the case for a new trial, the court held that factual issues existed relating to the question of whether the wife had a meritorious defense to the trial court's division of the community property and whether her claim was barred by

406. TEX. REV. CIV. STAT. ANN. art. 2255 (Vernon 1971).

407. *Id.* art. 2249a.

408. McEwen v. Harrison, 162 Tex. 125, 132, 345 S.W.2d 706, 709 (1961).

409. 618 S.W.2d 117 (Tex. Civ. App.—Corpus Christi 1981, no writ).

410. *Id.* at 118-19. The court noted that it would have been a simple matter for the husband to have filed an inventory of all the community and separate assets owned by him either before trial or with the motion for a new trial so that his claim of a disproportionate award of property could be evaluated by the court. Because no such evidence was in the record, the court held the trial court's judgment was not invalid on the face of the record. *Id.* at 119.

411. Alexander v. Hagedorn, 148 Tex. 565, 568-69, 226 S.W.2d 996, 999 (1949).

412. 613 S.W.2d 777 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).

413. The claim was made in the alternative to setting aside the entire divorce decree. *Id.* at 778.

laches.[414] In addition, the court held that the husband's remarriage, creation of a new community estate, and disposal of some of the assets received in the decree did not entitle him to summary judgment because there was no showing that whatever prejudice he might experience could not be remedied upon retrial of the case.[415] On the other hand, in *Rylee v. McMorrough*[416] the wife's bill of review failed for two reasons. First, she was unable to prove that her husband committed extrinsic fraud and, secondly, she admitted signing a property settlement agreement and waiver of citation and was thereby prevented from asserting a lack of negligence on her part.[417]

In *Anderson v. Anderson*[418] the former wife filed a bill of review over two years after a divorce decree was signed. More than four years later, the case was dismissed for want of prosecution because the wife had not requested a trial setting. The wife asserted that she was unconditionally deprived of her remedy. She defended her delay by alleging temporary incapacity to prosecute the case caused by her phobia of the judicial process. The appellate court rejected this argument and concluded that she failed to use due care in the prosecution of her cause of action.[419]

V. DIVISION ON DIVORCE

Exercise of Discretion. The trial court has broad discretion in determining the disposition of property in suits for divorce and this discretion will not be disturbed unless an abuse of discretion is shown.[420] The property need not be divided equally;[421] the trial court is required only to divide the estate of the parties in a fair, just and equitable manner.[422] The discretion of the trial court is not unlimited, however; some reasonable basis is necessary for the court to decree an unequal division of the community estate.[423]

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414. *Id.* at 781.

415. *Id. See* Hornblower, Weeks, Noyes & Trask, Inc. v. Reedy, 587 S.W.2d 433 (Tex. Civ. App.—Dallas 1981, no writ).

416. 616 S.W.2d 649 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ dism'd).

417. *Id.* at 652.

418. 617 S.W.2d 776 (Tex. Civ. App.—Fort Worth 1981, no writ).

419. *Id.* at 778.

420. Murff v. Murff, 615 S.W.2d 696, 698 (Tex. 1981); Young v. Young, 609 S.W.2d 758, 762 (Tex. 1980); McKnight v. McKnight, 543 S.W.2d 863, 866 (Tex. 1976); Cockerham v. Cockerham, 527 S.W.2d 162, 173 (Tex. 1975); Bell v. Bell, 513 S.W.2d 20, 22 (Tex. 1974). *See* Barber v. Barber, 621 S.W.2d 671 (Tex. Civ. App.—Waco 1981, no writ); Mendoza v. Mendoza, 621 S.W.2d 420 (Tex. Civ. App.—San Antonio 1981, no writ); Villarreal v. Villarreal, 618 S.W.2d 99 (Tex. Civ. App.—Corpus Christi 1981, no writ); Mogford v. Mogford, 616 S.W.2d 936 (Tex. Civ. App.—San Antonio 1981, no writ); Arrington v. Arrington, 613 S.W.2d 565 (Tex. Civ. App.—Fort Worth 1981, no writ); Walker v. Walker, 608 S.W.2d 326 (Tex. Civ. App.—Eastland 1980, no writ).

421. Colley v. Colley, 597 S.W.2d 30 (Tex. Civ. App.—Austin 1980, no writ). *Cf.* Huls v. Huls, 616 S.W.2d 312 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (reasonable basis for unequal division).

422. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982); McKibben v. McKibben, 567 S.W.2d 538 (Tex. Civ. App.—San Antonio 1978, no writ).

423. Cooper v. Cooper, 513 S.W.2d 229, 233 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

Because of the wide discretion afforded trial courts in such matters, only a very few cases yearly are overturned as an abuse of discretion in the division of property. *Zamora v. Zamora*[424] was such a case. A no-fault divorce was granted and the wife was appointed managing conservator of the children. Although the husband was a skilled worker and the wife was not, their earning capacity did not differ greatly and neither had any separate property. The community estate consisted of the family home worth $35,000 with a mortgage of $7,800, an automobile worth $3,500 subject to a loan of $1,900, a second car worth $800 with no corresponding debt, and approximately $3,000 in community retail indebtedness. The trial court awarded the wife sole title to the house and the encumbered automobile with assumption of the indebtedness on it, and ordered her to pay approximately one-third of the community retail indebtedness. The net value of her share was $27,700. The husband, on the other hand, was awarded the $800 car and was ordered to pay the rest of the community debt, for a total share of the community estate worth a negative net value. The appellate court held the gross disparity between the dollar value of the property received by the parties under the trial court's division was not justified by the facts or conclusions of law and that, therefore, such an unequal division by the trial court constituted a clear abuse of discretion.[425]

In *Roberts v. Roberts*[426] the trial court made a division of property based upon a finding that the wife had successfully traced her separate property into assets on hand at dissolution of the marriage. The Waco court of civil appeals reversed the property division as an abuse of discretion because the wife did not meet the rules of tracing[427] as to any particular property.[428] An error by the trial court, however, in characterizing property as separate or community is not necessarily reversible unless the division is manifestly unfair and consequently an abuse of discretion.[429] The Dallas court of civil appeals in *Smith v. Smith*[430] stated that it found no cases mandating a reversal of an unequal division that would be within the trial court's discretion under section 3.63[431] even if the court mischaracterized community property as separate, unless the party contesting the property division showed that the trial court would have made a different division of the property had such property been properly characterized.[432] The court characterized the problem as one of appellate procedure[433] and not one involving the invasion of separate realty, as condemned in *Eggemeyer*

424. 611 S.W.2d 660 (Tex. Civ. App.—Corpus Christi 1980, no writ).
425. *Id.* at 663.
426. 621 S.W.2d 835 (Tex. Civ. App.—Waco 1981, no writ).
427. For a discussion of tracing, see text accompanying notes 97-117 *supra*.
428. 621 S.W.2d at 838.
429. *See* Bell v. Bell, 513 S.W.2d 20, 22 (Tex. 1974); Crowell v. Crowell, 578 S.W.2d 562, 564-65 (Tex. Civ. App.—Fort Worth 1979, no writ); Muns v. Muns, 567 S.W.2d 563, 567-68 (Tex. Civ. App.—Dallas 1978, no writ).
430. 620 S.W.2d 619 (Tex. Civ. App.—Dallas 1981, no writ).
431. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982).
432. 620 S.W.2d at 625. *But see In re* York, 613 S.W.2d 764 (Tex. Civ. App.—Amarillo 1981, no writ).
433. 620 S.W.2d at 625.

v. Eggemeyer.[434]

In 1980, the Supreme Court of Texas held in *Young v. Young* that in a divorce granted on a fault ground, the trial court could consider the fault of one spouse in the break down of the marriage in making a "just and right"[435] property division.[436] The same issue arose in 1981 in *Murff v. Murff*,[437] and the court reiterated its conclusion. The court pointed out, however, that "this does not mean that fault *must* be considered, only that it *may* be considered."[438] Furthermore, the court held:

> [T]he trial court, in exercising its direction in the making of property divisions, may consider such factors as the spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of the separate estates, and the nature of the property. . . . Likewise, the consideration of disparity in earning capacities or of incomes is proper and need not be limited by "necessitous" circumstances.[439]

The wife in *Barber v. Barber*[440] contended that the trial court abused its discretion in neglecting to consider the difference in earning power, age, health, and fault in the break up of the marriage, as reflected in its "too equal" division. The appellate court rejected her argument and held that in light of substantial equality between the spouses' expected earnings and retirement benefits, the trial court did not abuse its discretion.[441] The main asset belonging to the parties in *Vallone v. Vallone*[442] was stock in Tony's Restaurant, Inc. The stock had been transferred to the husband by his father. The trial court adjudged that the stock was owned forty-seven percent as the separate property of the husband and fifty-three percent as community property. Accordingly, it awarded the stock to the husband subject to a $300,000 promissory note to his wife. The appellate court concluded that the trial court had abused its discretion because of the following factors: the labor and skills of both spouses caused the stock to appreciate during the marriage from $20,000 to $1,000,000; the relative earning capacities of the parties were disparate, $200,000 for the husband as compared to his wife's $9,600; the husband had extensive knowledge of

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434. 554 S.W.2d 137 (Tex. 1977). For a discussion of *Eggemeyer* see McKnight, 1978 *Survey*, *supra* note 202, at 122.

435. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982).

436. 609 S.W.2d 758, 761 (Tex. 1980).

437. 615 S.W.2d 696 (Tex. 1981).

438. *Id.* at 698 (quoting Young v. Young, 609 S.W.2d 758, 762 (Tex. 1980)). *Cf.* Mogford v. Mogford, 616 S.W.2d 936 (Tex. Civ. App.—San Antonio 1981, no writ) (fault of a spouse as a proper consideration).

439. 615 S.W.2d at 699 (footnote omitted). *See* Bokhoven v. Bokhoven, 559 S.W.2d 142, 144 (Tex. Civ. App.—Tyler 1977, no writ); Cooper v. Cooper, 513 S.W.2d 229, 233-34 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); Allen v. Allen, 363 S.W.2d 312, 316 (Tex. Civ. App.—Houston 1962, no writ).

440. 621 S.W.2d 671 (Tex. Civ. App.—Waco 1981, no writ).

441. *Id.* at 675.

442. 618 S.W.2d 820 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ granted).

the restaurant business while his wife had limited business experience, and the value of the husband's separate property was $470,000 compared to the wife's $71,000.[443]

In *Bray v. Bray*[444] the husband complained that the trial court's unequal division was based on evidence of fault improperly heard by the court because the wife had failed to allege fault in her pleadings. The appellate court noted that the supreme court's holdings in *Young v. Young*[445] and *Murff v. Murff*,[446] did not clarify whether the trial court might consider fault in the division of property in a no-fault divorce. Acknowledging that the better practice would be to plead fault, which would allow all such evidence to be admitted, the court of civil appeals stated that in this case, however, the wife's failure to plead fault did not warrant overturning the trial court's property settlement.[447] But in addition to the trial court's broad discretion and the factors enumerated in *Murff* favoring the wife, the court noted the existence of secret bank accounts of the husband and his failure to introduce any evidence of the value on the property he received as his share of the community estate and stated that it was not convinced that the unequal property division was manifestly unjust.[448]

An appellate court, in *Frausto v. Frausto*,[449] for the first time dealt with the issue of the divisibility of a medical education as part of a community estate[450] in the "somewhat typical"[451] situation which occurs when one spouse continues to work while the other spouse is obtaining a degree that results in higher potential earnings for the degreed spouse. Following the lead of California, the court[452] held that a professional education acquired during marriage was not a property right divisible upon divorce and that awarding future monthly payments that were specifically referable to an education received by a spouse during marriage would violate the rule in *Eggemeyer*.[453] The court recognized the inequities that could result from the failure to compensate the spouse who supported the other spouse through college or professional school but it concluded that such difficulties were overcome by a trial court's wide discretion to consider many fac-

443. *Id.* at 824.
444. 618 S.W.2d 93 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd).
445. 609 S.W.2d 758 (Tex. 1980).
446. 615 S.W.2d 696 (Tex. 1981).
447. 618 S.W.2d at 95-96.
448. *Id.* at 96.
449. 611 S.W.2d 656 (Tex. Civ. App.—San Antonio 1980, writ dism'd).
450. The court also dealt with the issue of the wife's reimbursement for her share of the community expense for her husband's education. *Id.* at 660. For a discussion of the reimbursement considerations, see notes 475-510 *infra* and accompanying text.
451. 611 S.W.2d at 658.
452. *See* Todd v. Todd, 78 Cal. Rptr. 131, 272 Cal. App. 2d 786 (1969) (husband's education for the practice of law not susceptible to monetary valuation for division on divorce). This conclusion was reaffirmed in *In re* Aufmuth, 152 Cal. Rptr. 668, 89 Cal. App. 3d 446 (1979). A Colorado court in *In re* Graham, 38 Colo. App. 130, 555 P.2d 527 (1976), also found that education was not a property item capable of division. The *Frausto* court found only one state that had held that a spouse had a property interest in the other spouse's professional degree. 611 S.W.2d at 659. *See* Inman v. Inman, 578 S.W.2d 266 (Ky. 1979).
453. 611 S.W.2d at 659; *see* Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977).

tors in dividing the estate of the parties in a divorce decree, including the difference in earning capacity and the education and ability of the parties.[454] This rationale, however, is of no comfort to the non-degreed spouse when, as in *Frausto*, no significant community estate has been accumulated.

Property Acquired While Domiciled Elsewhere. As of September 1, 1981, the concept of what in California parlance is referred to as quasi-community property[455] was annexed to Texas divorce law. Subsection (b) added to Family Code section 3.63[456] provides that on divorce or annulment the property subject to division includes all that property acquired during the marriage by either spouse while domiciled elsewhere if the property would have been community property if the acquiring spouse had been domiciled in Texas.[457] The statute also covers that property traceable to an exchange for such property.[458] Although section 3.63(b) covers property which formerly would have been called separate property because so termed in the state of acquisition, the definition does not conflict with that of article XVI, section 15 of the Texas Constitution. Nor does it recharacterize property as community property. It merely provides a standard for property division on divorce.[459] At the same time, however, the statute may be regarded as interfering with rights of sole ownership acquired in a sister state.[460]

Divestiture of Separate Property. After *Eggemeyer v. Eggemeyer*, holding that a spouse could not be divested of title to separate realty,[461] the

454. 611 S.W.2d at 659; *see* Hedke v. Hedke, 112 Tex. 404, 248 S.W.2d 21 (1923); Bokhoven v. Bokhoven, 559 S.W.2d 142 (Tex. Civ. App.—Tyler 1977, no writ); Copeland v. Copeland, 544 S.W.2d 183 (Tex. Civ. App.—Amarillo 1976, no writ); Cooper v. Cooper, 513 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); Dobbs v. Dobbs, 449 S.W.2d 119 (Tex. Civ. App.—Tyler 1969, no writ).

455. *See* ARIZ. REV. STAT. ANN. § 25-318 (1974); CAL. CIV. CODE § 4803 (West 1976).

456. TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1982) reads:

> In a decree of divorce or annulment the court shall also order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right having due regard for the rights of each party and any children of the marriage:
>
> (1) property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or
>
> (2) property that was acquired by either spouse in exchange for real or personal property, and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

457. *Id.* § 3.63(b)(1).

458. *Id.* § 3.63(b)(2).

459. Article XVI, § 15 provides that "[a]ll 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." TEX. CONST. art. XVI, § 15.

460. *See generally* Oldham, *Property Division in a Texas Divorce of a Migrant Spouse: Heads He Wins, Tails She Loses?*, 19 HOUS. L. REV. 1 (1981).

461. 554 S.W.2d 137 (Tex. 1977); *see* Villarreal v. Villarreal, 618 S.W.2d 99 (Tex. Civ. App.—Corpus Christi 1981 no writ).

supreme court decided *Campbell v. Campbell*,[462] which enunciated the same rule for separate personalty. Six months after a motion for rehearing was filed, however, the opinion in *Campbell* was withdrawn when the parties settled their dispute. The court promptly granted a writ of error on the same point in *Cameron v. Cameron*,[463] which followed the court's reasoning in the *Campbell* opinion.

In *Frausto v. Frausto* the appellate court not only held that a professional degree acquired during marriage is not a property right divisible upon divorce[464] but also held that an award of future monthly payments referable to a professional education violated the rules of *Eggemeyer* and *Campbell*.[465] The court stated that such payments would be an award of future earnings, which constitute separate property.[466]

In *Mogford v. Mogford*,[467] a tract of land that was one half the separate property of the husband and one half community property was sold by order of the trial court to achieve partition. The husband contended that the order of sale wrongfully divested him of his separate real estate in violation of *Eggemeyer* and the Texas Constitution.[468] The appellate court rejected his contention, holding that the sale did not interfere with his title but merely changed the form of his separate realty to personalty.[469]

The decision in *McCarty v. McCarty*,[470] that the United States system of military retirement benefits precludes a state court from dividing military retirement benefits as community property, has displaced the principle announced by the Texas Supreme Court in *Busby v. Busby*.[471] Though doubting the wisdom of *McCarty*, the courts of appeal have had no choice but to follow the rule.[472] In *Trahan v. Trahan* the Supreme Court of Texas

462. 23 Tex. Sup. Ct. J. 391 (June 7, 1980), *withdrawn* 613 S.W.2d 236 (Nov. 22, 1980).

463. 608 S.W.2d 48 (Tex. Civ. App.—Corpus Christi 1981, writ granted); *see* McKnight, 1981 *Survey*, *supra* note 59, at 136-38. *See also* Mendoza v. Mendoza, 621 S.W.2d 420, 423 n.2 (Tex. Civ. App.—San Antonio 1981, no writ), in which the court expressed the view that the assumption that a divorce court may make an unequal division of the community estate is not beyond challenge in light of *Eggemeyer*, *Campbell*, and TEX. CONST. art. 1, § 19. The court also pointed out that the unequal division of community assets could be considered inconsistent with the philosophy underlying the adoption of the community property system. *Id.*

464. For a discussion of this portion of the opinion, see notes 449-54 *supra* and accompanying text.

465. 611 S.W.2d 656, 659 (Tex. Civ. App.—San Antonio 1980, writ dism'd). In addition the court relied on Benedict v. Benedict, 542 S.W.2d 692 (Tex. Civ. App.—Fort Worth 1981, writ dism'd), and Garrett v. Garrett, 534 S.W.2d 381 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

466. 611 S.W.2d at 659.

467. 616 S.W.2d 936 (Tex. Civ. App.—San Antonio 1981, no writ).

468. TEX. CONST. art. XVI, §§ 15, 16 and art. I, § 19.

469. 616 S.W.2d at 945.

470. 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

471. 457 S.W.2d 51 (Tex. 1970).

472. "Whether we agree with the majority opinion's reasoning or the scholarly dissent, we are bound to follow the Supreme Court's holding in McCarty . . . ." Koon v. Koon, 621 S.W.2d 834, 835 (Tex. Civ. App.—Eastland 1981, no writ). "We have no choice, therefore, except to hold that the trial court erred by awarding [wife] a portion of [husband's] military retirement benefits." Jeffrey v. Kendrick, 621 S.W.2d 207, 208 (Tex. Civ. App.—Amarillo 1981, no writ). *See also Ex parte* Acree, 623 S.W.2d 810 (Tex. Civ. App.—El Paso 1981);

held that military retirement benefits left undivided in a pre-*McCarty* divorce had not become a tenancy in common by operation of the principle of res judicata.[473] In so doing the court somewhat disingenuously distinguished a holding of the Fifth Circuit that would have allowed an unappealed pre-*McCarty* division of military retirement benefits to stand.[474]

Reimbursement. The community estate is entitled to reimbursement for funds expended to purchase a spouse's separate property or to reduce the indebtedness thereon[475] and for improvements made on the separate property.[476] If the amount of reimbursement is measured by the lesser of cost or enhancement in value, evidence must be presented that establishes the enhanced value of the separate property and the amount expended.[477] In *Villarreal v. Villarreal* the court held that in the absence of such evidence the trial court could not make a proper computation of reimbursement and thus a "just and right" division of the estate.[478] The right of reimbursement is applied along equitable principles[479] and will not be awarded unless the expenditures of the contributing estate are greater than the benefits received by it.[480]

Snider v. Snider[481] was a widow's action against the executors of her deceased husband's estate for an accounting between his separate estate and their community estate. The court held that reimbursement to the community of the cost of improving the decedent's separate homestead was proper when such costs produced an enhancement in value in that amount, and that the widow's continued occupancy of the homestead did not foreclose her claim for community reimbursement.[482] While the trial

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Powell v. Powell, 620 S.W.2d 253 (Tex. Civ. App.—Waco 1981, no writ). *See generally* McKnight, *Dealing with reimbursement and federal retirement benefits on divorce*, TRIAL LAW. F., Jan.-March 1982, at 13.

473. 626 S.W.2d 485, 488 (Tex. 1981).

474. *See* Erspan v. Badgett, 659 F.2d 26 (5th Cir. 1981).

475. *See* Colden v. Alexander, 141 Tex. 134, 147, 171 S.W.2d 328, 334 (1943) (community estate should be reimbursed when community funds used to repay mortgage on spouse's separate property acquired before marriage); Villarreal v. Villarreal, 618 S.W.2d 99, 101 (Tex. Civ. App.—Corpus Christi 1981, no writ) (community estate entitled to reimbursement for funds expended to improve and purchase separate property).

476. *See* Pruske v. Pruske, 601 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1980, writ dism'd) (community estate entitled to reimbursement for improvements to separate property).

477. Villarreal v. Villarreal, 618 S.W.2d 99, 101 (Tex. Civ. App.—Corpus Christi 1981, no writ).

478. *Id.*; *see* TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp. 1982) that provides: "In a decree for divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right having due regard for the rights of each party and children of the marriage."

479. 618 S.W.2d at 684; *see* Dakan v. Dakan, 125 Tex. 305, 319, 83 S.W.2d 620, 628 (1935) (amount allowed for improvements limited to enhanced value of the property).

480. *See* Hawkins v. Hawkins, 612 S.W.2d 683, 685 (Tex. Civ. App.—El Paso 1981, no writ). *But see* Brooks v. Brooks, 612 S.W.2d 233, 238 (Tex. Civ. App.—Waco 1981, no writ) (reimbursement allowed without proof that expenditures exceeded benefits received by community).

481. 613 S.W.2d 8 (Tex. Civ. App.—Dallas 1981, no writ).

482. *Id.* at 9; *see* Ogle v. Jones, 143 S.W.2d 644, 645 (Tex. Civ. App.—Waco 1940, writ ref'd).

court has discretion to impose a charge or lien on the improved separate property rather than a cash award, the court found that the imposition of such a charge would force the widow to elect between present reimbursement and continued occupancy of the homestead.[483] The court also observed that both the community and separate estates appeared to be sufficiently substantial to discharge any reimbursement without a forced sale.[484] Additionally, the court allowed reimbursement to the community for payments of annual installments on the husband's separate property from a checking account that existed prior to the marriage after the executor had failed to establish the separate nature of the account.[485] The court, however, denied community reimbursement for taxes and insurance paid on the husband's income producing interest in a farm and for interest paid on the outstanding debt because the community enjoyed the income from the separate property for those expenses.[486]

In *Brooks v. Brooks*[487] the couple was supported solely through the funds of the husband's wholly owned corporation, which was in existence at the time of the marriage. The appellate court affirmed the trial court's reimbursement to the husband on behalf of his separately-owned corporation in the amount of $48,000, that represented the capital depletion suffered by the corporation for purchase and payment of community assets owned by the parties at the time of divorce.[488] The court reasoned that the net worth[489] of the company was $63,000 at the time of the marriage and $15,000 at the time of the divorce, thus the couple not only withdrew all of the money the company earned during the marriage but also $48,000 from the company's capital structure.[490] In addition, the court upheld the reimbursement to the husband for the decrease of cash values of separate life insurance policies, resulting from loans made against the policies during the marriage.[491] The court stressed that the reimbursement awards seemed fair and equitable because the community estate acquired by the parties greatly exceeded the total of reimbursements to the husband's separate estate.[492]

In *Wachendorfer v. Wachendorfer*, the appellate court remanded a case due to pleading defects in which the wife was awarded her share of reim-

483. 613 S.W.2d at 9.
484. *Id.* at 10.
485. *Id.*
486. *Id.*
487. 612 S.W.2d 233 (Tex. Civ. App.—Waco 1981, no writ).
488. *Id.* at 237.
489. Net worth is defined as the "remainder after deduction of disabilities from assets." BLACK'S LAW DICTIONARY 939 (5th ed. 1979).
490. 612 S.W.2d at 238.
491. *Id.* at 237-38. The policies had a cash value of $17,200 with no loans against them at the time of marriage. On the date of divorce, the cash values were $37,700 against which were loans totalling $27,900, leaving a net cash value of $9,800. The amount of reimbursement awarded was the net loss of $7,400. *Id.* at 238.
492. *Id.* at 237-38. As explained in McKnight, *supra* note 472, at 14, the situation was treated as one of reimbursement, although "it really constituted a third party claim for restitution."

bursement to the community estate for the enhancement of the husband's separate corporation.[493] In so doing, the court left open the question of whether a reimbursement claim need be based on *money* contributed or if time, labor, and efforts would suffice.[494] The court noted that the holding in *Hale v. Hale*,[495] which did not allow reimbursement for such a non-monetary claim, has been criticized.[496] The court stated: "Although we are not aware of any recovery in Texas by a spouse for the contribution of community labor to the enhanced value of the other spouse's separate corporation, we cannot say that there can be no such recovery under Texas law."[497]

In *Frausto v. Frausto*[498] the wife sought reimbursement for her share of community expenses contributed to her ex-husband's medical education. The appellate court rejected her claim because the education of one of the spouses was held not to be a property right and thus not divisible upon divorce.[499] Because the wife's pleadings had not sought reimbursement, the appellate court found that the trial court abused its discretion in awarding her such portion of the community estate.[500]

Attorney's Fees. In a divorce suit the court may award either spouse attorney's fees as part of the court's equitable powers to make a just and fair division of the marital estate.[501] The award is discretionary with the court[502] and must be supported by evidence[503] and should bear some rea-

493. 615 S.W.2d 852, 853 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). No pleading expressly asserted the right to community reimbursement. *See* TEX. R. CIV. P. 301 (judgment of the court must conform to the pleadings).

494. *Id.*

495. 557 S.W.2d 614 (Tex. Civ. App.—Texarkana 1977, no writ).

496. 615 S.W.2d at 854. *See* Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 36, 64 (1978).

497. 615 S.W.2d at 855.

498. 611 S.W.2d 656 (Tex. Civ. App.—San Antonio 1981, writ dism'd).

499. *Id.* at 659.

500. *Id.* at 660.

501. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982); *see* Carle v. Carle, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (Tex. 1950) (court can require husband to pay all of wife's attorney's fees); Austin v. Austin, 619 S.W.2d 290, 292 (Tex. Civ. App.—Austin 1981, no writ) (court may award either spouse his or her attorney's fees as part of court's equitable powers); Braswell v. Braswell, 476 S.W.2d 444, 446 (Tex. Civ. App.—Waco 1981, writ dism'd) (court did not abuse its discretion in requiring husband to pay wife's attorney's fees).

502. The trial court, in making an award of attorney fees should consider the nature of the case, nature of the services rendered, the amount of property involved, the client's interest at stake, the amount of time devoted by the attorney, and the skill and experience reasonably needed to perform the services. *See* Treadway v. Treadway, 613 S.W.2d 59, 60 (Tex. Civ. App.—Texarkana 1981, writ dism'd) (citing McFadden v. Bresler Malls, Inc., 526 S.W.2d 258, 263-64 (Tex. Civ. App.—Austin 1975, no writ) (discussing factors court should consider in making award of attorney's fees)). *But see* Saums v. Saums, 610 S.W.2d 242, 243 (Tex. Civ. App.—El Paso 1980, writ dism'd) (holding that although an attorney's fee may be normal and customary, it may nonetheless be considered unreasonable in light of its relationship to the client's income).

503. *See* Great Am. Reserve Ins. Co. v. Britton, 406 S.W.2d 901, 907 (Tex. 1966) (when party offers no proof of reasonableness of attorney's fees recovery of such fees will not be allowed); Mogford v. Mogford, 616 S.W.2d 936, 945 (Tex. Civ. App.—San Antonio 1981, no writ) (on appeal, evidence on attorney's fees must be viewed in the light most favorable to the prevailing party); Warner v. Warner, 615 S.W.2d 904, 908 (Tex. Civ. App.—Fort Worth

sonable relationship to the amount in controversy.[504] Opinion evidence as to what the correct amount of attorney's fees should be is not conclusive and does not bind the trial court.[505]

The attorney's fees are but one factor to be considered by the court in making a division of the estate, considering the conditions and needs of the parties and all of the surrounding circumstances.[506] No specific statute permits either spouse to collect attorney's fees from the other upon divorce, nor are such fees recoverable as costs,[507] and the trial court is not bound to award anything as attorneys' fees.[508] If parties to a divorce are permanently reconciled, the attorneys are entitled to recover the reasonable value of services rendered, despite an agreement for a contingent fee.[509] The trial court is not authorized to award attorney's fees in a contempt proceeding brought to enforce a provision in a divorce decree.[510]

Enforcement. In 1975, prior to entry of a divorce decree by a Harris County domestic relations court, the parties entered into a property settle-

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1981, no writ) (award of attorney's fees must be supported by the evidence); Underhill v. Underhill, 614 S.W.2d 178, 181 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (reasonableness of attorney's fees is required to be supported by competent evidence); Reames v. Reames, 604 S.W.2d 335, 338 (Tex. Civ. App.—Dallas 1980, no writ) (absent statement of good cause, trial court could not assess one-half of wife's attorney's fees against the husband in divorce action).

In Smith v. Smith, 620 S.W.2d 619, 625 (Tex. Civ. App.—Dallas 1981, no writ) the party responsible for payment of attorney's fees was directed to file a remittitur because there was no evidence in the record to justify the trial court's award of $1500 in the event of a writ of error to the Texas Supreme Court. *Cf.* Thomas v. Thomas, 603 S.W.2d 356, 358 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (holding that when attorney's fees exceeded amount to which attorney was entitled, such fees were impermissible and could be cured by remittitur).

504. *See* Treadway v. Treadway, 613 S.W.2d 59, 60 (Tex. Civ. App.—Texarkana 1981, writ dism'd). *See also* Paugh v. Paugh 579 S.W.2d 38 (Tex. Civ. App.—Waco 1979, no writ) (attorney's fee should bear reasonable relationship to amount in controversy).

505. Warner v. Warner, 615 S.W.2d 904, 908 (Tex. Civ. App.—Fort Worth 1981, no writ).

506. *See* Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981); Carle v. Carle, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005. *See also* Mendoza v. Mendoza, 621 S.W.2d 420, 422 (Tex. Civ. App.—San Antonio 1981, no writ) (fact that husband has to pay attorney's fees is factor to be considered in court's division of community property); Rodriguez v. Rodriguez, 616 S.W.2d 383, 384 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (court did not abuse discretion in ordering each party to pay his or her own attorney's fees); Brooks v. Brooks, 612 S.W.2d 233, 238 (Tex. Civ. App.—Waco 1981, no writ) (trial court did not abuse discretion in refusing to award wife attorney's fees despite fact that her attorney spent 84.5 hours on case); Zamora v. Zamora, 611 S.W.2d 660, 663 (Tex. Civ. App.—Corpus Christi 1980, no writ) (issue of attorney's fees can be factor considered by court in making equitable division of community estate).

507. *See* Austin v. Austin, 619 S.W.2d 290, 292 (Tex. Civ. App.—Austin 1951, no writ); Jacks v. Teague, 136 S.W.2d 896 (Tex. Civ. App.—Dallas 1940, writ dism'd).

508. *See* Killpack v. Killpack, 616 S.W.2d 434, 437 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

509. *See* Navarro v. Brannon, 616 S.W.2d 262, 263 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ). *Cf.* Findlay v. Cave, 611 S.W.2d 57, 58 (Tex. 1981) (attorney entitled to fees incurred in collecting debts even though amount found by jury was less than demanded).

510. *See* Grimes v. Grimes, 612 S.W.2d 714, 715 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). A contempt proceeding is governed by TEX. REV. CIV. STAT. ANN. art. 1911a (Vernon Supp. 1982), which does not provide for attorney's fees.

ment agreement requiring the husband to make monthly payments to the wife. After the husband failed to make several of the payments, the ex-wife brought suit in a county court at law. The husband argued that the domestic relations court had exclusive jurisdiction of the suit because it was a suit to enforce a settlement agreement incident to divorce. The court of civil appeals held[511] that a suit to recover periodic support payments under a property settlement agreement was an independent contract action rather than a suit incident to divorce. The court that granted the divorce, therefore, does not have exclusive jurisdiction to hear the suit but has concurrent jurisdiction with other courts.[512]

Venue may not be maintained pursuant to section 5 of article 1995[513] in a suit for damages for breach of divorce settlement agreement when there is no general provision within such agreement naming a particular county as the place for performance.[514] The ordinary venue rule in favor of the defendant applies.

In *In re Hill*[515] the trial court's decree dividing the community property was so drawn that it could not support an order for contempt. On appeal, the appellate court found that the decree merely awarded one-half of the husband's periodic retirement payments to his wife.[516] No order required the husband to pay her anything and the decree failed to state when or where the payments were to be made.[517] Under the rule in *Ex parte Slavin*[518] the appellate court held the trial court's commitment order violated

511. Underhill v. Underhill, 614 S.W.2d 178 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). *See also* Hutchings v. Bates, 406 S.W.2d 419, 420 (Tex. 1966) (father's estate liable for support payments pursuant to a property settlement agreement because contract law governs the rights and obligations under such agreements).

512. 614 S.W.2d at 180. The court relied on 1963 Tex. Gen. Laws, ch. 299, § 3, at 778, in effect at the time of filing of this suit, which created the Court of Domestic Relations Number Four that granted the divorce in this case. 614 S.W.2d at 180. The court is now the 311th Family District Court. The statute provided that the "Court of Domestic Relations No. 4 shall have jurisdiction concurrent with the District Courts . . . situated in . . . [Harris] County . . . of all divorce and marriage annulment cases, including the adjustment of property rights . . . and every other matter incident to divorce." The court did not seem concerned that this statute referred to district courts, when in this instance the wife filed suit in the county court at law. *See also* Day v. Day, 603 S.W.2d 213, 216 (Tex. 1980) (court granting the divorce did not have exclusive jurisdiction in a suit to enforce a judgment lien provided for in the property settlement agreement; suit was an independent action and not a matter incident to or related to the underlying divorce).

513. TEX. REV. CIV. STAT. ANN. art. 1955, § 5 (Vernon 1964 & Supp. 1982) provides that if a person has contracted in writing to perform an obligation in a particular county, expressly naming the county, or a definite place therein, suit upon, or by reason of, such obligation may be brought against him in that county. For a case to come within § 5, the contract must expressly provide for performance of the obligation in the county of suit. Southwestern Inv. Co. v. Allen, 160 Tex. 258, 260, 328 S.W.2d 866, 867 (1959).

514. Busbey v. Busbey, 619 S.W.2d 472 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

515. 611 S.W.2d 457 (Tex. Civ. App.—Dallas 1980, no writ).

516. *Id.* at 458.

517. *Id.*

518. *Ex parte* Slavin, 412 S.W.2d 43 (Tex. 1967) (holding that in order for a person to be held in contempt, the decree must clearly specify the details of compliance in clear, specific and unambiguous terms so that the person will know what duties are imposed on him).

due process and could not stand.[519]

In *Ex parte Finn*[520] the trial court's order was impossible to perform because it ordered the relator to perform an act in the past. On October 2, during the course of a divorce proceeding, the trial court ordered the ex-wife to deliver certain coins and other objects of precious metals to particular persons "no later than" three days before. On her failure to act the trial court committed her to jail for criminal contempt. The appellate court concluded that the trial court's order was clearly void and ordered the contemnor released.[521] Although the trial judge's attorney asserted that the contemnor had been orally ordered to do the acts recorded in the written order several days prior to the deadline for delivery, the appellate court found that the record did not bear out this assertion.[522] If that fact had been proved, some authority would have sustained the commitment.[523] The court of civil appeals also found that even if the trial court's order had been a proper basis for a contempt proceeding, confinement was not proper because the relator had no notice of the violation of the order before she was held in contempt.[524]

Ex parte Eureste,[525] a child support case, illustrates Texas's strict adherence to the notice principle of due process.[526] In *Eureste* the husband failed to make full child support payments as ordered in the divorce decree. Both spouses were present at a hearing on the matter on October 2, 1980. At the hearing the judge ordered the husband to make up the arrearages, set a hearing for December 15, 1980, and entered an order to that effect on October 4, 1980. In addition the judge told the husband he would receive no further notice of the future hearing. When the husband made no further payments and failed to appear at the December 15 hearing he was found in contempt of the October 4 order. The Austin court of civil appeals reversed the contempt order because the husband was not notified of any violations, which could not have occurred until after October 5, when the first payment was due.[527]

In *Peissel v. Peissel*[528] the former wife brought suit to accelerate payments intended to equalize community property under a divorce decree. The decree directed payment by installments but provided for acceleration

519. 611 S.W.2d at 458-59.
520. 615 S.W.2d 293 (Tex. Civ. App.—Dallas 1981, no writ).
521. *Id.* at 296.
522. *Id.*
523. *See Ex parte* Barnes, 581 S.W.2d 812 (Tex. Civ. App.—Waco, 1980).
524. 615 S.W.2d at 296.
525. 614 S.W.2d 647 (Tex. Civ. App.—Austin 1981, no writ).
526. *See Ex parte* Gordon, 584 S.W.2d 686, 688 (Tex. 1979) (due process requires that the contemnor be given full and complete notification); *Ex parte* Edgerly, 441 S.W.2d 514, 516 (Tex. 1969) (due process demands that before a court can punish for contempt, not committed in its presence, the accused must have full and complete notification stating when, how, and by what means the defendant is guilty of the alleged contempt); *Ex parte* Conway, 419 S.W.2d 827, 828 (Tex. 1967) (notice is a prerequisite to the validity of a contempt order).
527. 614 S.W.2d at 648.
528. 620 S.W.2d 796 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

of the entire balance if any periodic payment was more than fifteen days in arrears. The decree also provided that payments could be abated for six months if the husband's business was not commercially successful or he became permanently disabled. The wife brought suit sixty days after the first payment date was missed. The ex-husband defended on the ground that his business had ceased at the time the suit was filed and that his former wife was premature in the filing of her suit. The trial court awarded the former wife the balance due, attorney's fees, and post judgment interest. The appellate court held that the right to the six month abatement was a defense to the option to accelerate but did not bar the filing of suit.[529] Because the six month abatement period had ended prior to judgment for the wife in October, 1980, the appellate court held that neither the filing of her suit nor the judgment against the ex-husband was premature.[530]

In *Ex parte Thomas*[531] the trial court held the husband in contempt for failing to make money payments to his ex-spouse to adjust the property rights of the parties. The Houston court of civil appeals granted the contemnor's writ of habeas corpus concluding that he could not be held in contempt for failing to make money payments as ordered in the original decree, because the effect of the order was to create a debt.[532] The appellate court found that holding a party in contempt and ordering him jailed for nonpayment of a debt was in violation of the Texas Constitution.[533] In granting the writ, the court of civil appeals distinguished *Ex parte Sutherland*[534] as a case in which the husband was effectively held in contempt for failure to obey the court's order to make payment of an existing community asset into the registry of the court.[535] *Thomas* stands for a significant, if small, proposition, but all the relevant facts are not set out in the opinion. In order to make an equitable division of property on receipt the trial court awarded the wife a money judgment for $16,000 and ordered the husband to pay the wife $10,000 immediately and the balance in twelve consecutive payments of $500 each. In addition, the trial court set aside to the former husband his separate property, but there was no community property available with which the husband could have discharged the obligation put upon him. As an alternative the court, relying on *Buchan v. Buchan*[536] and *Day v. Day*,[537] could have put an equitable lien on the husband's separate property. On failure of the husband to make the pay-

529. *Id.* at 798-99.
530. *Id.* at 800.
531. 610 S.W.2d 213 (Tex. Civ. App.—Houston [1st Dist.] 1980).
532. *Id.* at 214.
533. *Id.*; *see* TEX. CONST. art. 1, § 18 which states: "No person shall ever be imprisoned for a debt." *Ex parte Thomas* is distinguishable from a case involving an order to pay money into the registry of the court to secure payment of the wife's share, which can result in a contempt order for nonpayment. *See Ex parte* Preston, 162 Tex. 379, 347 S.W.2d 938 (Tex. 1961).
534. 515 S.W.2d 137 (Tex. Civ. App.—Texarkana 1974, writ dism'd).
535. 610 S.W.2d at 215.
536. 592 S.W.2d 367 (Tex. Civ. App.—Tyler 1979, writ dism'd) (holding that a trial court's imposition of an equitable lien on wife's separate homestead property to secure pay-

ments as ordered the wife could then have foreclosed the lien. Under the circumstances she might have reduced the husband's arrears to a money judgment and then used the appropriate measures for collection.

Post Divorce Claims. The proceeds of life insurance policies purchased during marriage are presumptively community property as the fruits of a community contract.[538] If during the marriage the insured spouse purports to change the beneficiary of the policy from the other spouse to another person, such a change is effective for the insured spouse's share, but it raises a question of constructive fraud as to the other spouse's share of the proceeds.[539] But if the spouses are divorced before there is a change and the decree fails to dispose of the policy, then the ex-spouses become owners of the policy as tenants in common.[540] The insured may then exercise his contractual right to change the beneficiary of the policy, but such change is only effective as to the insured person's one-half interest in the policy.[541] The other ex-spouse still has an interest in the policy which is unaffected by the insured ex-spouse's action.[542] Although regular federal civil service retirement benefits and civil service disability retirement benefits[543] are subject to division and partition, compensation payments for a post-divorce injury are not a property right to which a former spouse has any claim.[544]

Retirement benefits which accrue during the marriage of the parties are community property, but when the divorce decree fails to provide for a division of such property, the husband and wife become tenants in common.[545] A wife's suit to partition the benefits is not barred by the doctrine

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ment of an award to the husband did not constitute actual divestiture of such property and was not an abuse of discretion).

537. 610 S.W.2d 195 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (divorce court justified in creating equitable lien on husband's separate property to secure payment of award to wife.).

538. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975) states: "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property." *See generally* Pope Photo Records, Inc. v. Malone, 539 S.W.2d 224, 226 (Tex. Civ. App.—Amarillo 1976, no writ) (when a husband insures his life with community funds, the right to the insurance proceeds is community property); Givens v. Girard Life Ins. Co., 480 S.W.2d 421, 423 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (insurance purchased through the earnings of the husband are community property).

539. *See* Murphy v. Metropolitan Life Ins. Co., 498 S.W.2d 278, 282 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) (holding that a husband may property make a gift of part of the community controlled by him, but propriety of such a gift requires absence of fraud).

540. *See* Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970), *Ex parte* Williams, 160 Tex. 314, 316, 330 S.W.2d 605, 606 (1960), Horlock v. Horlock, 614 S.W.2d 478, 481 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), all holding that when a divorce decree fails to provide for division of property, the husband and wife become tenants in common.

541. *See* Prudential Life Ins. Co. v. Burke, 614 S.W.2d 847, 849 (Tex. Civ. App.—Texarkana), *writ ref'd n.r.e. per curiam*, 621 S.W.2d 596 (Tex. 1981) (holding that a change of beneficiary is effective only as to the insured's community interest).

542. *See* 614 S.W.2d at 849.

543. Such retirement benefits are covered under 5 U.S.C. §§ 8301-8339 (1976).

544. *See* Bonar v. Bonar, 614 S.W.2d 472 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.).

545. *See* Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976); Bankston v. Taft, 612 S.W.2d

of laches absent any repudiation of her interest in the retirement fund,[546] pleading of such affirmative defense,[547] or evidence to show that the husband's position had been changed in good faith because of any delay on the part of the claimant.[548]

Effects of Bankruptcy on Property Division. The Bankruptcy Reform Act of 1978[549] provides that debts "designated as alimony, maintenance, or support" are nondischargeable obligations in bankruptcy.[550] In *In re Nunnally*[551] the Fifth Circuit Court of Appeals recognized that although alimony after divorce is not permitted in Texas,[552] future support of a former spouse can affect a divorce court's property division so as to contain a substantial element of "alimony-substitute," support or maintenance.[553] For purposes of applying federal bankruptcy laws, the substance of the award, not the label a state affixes to an award, must govern.[554]

Interpretation of a property settlement agreement under state law is an important factor if the parties intended an agreement to provide for the payment of alimony within the meaning of the federal bankruptcy law.[555] In *In Re Teter*[556] the agreement provided that the former wife would continue to receive a salary from a corporation in which her husband owned a controlling interest. That salary was held to be a nondischargeable support obligation when the husband acknowledged that the obligation was for her support.[557]

In *Ealy v. Ealy*[558] the husband was ordered by the divorce court to pay

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216 (Tex. Civ. App.—Beaumont 1980, no writ); Yeo v. Yeo, 581 S.W.2d 734 (Tex. Civ. App.—San Antonio 1979, writ ref. n.r.e.). *See also* Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970).

546. *See* Bankston v. Taft, 612 S.W.2d 216, 217 (Tex. Civ. App.—Beaumont 1980, no writ).

547. *See* Murray v. Murray, 611 S.W.2d 172 (Tex. Civ. App.—El Paso 1981, no writ). *See also* TEX. R. CIV. P. 94 stating: "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, . . ., laches, . . . and any other matter constituting an avoidance or affirmative defense."

548. *See* Murray v. Murray, 611 S.W.2d 172, 173 (Tex. Civ. App.—El Paso 1981, no writ). *See also* City of Forth Worth v. Johnson, 388 S.W.2d 400 (Tex. 1964) (holding that essential elements of laches are unreasonable delay by one having legal or equitable rights in asserting them and a good faith change of position by another to his detriment because of the delay).

549. 11 U.S.C. §§ 101-151326 (Supp. II 1978).

550. *Id.* § 523(a)(5)(B).

551. 506 F.2d 1024 (5th Cir. 1975).

552. *Id.* at 1026. *See* Francis v. Francis, 412 S.W.2d 29, 32 (Tex. 1967) (holding that "the statutes and public policy of this state do not sanction alimony for the wife after a judgment of divorce has been entered.").

553. 506 F.2d at 1027.

554. *Id.*

555. *See* Melichar v. Ost, 661 F.2d 300 (4th Cir. 1981). The court stated: "The proper test of whether the payments are alimony lies in proof of whether it was the intention of the parties that the payments be for support rather than as a property settlement." *Id.* at 303.

556. 14 Bankr. 434 (Bankr. N.D. Tex. 1981).

557. *Id.* at 436. Although the former wife had never been requested to do any work for the corporation, earning power of parties had been uneven, and there were minor children to be supported. *Id.* at 437.

558. 616 S.W.2d 420 (Tex. Civ. App.—Texarkana 1981, writ dism'd).

his ex-wife $25,000 in installments, in lieu of her interest in the parties' home. The next year the husband was adjudged bankrupt and discharged from the debt. The ex-wife sued to force her husband to sell the homestead in order to make the payments to her under the divorce decree. The appellate court held that the husband was protected from such a forced sale by the Texas Constitution even though the divorce court had named the ex-husband as trustee and ordered him to pay the monthly sum for his ex-wife's interest in the home.[559] The ex-wife's difficulty could have been avoided by the simple expedient of putting a lien on the home to secure the payment for her interest in it.

In *Erspan v. Badgett*[560] an ex-wife's claim to one-half of the ex-husband's military retirement benefits awarded prior to the decision of *McCarty v. McCarty*,[561] was treated as nondischargeable if the award was for alimony substitute, support or maintenance.[562] A debtor's obligation pursuant to a separation agreement to pay his former spouse's attorney's fees in connection with divorce proceedings has been held to be nondischargeable because it was in the nature of alimony, maintenance, or support.[563] A husband's discharge can, under some circumstances, impact upon the needs of the wife so as to constitute the change in financial condition required for a modification of a child support order.[564] In a suit to increase child support, the discharge in bankruptcy of a debt subsequent to the original order may be considered as a factor in determining whether a material change has occured in a father's ability to support his child.[565] But a child-support obligation assigned to a state is immediately dischargeable.[566]

559. *Id.* at 422; *see* TEX. CONST. art. XVI, § 50 (defining homestead exemption). *Cf.* Spence v. Spence, 455 S.W.2d 365 (Tex. Civ. App.—Houston [14th dist.] 1970, writ ref. n.r.e.) (tract that husband established as homestead was exempt from claim of former wife).

560. 647 F.2d 550 (5th Cir. 1981).

561. 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

562. 647 F.2d at 555. *See In re* Spong, 661 F.2d 6, 11 (2nd Cir. 1981). *See also* 11 U.S.C. § 523(a)(5)(B) (Supp. IV 1980).

563. *See In re* Lineberry, 9 Bankr. 700, 709 (Bankr. W.D. Mo. 1981) (holding that debtor's obligation under a separation agreement was in nature of support and nondischargeable). If attorney's fees are treated as an integral part of the property division on divorce, an award for the attorney's fees would be properly treated as discharged in bankruptcy. *See, e.g.*, Jones v. Tyson, 518 F.2d 678, 681 (9th Cir. 1975).

564. *In re* Danley, 14 Bankr. 493, 495 (Bankr. N.M. 1981). The case dealt with New Mexican law.

565. *See* Strauss v. Strauss, 619 S.W.2d 18 (Tex. Civ. App.—Corpus Christi, 1981, no writ).

566. *See In re* Blair, 644 F.2d 69, 69 (2d Cir. 1980). By enacting 11 U.S.C. § 523(a)(5)(B) (Supp. II 1978) Congress intended to make a child support obligation assigned to a state immediately dischargeable. *See In re* Spell, 650 F.2d 375, 376-77 (2d Cir. 1980).