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FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight*

I. STATUS

INFORMAL Marriage. Texas courts will strictly scrutinize the assertion of an informal marriage.¹ Once the marital relationship is established, however, the state's policy is to uphold a marriage against a claim of invalidity unless it is clearly void or voidable.² In *In re R.L.*³ a biological father appealed from a lower court judgment terminating his parent-child relationship with two minor children. The father gave uncontroverted testimony that he and the now-deceased mother had agreed to be husband and wife, that they had cohabited as such, and that they had represented themselves to others as married. The father, however, admitted that his wife had been previously married. The appellate court held that the presumption that the more recent marriage was valid overcame any inference of the continuance of the deceased wife's prior marriage.⁴

Although Texas courts seek to protect the marital relationship, they do not recognize the existence of "marriage" between persons of the same sex, either with or without formalities.⁵ In that regard, a recent decision held that an indictment for indecency with a child was not defective despite the fact that it did not allege a nonspousal relationship between the defendant and his male victim.⁶ In a different context another court held that no public policy considerations prevented a woman from bringing a suit to recover realty and personalty she had acquired jointly with another woman during the course of a twelve year lesbian relationship.⁷ Reversing a summary judgment for the defendant, the court of appeals held that the

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1. *Bodde v. Texas*, 568 S.W.2d 344, 352 (Tex. Crim. App. 1978), *cert. denied*, 440 U.S. 968 (1979). The reasoning in *Standard v. Bledsoe*, 633 S.W.2d 566 (Tex. Ct. App.—Texarkana 1982, no writ) (couple who allegedly entered into agreement in Texas but cohabited elsewhere) is far from clear.

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

3. 622 S.W.2d 660 (Tex. Ct. App.—Fort Worth 1981, no writ).

4. *Id.* at 661.

5. *Slayton v. Texas*, 633 S.W.2d 934, 937 (Tex. Ct. App.—Forth Worth 1982, no writ).

6. *Id.* The relevant statute did not apply to a child that was the spouse of the alleged offender. *Id.* at 938 (Hughes J., dissenting).

7. *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. Ct. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

evidence was sufficient to suggest the existence of a partnership for profit with the attendant right to recover property in proportion to the value of labor contributed by each.⁸

Interspousal Testimony. Code of Criminal Procedure section 38.11 defines the marital communication privilege in providing that with some exceptions neither spouse may be a witness against the other during the existence of the marriage regardless of whether the testimony reveals a confidential communication.⁹ Moreover, a person no longer married may not testify to a confidential communication made to an ex-spouse during the marital relationship unless the testimony extenuates or justifies the offense for which the witness's ex-spouse is on trial.¹⁰ In a recent criminal case the defendant asserted on appeal that the trial judge had erred in allowing testimony by his alleged common-law wife.¹¹ The court recognized that the privilege for confidential communications extends to informal marriages, but upon close scrutiny of the relationship, determined that the defendant had failed to show a "present agreement" with his alleged wife to be married.¹² The court concluded that to "agree on present cohabitation and future marriage" was not sufficient to prove a valid informal marriage.¹³

Federal courts have consistently held that communications by a spouse who knows that a third person is present are not protected from disclosure by the marital communication privilege.¹⁴ In a case of first impression a federal district court in Colorado refused to apply the presence-of-a-third-person exception to telephone conversations between two spouses after the husband's arrest.¹⁵ Federal agents taped the calls with the wife's acquiescence. The court held that absent a showing that the husband was aware that a third person was listening to the conversation, the federal government could not rebut the presumption of confidentiality arising in the marital communication.¹⁶ Moreover, the wife's willingness to testify did not abrogate the husband's privilege since he alone, as communicator, held the privilege and the power to waive it.¹⁷

8. *Id.* at 27-28. The court analogized the instant situation to *Hayworth v. Williams*, 102 Tex. 308, 313-14, 116 S.W.43, 45-46 (1909) (putative spouses entitled to property in proportion to efforts exerted during cohabitation).

9. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979), where the exceptions are specifically enumerated.

10. *Id.*

11. *Lackey v. Texas*, 638 S.W.2d 439 (Tex. Crim. App. 1982).

12. *Id.* at 443-44; see *Bush v. State*, 159 Tex. Crim. 43, 46, 261 S.W.2d 158, 159-60 (1953) (common-law wife disqualified as a witness against her common-law husband).

13. 638 S.W.2d at 443-44 (citing *Rosetta v. Rosetta*, 525 S.W.2d 255, 261 (Tex. Civ. App.—Tyler 1975, no writ)); see also *Hightower v. State*, 629 S.W.2d 920, 924 (Tex. Crim. App. 1982).

14. *Pereira v. United States*, 347 U.S. 1, 6 (1954); *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

15. *United States v. Neal*, 532 F. Supp. 942 (D. Colo. 1982). This case provides an excellent overview of the present status of marital privilege in federal cases.

16. *Id.* at 947.

17. *Id.* (citing 8 J. WIGMORE, EVIDENCE, § 2340 (McNaughton rev. 1961)).

Workers' Compensation. The affirmative defense of abandonment involves the voluntary separation of one spouse from the other with the intention not to return to cohabit as husband and wife for the requisite statutory period.¹⁸ In addition, the abandonment by one spouse must "be neither caused, procured, nor consented to" by the nonabandoning party.¹⁹ A Houston court of appeals held that because abandonment must be affirmatively pled, a workers' compensation claimant need not incorporate in her pleadings allegations controverting the defense.²⁰ Thus, the mere pleading by the liability carrier that the wife had abandoned the recipient husband placed no additional burden of pleading or proof on the claimant.²¹

Grounds for Divorce. The pre-1973 version of Family Code section 3.64 required that a decree of divorce or annulment be based on "full and satisfactory evidence," as previously provided in article 4632 of the Revised Civil Statutes.²² The repeal of old section 3.64, however, was not intended to change the burden of proof or to allow a petitioner to take a default judgment without proof of grounds.²³ A dissenting opinion in *Vallone v. Vallone*²⁴ confirmed this interpretation in a discussion of the liberal pleading requirements for divorce suits. Justice Sondock recognized that "no true default judgment in a divorce suit" exists under Texas law;²⁵ therefore, even in the event that a defendant fails to answer a plaintiff's petition, full and satisfactory evidence must be produced to warrant the granting of a divorce.²⁶

II. CHARACTERIZATION OF MARITAL PROPERTY

Community Presumption. *In re Read*²⁷ involved the use of separate funds in developing community mineral interests. The Amarillo court of appeals held that all the profits a husband derived from these activities were community property.²⁸ The use of separate property in the development or

18. *Jackson v. Jackson*, 470 S.W.2d 276, 278 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

19. *Id.* at 279 (quoting *McGowen v. McGowen*, 52 Tex. 657, 667 (1880)).

20. *Liberty Mut. Ins. Co. v. Woody*, 640 S.W.2d 718, 720 (Tex. Ct. App.—Houston [1st Dist.] 1982, no writ).

21. *Id.*; see *Seale v. Nichols*, 505 S.W.2d 251, 254 (Tex. 1974) (mere pleading of affirmative defense without more is insufficient to withstand summary judgment motion); *Gulf, Colo. & S.F. Ry. v. McBride*, 159 Tex. 442, 453-54, 322 S.W.2d 492, 500 (1959) (plaintiff's petition need not negative affirmative defense; defendant must make showing of facts supporting such defense).

22. TEX. REV. CIV. STAT. ANN. art. 4632 (Vernon 1960) (current version TEX. FAM. CODE ANN. §§ 3.53, 3.60, 3.61, 3.64 (Vernon 1975 & Supp. 1982-1983)).

23. See *McKnight, Texas Family Code and Commentary, Title 1: Husband and Wife*, 13 TEX. TECH L. REV. 611, 693 (1982).

24. 644 S.W.2d 455 (Tex. 1983).

25. *Id.* at 467 (Sondock, J., dissenting).

26. *Id.*

27. 634 S.W.2d 343 (Tex. Ct. App.—Amarillo 1982, writ dism'd w.o.j.).

28. *Id.* at 346 (citing *Norris v. Vaughan*, 152 Tex. 491, 500-01, 260 S.W.2d 676, 682 (1953)).

operation of the oil and gas interests did not change the community status of the property but only gave rise to an equitable right of reimbursement in the separate estate.²⁹

In *Vallone v. Vallone*³⁰ the wife asserted that the trial court erred in not considering the substantial contribution the community estate made to the husband's separate corporate stock through the husband's expenditure of time, toil, and talent in making the corporation productive. The majority of the Texas Supreme Court declined to address the characterization issue, however, and limited its decision to issues of pleading.³¹ The dissenting opinions of Justices Barrow and Sondock nevertheless make it abundantly clear that the court must have discussed the proper characterization of the stock's enhanced value. Indeed, the majority's limited discussion of the pleadings regarding an alleged right of reimbursement seems to contain an implicit (if tentative) rejection of the dissenting justices' analysis.³² Justice Sondock's vigorous dissent espouses the view that the increased value of separately owned stock of a corporation to which the owner devoted virtually all of his time is community property and therefore is divisible on divorce.³³ The trial court had concluded that the husband owned forty-seven percent of the stock as separate property and the remaining fifty-three percent as community. The court of appeals held that the trial court's division of property constituted an abuse of discretion because the court had ignored the enhancement in the value of the stock attributable to community labor.³⁴ A majority of the supreme court found no abuse of discretion by the trial judge, suggesting that the increase in the value of the husband's stock remained his separate property.³⁵ The dissenting judges rested their argument on the rule that all of the spouses' earnings during marriage belong to the community, and hence they deemed it irrelevant that the community was said to have been adequately compensated by the \$200,000 annual salary earned by the husband.³⁶ Moreover, the dissent regarded the fact that the property involved was "cloaked in corporate form" as inconsequential. Justice Sondock concluded, as in the case of a separate sole proprietorship, that earnings from a separate corporation or partnership produced by community energies should belong to the com-

29. 634 S.W.2d at 346.

30. 644 S.W.2d 455 (Tex. 1982). For a discussion of the appellate court opinion, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 36 Sw. L.J. 97, 108, 141-42 (1982).

31. 634 S.W.2d at 458.

32. *Id.* at 458-59.

33. *Id.* at 461 (Sondock, J., joined by Pope, C.J., and McGee, J., dissenting). Justice Barrow entered a separate dissenting opinion but also expressed his agreement with Justice Sondock's dissent.

34. 618 S.W.2d 820, 824 (Tex. Civ. App.—Houston [1st Dist.] 1981).

35. 644 S.W.2d at 460.

36. *Id.* at 461 (Sondock, J., dissenting). The dissent suggests that the majority "finds solace" in its determination that the community received adequate compensation, but holds that all of the earnings, not just those deemed "adequate compensation," should be included in the community estate. *Id.* at 161.

munity estate.³⁷ The issue in *Vallone* was not as clear-cut as it might have been, however, because every time the separate estate was enhanced by forty-seven percent, the community estate was enhanced by fifty-three percent, and, as the majority noted, "[m]any of the couple's personal transactions were handled through the corporation."³⁸

Prior to the supreme court's disposition of *Vallone*, the Tyler court of appeals in *Jensen v. Jensen*³⁹ characterized the enhancement in value of a husband's separate corporate stock as community property divisible on divorce.⁴⁰ Prior to marriage the husband had acquired a significant block of shares in a closely held corporation.⁴¹ During the next four years the value of the stock greatly increased as a result of the husband's efforts. In her suit for divorce the wife claimed that the enhanced value of the stock belonged to the community estate. The trial court concluded that the husband had been adequately and reasonably compensated through salary, dividends, and bonuses⁴² and that the community was not entitled to receive the value of the appreciation in the shares.⁴³ The appellate court declined to address the issue of the community's reasonable compensation and concluded that the weight of authority suggests that the enhanced value of corporate stock, even when due to the efforts of one spouse, should be attributable to the community estate.⁴⁴ The court indicated that the trial court's mischaracterization of the shares substantially altered the way the trial court would have divided the estate if properly characterized and constituted reversible error.⁴⁵ In *Jensen* the Texas Supreme Court will have before it a clear case for testing Justice Sondock's hypothesis.

The Fort Worth court of appeals in *Martin v. Martin*⁴⁶ recognized that a family corporation is a separate entity, the assets of which are not ordinarily to be included in the community estate upon division in a divorce

37. *Id.* at 463-64. The Sondock dissent cited numerous Texas cases holding that the increase in value of a separate business is community property when attributable to the spouse's operation of the business during the marriage. *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976) (military retirement case); *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972) (personal injury case); *Moss v. Gibbs*, 370 S.W.2d 452, 454-55 (Tex. 1963) (case dealing with the wife's earnings and their investment); *Norris v. Vaughan*, 152 Tex. 491, 500-01, 260 S.W.2d 676, 682 (1953) (aggregate partnership case); *Epperson v. Jones*, 65 Tex. 425, 428 (1886) (a case dealing with the profits derived from the wife's business).

38. 644 S.W.2d at 457.

39. 629 S.W.2d 222 (Tex. Ct. App.—Tyler 1982, writ granted).

40. *Id.* at 224.

41. The husband owned 48.5% of the stock as separate property and controlled another 2% as trustee.

42. The findings that related to adequacy of compensation were in response to the wife's contention that the community was entitled to the difference between her husband's actual compensation and the compensation the community would have received if he had been adequately compensated.

43. The court further found that the corporation was not the alter ego of the husband, and on appeal the wife did not contend otherwise.

44. 629 S.W.2d at 224. The court cited 3 O. SPEER, TEXAS FAMILY LAW § 15:50, at 115 (5th ed. 1975), *Logan v. Logan*, 112 S.W.2d 515, 525 (Tex. Civ. App.—Amarillo 1937, writ dismissed), and a student comment.

45. 629 S.W.2d at 226.

46. 628 S.W.2d 534 (Tex. Ct. App.—Fort Worth 1982, no writ).

case.⁴⁷ In *Martin* a motor freight line was purchased during marriage, and thus the shares were presumed to belong to the community. The trial court valued the entire community property, including the corporation, at approximately \$114,000 and on division, awarded the wife 56.5 percent of the estate. The court ordered that the wife's community interest in corporate stock be transferred to the husband, and the husband assumed all of the corporation's liabilities.⁴⁸ The husband was also required to execute a promissory note of \$18,000 to the wife, secured by a lien on the assets in the corporation. The appellate court remanded the case because the trial court had treated the corporation as the alter ego of the husband.⁴⁹ The court found no justification in the trial record for failing to regard the corporation as a discrete entity and for "piercing the corporate veil."⁵⁰ Moreover, the court held that a justified application of the alter ego doctrine "does not necessarily mean that the *alter ego* is invested with the ownership of the corporate property even in part, certainly not in totality."⁵¹ The lower court, therefore, had erred in dividing the property without properly ascertaining the community estate to be divided, and the \$18,000 note the husband executed "could not be deemed referable to the estate to be divided" without further findings of fact.⁵²

Tracing and Commingling. If a party asserting the separate character of particular property can trace the property to a separate source, the community presumption is rebutted.⁵³ In *Vallone* the trial and appellate courts also addressed the tracing issue in characterizing the stock of a closely held corporation.⁵⁴ The courts determined that the husband received the assets of the business, valued at \$9,365, as a gift from his father. The husband then incorporated the business, transferring these assets and approximately \$10,000 of community property in exchange for all the stock. The intermediate appellate court rejected the wife's argument that the husband must continue to trace those transferred assets after incorporation in order to show that a part of the shares were separate property.⁵⁵ The majority of the Texas Supreme Court did not discuss the tracing issue, but the dissent-

47. *Id.* at 535.

48. The corporation was not, however, made a party to the suit.

49. *Id.* at 534.

50. *Id.* at 535 (citing *Duke v. Duke*, 605 S.W.2d 408, 412 (Tex. Civ. App.—El Paso 1980, writ *dism'd*) (corporate entity can only be disregarded when used to perpetrate fraud or justify a wrong)); *Humphrey v. Humphrey*, 593 S.W.2d 824, 826 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ *dism'd*) (separateness of corporation must have ceased and "adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice"). The court might also have cited *Goetz v. Goetz*, 567 S.W.2d 892 (Tex. Civ. App.—Dallas 1978, no writ) (corporate entity cannot be disregarded unless corporation used to defraud creditors, circumvent a statute, protect crimes, or perpetuate a monopoly).

51. 628 S.W.2d at 535.

52. *Id.* at 536.

53. *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965); *Schmidt v. Huppman*, 73 Tex. 112, 115, 11 S.W. 175, 176 (1881).

54. 618 S.W.2d 820 (Tex. Civ. App.—Houston [1st Dist.] 1981); see *McKnight*, *supra* note 30, at 108 (discussing the lower courts' disposition of *Vallone*).

55. 618 S.W.2d at 822-23.

ing justices adopted the wife's argument.⁵⁶ The dissenters argued that "the husband made no attempt to trace the increase in his separate property, either in specie, through mutation, or by keeping detailed business records."⁵⁷ They further argued that, in this case, the lower appellate court had treated the simple act of incorporation as a substitute for the tracing requirement.⁵⁸ The minority of the court suggested that "the majority ha[d] created an option of election for a spouse, who by a simple ex parte paper transaction will be able to transform community earnings into separate property."⁵⁹ Because the business continued to be run like a sole proprietorship after incorporation,⁶⁰ the dissent treated the corporation as a mere instrumentality for the conduct of the husband's business affairs,⁶¹ that is as the husband's alter ego without so designating it.

The husband in *In re Read*⁶² unsuccessfully attempted to trace premarital income from certain separate oil and gas leases, as well as the separate funds used to develop them. In examining the trial record the Amarillo court of appeals found substantial commingling of separate and community funds, without a detailed record of either expenditures or deposits to distinguish them.⁶³ The husband had deposited income from oil and gas rights acquired before and after marriage in the same account but failed to relate those deposits to disbursements from the same account. The court held that this was a necessary requisite to proper tracing and identification of his separate property.⁶⁴

56. 644 S.W.2d at 464 (Sondock, J., dissenting). The dissent cited *Hardee v. Vincent*, 136 Tex. 99, 102, 147 S.W.2d 1072, 1074 (Tex. 1941) (burden on spouse to trace separate character of stock of merchandise and fixtures in family business); *Blumer v. Kallison*, 297 S.W.2d 898, 900-01 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.) (separate property could be identified by "modern and accurate" bookkeeping methods).

57. 644 S.W.2d at 465.

58. *Id.*

59. *Id.*

60. The dissent noted the following observation of the intermediate appellate court:

There is little doubt that in many respects the financial and business end of the corporation was operated with great informality. Cash was taken from the business when it was needed for personal expenses; neither officer nor directors' meetings were held on a regular basis; and the corporation was run by the husband, rather than by its officers or a board of directors.

Id. at 465 (citing 618 S.W.2d at 824).

61. 644 S.W.2d at 466 (citing *Dillingham v. Dillingham*, 434 S.W.2d 459, 462 (Tex. Civ. App.—Fort Worth 1968, writ dismissed)).

Texas adopted the Uniform Partnership Act in 1961. TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1970). The majority of the Act treats a partnership as an entity distinct from its partners, with some exceptions, e.g., the aggregate notion of joint and several liability. *Id.* § 15. Because Texas law recognizes the independent existence of a partnership for most purposes, by analogy a legislative intent can be shown that a corporation should remain wholly independent of its shareholders. The *Vallone* dissenters refused to acknowledge the entity concept and insisted upon treating the husband and his closely held corporation as indistinguishable.

62. 634 S.W.2d 343 (Tex. Ct. App.—Amarillo 1982, writ dismissed w.o.j.).

63. *Id.* at 348. The court found that the husband's records were insufficient to discharge his burden of tracing by clear and satisfactory evidence. *Id.* (citing *Wilson v. Wilson*, 145 Tex. 607, 610, 201 S.W.2d 226, 227 (1947)).

64. 634 S.W.2d 347 (citing *Latham v. Allison*, 560 S.W.2d 481, 485 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.)).

The dispute in *Grimmsley v. Grimmsley*⁶⁵ focused on a letter that the husband had written to the wife shortly before their marriage. In it the husband related that he was giving her an extensive list of real and personal property. Shortly after their marriage the spouses purchased a home with a down payment from the proceeds of the sale of assets that were included in the premarital letter. On divorce the district court awarded the home and several items of listed real and personal property to the wife as her separate property. The court attempted to determine whether the husband had made a gift of all of the assets to his wife prior to marriage, thus making the down payment for the home a part of her separate estate. The court of appeals held that the attempted gift of the husband's realty could be accomplished only by deed or by showing (1) a present gift, (2) possession by the donee with the donor's consent, and (3) the donee's having made valuable improvements.⁶⁶ The court found none of these prerequisites satisfied. Moreover, the purported gift of the personalty was invalid because the husband never relinquished total dominion and control.⁶⁷ The husband was therefore entitled to a separate property interest in the house to the extent his separate property was used as the downpayment.⁶⁸ It is not stated in whose name title to the house was taken, and the court did not discuss the presumption of an interspousal gift when the husband's separate property is used to purchase property with title taken wholly or partially in the wife's name.⁶⁹

III. MANAGEMENT AND LIABILITY

Interspousal Transfers. In *Daubert v. United States*⁷⁰ the executors of a decedent's estate sought to have the deceased spouse's community interest in the proceeds of a \$75,000 life insurance policy excluded from his taxable estate. The executors alleged that the husband made a gift of his community interest to his wife at the time the policy was purchased by buying it in her name as owner. The court held that to effect a gift of the policy the donor must "perform an affirmative act which would clearly reflect an intention to make a gift" of community interest.⁷¹ The federal court sup-

65. 632 S.W.2d 174 (Tex. Ct. App.—Corpus Christi 1982, no writ).

66. *Id.* at 178 (citing *Moody v. Ireland*, 456 S.W.2d 494, 496 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.)). The court noted that in the absence of improvements the gift may nevertheless be enforced if it would work a fraud on the donee to do otherwise. *Id.*

67. 632 S.W.2d at 179. The court found that the husband's corporation had \$20,000 in a savings account and that he never relinquished control of the passbook nor transferred the account into the wife's name. The corporate stock allegedly given to the wife was never endorsed over to her nor did the husband ever give up possession of the shares. *Id.* at 178-79. One would have thought, however, that the delivery of the letter would have sufficed under the circumstances to constitute a constructive delivery of the items of personalty enumerated.

68. *Id.* at 179.

69. See *Smith v. Strahan*, 16 Tex. 314, 321 (1856) (presumption of gift when one spouse purchases property with separate funds to which title is taken in name of other spouse); *Powell v. Jackson*, 320 S.W.2d 20, 23 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.) (presumption of gift arises when one spouse conveys separate property to other spouse).

70. 533 F. Supp. 66 (W.D. Tex. 1981).

71. *Id.* at 69 (quoting *Freedman v. United States*, 382 F.2d 742, 747 (5th Cir. 1967)).

ported this conclusion by reference to the husband's continued control of the policy and the argument that designation of the wife as the policy owner did not constitute a "clear and conscious choice" reflecting donative intent.⁷² A purchase with community property in the name of either spouse does not change its character. If the purchase was intended to belong to the wife, she should have been designated not merely as its owner but it should have been stated to be her separate property.⁷³ The federal court imposed a very strict standard of proof.

A trustee sought to set aside a bankrupt's transfer of property to his wife in *Adams v. Wilhite*.⁷⁴ In November 1977 the Wilhites executed a buy-sell agreement in which the husband transferred ownership in a dairy business to his wife. The agreement recited that the husband was no longer able to pay his business debts and that he would transfer all assets and liabilities to his wife. Moreover, the document noted that the wife had used her separate funds to operate the business for over a month and would continue to do so under the terms of the agreement. In March 1978 the husband filed a bankruptcy petition and the trustee objected to his discharge, alleging that the transfer of his property to Mrs. Wilhite was intended to defraud his creditors. The bankruptcy court overruled the trustee's objections and held that the transfer of property to the wife was not an attempt to defraud the husband's creditors. For some mysterious reason the trustee had not initially attempted to set aside the transfer to the wife in the bankruptcy court. A month later, however, he filed suit in state court for that purpose. He alleged that the transfer was made without fair or adequate consideration and with the intent to hinder, delay, and defraud the debtor-husband's creditors. The trustee further alleged that the transferred property remained in the possession of the husband and that the wife knew of the husband's attempt to defraud his creditors. The trial court rejected the wife's argument that the fraudulent conveyance issue had been litigated in the prior bankruptcy proceeding and that the trustee should be estopped from asserting it collaterally. The jury found that the husband had intended to defraud his creditors in the transfer of property to his wife, but that the wife acquired the property with adequate consideration and without notice of the husband's fraudulent intent.⁷⁵ The trial court entered a take-nothing judgment against the trustee. On appeal the trustee urged that the weight of the evidence suggested that the wife's knowledge of her husband's financial status put her on notice of his intent to defraud his creditors. Under Texas law a transfer may be set aside if the purchaser

72. 533 F. Supp. at 71.

73. *Id.* at 70-71 (citing *Freedman v. United States*, 382 F.2d 742, 747 n.9 (5th Cir. 1967); *Johnson v. First Nat'l Bank*, 306 S.W.2d 927, 929 (Tex. Civ. App.—Fort Worth 1957, no writ).

74. 636 S.W.2d 851 (Tex. Ct. App.—Tyler), *rev'd per curiam*, 640 S.W.2d 875 (Tex. 1982).

75. The jury also found that the wife had made payments on the purchase price of a tract of land included in the transfer; that she had made improvements on the land with her separate funds; and that she made the improvements in good faith and with the belief that the land was her separate property.

knows or should have known of a seller's fraudulent intent, even when valuable consideration is paid.⁷⁶ The trustee argued that several badges of fraud compelled the inference that the wife must have had such notice. The court noted that the wife knew of her husband's financial plight and that she failed to inventory the property she had purchased. These facts coupled with the parties' close relationship prompted the appellate court to find that the evidence was sufficient to charge the transferee-wife with notice, and the cause was accordingly remanded.⁷⁷ In a per curiam decision the Texas Supreme Court granted the wife's writ of error.⁷⁸ The court held that the issue of fraudulent conveyance had been litigated in the original bankruptcy proceeding and that the lower courts erred in overruling the plea of collateral estoppel.⁷⁹ The court further concluded that while the trustee had raised the "intent to defraud" issue in the trial court, his failure to request submission of a special issue on the intent to "hinder and delay" resulted in a waiver of any recovery under either claim.⁸⁰ The court affirmed the trial court decision without addressing the appellate court's finding of constructive notice.⁸¹

Disposition of Solely Managed Community Property. In *Spruill v. Spruill*⁸² the trial court found that the husband had created a false community debt in order to defraud his wife of her community interest in stock held in the husband's name. During their marriage the husband had conducted his business through a solely owned corporation and four other corporations in which he and a business associate each owned a fifty percent interest. All of the couple's ordinary living expenses were paid from corporate accounts. About the time the wife filed for divorce the husband's businesses declined, and he executed a series of promissory notes totalling \$358,000 to his business associate. The notes were secured by a pledge of his stock in the four corporations. The associate promptly filed suit in New Orleans to foreclose on all the husband's corporate stock. Although the associate's judgment completely wiped out the community estate, the husband remained on friendly terms with the associate and continued acting as president of one of the corporations at an annual salary of \$12,000. The trial court found that the husband's wholly owned corporation was his alter ego and that the stock was pledged to defraud the wife of her community interest. As a result the trial court awarded the wife all the husband's interest in the corporate stock as well as all the companies' corporate records and personal property. The court also awarded the wife the family home and \$30,000 to reimburse her for community funds expended on the husband's paramour. On review the appellate court affirmed the trial court's division

76. 636 S.W.2d at 855; see TEX. BUS. & COM. CODE ANN. art. 24.02 (Vernon 1968).

77. 636 S.W.2d at 856.

78. 26 Tex. Sup. Ct. J. 63 (Oct. 27, 1982).

79. *Id.*

80. *Id.* at 64.

81. *Id.* at 63-64.

82. 624 S.W.2d 694 (Tex. Ct. App.—El Paso 1981, writ *dism'd w.o.j.*).

and rejected the husband's assertion that the wife's knowledge of the \$30,000 community expenditure constituted a defense to any constructive fraud of the wife's rights.⁸³ The court noted the judicial disfavor of "gifts by the husband to 'strangers' of the marriage, particularly of the female variety."⁸⁴

Post-Divorce Liability. In *Smart v. Crawford Building Material Co.*⁸⁵ a creditor sued both spouses to recover on a debt they incurred during their marriage. During construction of what was to be the couple's future home, the husband set up a charge account with Crawford and charged construction materials over the course of a six month period. The outstanding balance increased to almost \$3,000, and Crawford added a service charge to the unpaid account of \$50 during the two months following nonpayment. Before the couple paid the balance they were divorced. The spouses' property settlement agreement required the husband to assign to his wife any usury claim he might have relative to the interest charged on the Crawford account. The wife, in turn, agreed to indemnify her husband for any indebtedness attributable to the home construction. The husband agreed to quitclaim his interest in the home to his wife, and she was required to sell the home and to place the amount owed to Crawford in an escrow account.

After the divorce Crawford sued both spouses for the principal amount of the debt, but did not seek the service charges earlier imposed. The ex-wife answered with a general denial and filed a cross-action for usury pursuant to the settlement agreement. The trial court awarded Crawford a judgment against the ex-husband for the entire indebtedness, rendered a take-nothing judgment against the ex-wife, and denied her usury claim. On appeal the former wife argued that the trial court erroneously denied her usury claim in failing to find her to be an obligor on the Crawford account, a necessary prerequisite for bringing such an action.⁸⁶ The Tyler court of appeals rejected her appeal on two grounds. The court held first that there was no community debt because the husband had acted alone in setting up the account and had received all delivery tickets, invoices, and statements pertinent to the account.⁸⁷ The court therefore concluded that the debt owed was "not a community debt or joint obligation of both the

83. *Id.* at 698.

84. *Id.* at 697 (citing Quilliam, *Gratuitous Transfers of Community Property to Third Persons*, 2 TEX. TECH L. REV. 23, 43-44 (1970)). On the other hand, if there is no conflict of interest in a county officer's receiving a salary from the county, none arises from the officer's spouse being so employed. Thus the attorney general ruled that a husband as county commissioner does not violate his oath against being interested in contractual dealings with the county if his wife is a salaried employee of the county. TEX. ATT'Y GEN. OP. W-438 (1982).

85. 638 S.W.2d 228 (Tex. Ct. App.—Tyler 1982, no writ).

86. Under Texas law a cause of action for usury is personal to the obligor and nonassignable. *Id.* at 230 n.1.

87. *Id.* at 230. The court cited *LeBlanc v. Waller*, 603 S.W.2d 265 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) for the rule that the community debt presumption can be overcome by sufficient evidence. The court's reliance was misplaced, however, because *LeBlanc* involved the transfer of spousal control of community property pursuant to an agreement between the spouses under § 5.22 of the Family Code. See McKnight, *Annual Survey of Texas Law, Family Law: Husband & Wife*, 34 Sw. L.J. 115, 128-29 (1980).

husband and the wife."⁸⁸ Hence, the ex-wife could not have been the obligor on the Crawford account.⁸⁹ The court further held that because a usury action is in the nature of a penalty, Texas law limits recovery to the obligor.⁹⁰ Consequently, no assignee can maintain an action for usury.⁹¹

Much of the judicial discussion of "community debt" is based on the erroneous supposition that all "community debts" are equally shared by the spouses whether they are both makers of the debt or not. That supposition is not warranted by the basic principles of Texas law. Apart from the context of acquiring necessities, debt incurred by only one spouse does not affect the other spouse at all except that it makes the nonobligated spouse's share of community property liable for payment if the property sought for payment is subject to the sole or joint management of the spouse who incurs the debt.⁹²

*Anderson v. Royce*⁹³ involved the community debt argument as well as a seeming corollary of fraudulent-transfer law. The husband co-signed a third person's promissory note as an accommodation maker. The holder of the note brought suit against both spouses after their divorce. Reversing the trial court's granting of summary judgment in favor of the ex-wife, the court of appeals reiterated the holding that community property reachable during marriage remains liable after divorce and partition of the community estate.⁹⁴ The wife argued that because she was not a party to the written contract, her liability was governed by section 5.61, which defines the liability of spouses for debts incurred during marriage.⁹⁵ She also contended that the debt, if any, should be governed by the two year statute of limitations then in effect for unwritten debts rather than the four year limit applicable to written debts.⁹⁶ The court of appeals rejected this argument

88. 638 S.W.2d at 230. The court apparently thought that a "community debt" and a "joint obligation" are the same thing. Clearly they are not.

89. *Id.*

90. TEX. REV. CIV. STAT. ANN. art. 5069—1.06 (Vernon Supp. 1982-1983); see *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex. 1979) (construing art. 5069—1.06).

91. 638 S.W.2d at 220 (citing *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex. 1979); *South E. Xpress, Inc. v. Bank of Crowley*, 612 S.W.2d 85, 88 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.)).

92. TEX. FAM. CODE ANN. § 5.61 (Vernon 1975). In *Donald R. Klein & Assoc. v. Klein*, 637 S.W.2d 507, 508 (Tex. Ct. App.—Eastland 1982, no writ), it was urged that because the contract of one spouse constituted a "community obligation," suit could not be maintained against the surviving spouse but had to be brought against the deceased spouse's estate or joinder of the decedent's estate was required. Both arguments were summarily rejected. *Id.*

93. 624 S.W.2d 621 (Tex. Ct. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

94. *Id.* at 623 (citing *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975); *Inwood Nat'l Bank v. Hoppe*, 596 S.W.2d 183, 185-86 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.)). For a criticism of *Hoppe*, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 35 Sw. L.J. 93 (1981); see also *Wall v. Wall*, 630 S.W.2d 493, 496-97 (Tex. Ct. App.—Fort Worth 1982, writ ref'd n.r.e.) (wife held liable on two promissory notes signed only by husband). *Cockerham* does not support the proposition, but other authorities do support it. See McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 474 n.361 (1976); Comment, *Bankruptcy After Divorce: Rights and Liabilities of Former Spouses in Texas*, 23 Sw. L.J. 173, 184-85 (1982).

95. See TEX. FAM. CODE ANN. § 5.61 (Vernon 1975).

96. TEX. REV. CIV. STAT. ANN. art. 5527, § 1 (Vernon 1958) (amended 1979). Prior to 1979 a two-year statute of limitation was applicable to debts not evidenced by a contract in

and found that section 5.61 was merely a codification of Spanish and Mexican law prior to 1840 and to common law thereafter.⁹⁷ So construed, the wife's liability, arising not from statute but rather "from the community nature of the debt based upon a contract in writing," was held subject to the four-year limitation governing contract actions.⁹⁸

It is high time that the community debt argument be put to rest. The phrase "community debt" has long been useful in characterizing borrowed money or property that a spouse buys on credit. If the lender or seller does not specifically look to the borrower's or buyer's separate property for payment, it is clear that a community debt has been incurred, and thus that the money borrowed or property bought is community property. But to take the phrase out of this context, as well as to say that the designation of such a debt as "community" makes both spouses liable for it (when only one of them has contracted it), is clearly contrary to the express terms of section 5.61. Under Texas law as amended and recodified in 1969, a community debt means nothing more than that some community property is liable for its satisfaction.⁹⁹ A community debt may at the same time be a separate debt, unless the creditor agrees to seek satisfaction from community property only. Hence when the creditor has not agreed to limit recovery from one marital estate or the other, he may proceed against either for satisfaction. Confining the term community debt to its traditional characterization context would remove a great source of confusion and discourage the tendency of some courts to find separate debts where a section 5.61 community debt was clearly intended by the parties concerned.¹⁰⁰

But a more disciplined use of the term community debt does not solve both problems raised in *Anderson v. Royce*, which does not rest directly on the community debt misnomer, but on the notion that property a creditor could have reached during marriage can likewise be reached after divorce. The latter aspect of *Anderson* was partially addressed by the Texas Supreme Court in *Stewart Title Co. v. Huddleston*.¹⁰¹ The court held that a creditor of one former spouse must first secure a judgment against the

writing. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1958) (amended 1979). All debts are presently governed by a four-year statute of limitation. TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon Supp. 1982-1983). Because of this change, this portion of *Anderson* is of no further practical significance.

97. It is neither. See Recommended Revision and Commentary of the Drafting Committee (art. 4620) 14-15 (1967). For the Hispano-Mexican law, see Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 17-29 (1969); for the pre-1968 law, see McKnight, *Liability of Separate and Community Property for Obligations of Spouses to Strangers*, in CREDITORS' RIGHTS IN TEXAS 330, 333, 338 (J. McKnight ed. 1963).

98. 624 S.W.2d at 623.

99. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 81-82 (1974) [hereinafter cited as McKnight, *1974 Annual Survey*]; see also McKnight, *supra* note 30, at 117; McKnight, *supra* note 94, at 114-16; McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 138-39 (1978).

100. See *Brazosport Bank v. Robertson*, 616 S.W.2d 663 (Tex. Civ. App.—1981, writ dismissed w.o.j.); *Mortenson v. Trammell*, 604 S.W.2d 269 (Tex. Civ. App.—Corpus Christi 1980, writ refused n.r.e.).

101. 598 S.W.2d 321 (Tex. Civ. App.—San Antonio, writ refused n.r.e. per curiam, 608 S.W.2d 611 (Tex. 1980).

owner of the property sought to be seized in satisfaction of the marital debt incurred by the other.¹⁰² Necessarily, the community debt argument will be raised by the creditor in attempting to secure the requisite judgment. But if a nonobligor, former spouse is to be held liable for the other's debt merely because the nonobligor has received property on divorce that would have been subject to satisfaction of the debt during marriage, the court must hold that a transfer by one spouse to the other in anticipation of divorce or by order of the divorce court is prima facie fraudulent if the creditor need not prove fraudulent intent of the transferor or his resulting insolvency. When it is considered that a gift by one spouse to the other is not prima facie fraudulent, surely a transfer in the divorce context is not so.

The 1981 amendment to article XVI, section 15 of the Texas Constitution, allowing spouses to partition their community property "without the intention to defraud pre-existing creditors,"¹⁰³ was designed to allow spouses a means of precluding unsecured creditors' reliance on those authorities allowing satisfaction of one spouse's debts from property that might have been reached prior to its partition on divorce to the other spouse. Thus a partition made by spouses in anticipation of divorce is clearly within the constitutional provision.¹⁰⁴ It may be cogently argued that if spouses can make such a partition, the divorce court should be able to do so for them, with the same effect, when they cannot agree. A court might thus prevent application of those authorities the amendment was designed to limit. A creditor who has failed to assert his claim to property during marriage or to intervene in the divorce should be later foreclosed from pursuing it in the hands of the debtor's former spouse, unless the circumstances of the property division shows an intent to defraud the creditor as in *Steed v. Bost*.¹⁰⁵

Liability Under Federal Law. A number of federal tax cases have reaffirmed the rule that each spouse living under a community property regime is subject to taxation on his or her share of community income.¹⁰⁶ One tax court decision held that under federal tax law as applied to Texas community property doctrine, each spouse is liable for payment on his or

102. The intermediate appellate court in *Huddleston* had held that a divorce decree does not diminish or limit the rights of creditors to proceed against either or both spouses for debts incurred prior to divorce. 598 S.W.2d at 323.

103. TEX. CONST. art. XVI, § 15.

104. See McKnight, *The Constitutional Redefinition of Texas Matrimonial Property As It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY'S L.J. 449, 473-74 (1982). For a comment on the law under the prior constitutional provision, see McKnight, *1974 Annual Survey*, *supra* note 99, at 82.

105. 602 S.W.2d 385 (Tex. Civ. App.—Austin 1980, no writ). In *Steed* the court found fraudulent intent. A division on divorce that makes a debtor insolvent may be covered by TEX. BUS. & COM. CODE ANN. § 24.03 (Vernon 1968). In the case of a marriage dissolved by death, TEX. PROB. CODE ANN. § 45 (Vernon 1980) provides specifically that "the community estate passes charged with the debts against it."

106. See *e.g.*, *Beatty v. Commissioner*, 676 F.2d 150 (5th Cir. 1982); *Alma J. Smith v. Commissioner*, 43 T.C.M. (CCH) 1982-140, at 826; *Roy M. Cline v. Commissioner*, 43 T.C.M. (CCH) 1982-44, at 439.

her respective share even if the couple has been permanently separated.¹⁰⁷ Furthermore, the overpayment of tax by one spouse filing separately cannot offset the deficiency of the other. The tax court sustained the Commissioner's deficiency assessment in another case when the wife filed separately as a married person and included only her annual earnings as her gross income.¹⁰⁸ The court determined that she must add the community income of both spouses together and then declare one-half of the total on her separate return as gross income taxable to her.¹⁰⁹ Conversely, when a husband filed separately and attempted to deduct losses from his income attributable to a community interest in his wife's limited partnership, the Fifth Circuit disallowed the deduction entirely, saying that community property laws did not "wipe out the distinction between husband and wife, nor . . . erase valid transactions made by one spouse."¹¹⁰

The tax court misconstrued the weight of Texas law in *Jones v. Commissioner*¹¹¹ in holding that a separated couple could not agree to allocate their income as separate property and file their tax returns accordingly.¹¹² After their separation the couple entered into an agreement providing that their respective incomes would remain separate property. The husband's tax returns for 1975 and 1976 failed to include his estranged wife's income. The Internal Revenue Service determined that the agreement was invalid under Texas law and included a portion of the wife's earnings in the husband's taxable income. The tax court affirmed the deficiency determination based upon the principle that Texas does not allow its community property laws to be altered by contractual agreement.¹¹³ The court recognized the amendment to section 5.42 allowing the partition of community property, but found that its effective date in 1981 rendered it inapplicable to the spouses' agreement entered into in 1974.¹¹⁴ The court overlooked the line of Texas authority holding that estranged couples could agree to forego the application of community property principles to their subsequent acquisitions.¹¹⁵

A recent United States Supreme Court decision outside the family law area suggested a question regarding divorced spouses' liability for mortgage indebtedness arising from the lender's exercise of a due-on-sale clause. In *Fidelity Federal Savings & Loan v. de la Cuesta*¹¹⁶ the appellees

107. *Roy M. Cline v. Commissioner*, 43 T.C.M. (CCH) 1982-44, at 439 (citing *Hunt v. Commissioner*, 22 T.C. 228, 231 (1954)).

108. *Alma J. Smith v. Commissioner*, 43 T.C.M. (CCH) 1982-140, at 826.

109. *Id.* at 827.

110. *Laney v. Commissioner*, 674 F.2d 342, 347 (5th Cir. 1982). The court cited no Texas authority to support its assertion.

111. 43 T.C.M. (CCH) 1982-277, at 1418.

112. *Id.*

113. *Id.* The court cited *Texas Bldg. & Mortgage Co. v. Rosenbaum*, 159 S.W.2d 554 (1942), *aff'd*, 140 Tex. 325, 167 S.W.2d 506 (1943); *Robbins v. Robbins*, 125 S.W.2d 666, 670 (Tex. Civ. App.—Fort Worth 1939, no writ).

114. 43 T.C.M. (CCH) 1982-277, at 1418 n.5.

115. See McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 419-20 (1976).

116. 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982).

had purchased property subject to a mortgage in favor of the appellant savings and loan association. The loan agreement had a due-on-sale clause providing that if the property was sold without prior notice to the lender, the lender might treat the loan as due in full. The borrower sold the property to the appellees without giving notice to the lender, who responded by demanding payment in full. When the borrower failed to make the payment, the lender instituted foreclosure proceedings against the buyers, who argued that the exercise of the due-on-sale clause violated state judicial precedent that limited a lender's right to enforce such a clause to situations when the lender could show that the transfer unreasonably impaired its security.¹¹⁷ The Supreme Court found, however, that section 5(a) of the Home Owner's Loan Act of 1933¹¹⁸ empowered the Federal Home Loan Bank Board to prescribe regulations governing savings and loan associations.¹¹⁹ One such regulation provided that a federal savings and loan association "continues to have the power to include . . . in its loan instrument" a due-on-sale clause.¹²⁰ The court held that under the preemption doctrine the federal regulation authorizing due-on-sale clauses superseded the inconsistent state law principles restricting federal savings and loan associations from using such provisions in loan instruments.¹²¹

Because the holding permits federal savings and loan associations to exercise due-on-sale clauses upon transfer of the mortgaged property without the lender's consent, many family lawyers questioned whether a division of property on divorce constituted a sale and thus triggered a due-on-sale clause. In apparent response to the Court's holding in *de la Cuesta*, Congress amended the Home Owner's Loan Act to achieve effective preemption of state laws that prohibit due-on-sale clauses in mortgages.¹²² But the amendment specifically provides that a lender may not exercise its option pursuant to a due-on-sale clause in the event of a transfer "resulting from a decree of dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property."¹²³

Homestead: Nature of the Interest. Although the historical development of Texas homestead law has not produced a clear definition of its character, it is sometimes likened to an estate in land rather than a mere exemption from creditors' claims.¹²⁴ Two recent decisions considered the nature of a

117. The borrowers relied upon *Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

118. 12 U.S.C. § 1464(a) (Supp. IV 1980).

119. 102 S. Ct. at 3018, 73 L. Ed. 2d at 670.

120. 12 C.F.R. § 545.8-3(f) (1982).

121. 102 S. Ct. at 3025, 73 L. Ed. 2d at 678-79.

122. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 341, 96 Stat. 1469, 1505.

123. *Id.* at 1506.

124. See *McKnight*, *supra* note 30, at 120-21; see also *United States v. Rogers*, 649 F.2d 1117, 1127 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 1748, 72 L. Ed. 2d 160 (1982). For an account of the early history of the institution, see *McKnight*, *Protection of the Family Home*

surviving spouse's interest in a homestead. In *Fiew v. Qualtrough*¹²⁵ the spouses entered into a mutual will vesting the survivor with a life estate in the eighty-five acre community homestead with the remainder in the couple's niece. The will was probated on the husband's death. On the niece's death the widow wrote a new will making no mention of the homestead estate and thereafter conveyed her undivided one-half interest in the property to Fiew. On the widow's death the niece's heirs brought suit to recover her interest in the realty. The trial court held that the spouses' original will was "joint, mutual, and contractual," vesting a life estate in the surviving wife and a remainder in the niece. The court further found that the conveyance was subject to a constructive trust in favor of the niece's heirs. On appeal Fiew asserted that the alleged contractual will giving the surviving spouse a life estate was without consideration because the wife was "already entitled to the use and occupancy of the tract for the remainder of her life as part of her Constitutional homestead rights,"¹²⁶ that is, that the widow's right did not rest on the contract but was already possessed.¹²⁷ The court rejected this argument and found that the homestead right was "not a life estate in the pure sense of that term"; rather it "*partakes of the nature of an estate for life . . .*"¹²⁸ It remains of such nature only so long as the property retains its homestead character and can therefore be lost through abandonment.¹²⁹ Hence, the widow's homestead rights were not indefeasibly vested as were those in the life estate contractually created through the mutual will. The court concluded that "[w]hile the two ran concurrently, it is obvious that she received an estate in the land as a result of the will to which her Constitutional homestead rights would not have entitled her."¹³⁰

The Amarillo court of appeals in *Hill v. Hill*¹³¹ commented on the nature of the homestead right in an attempt to determine the duties and liabilities arising therefrom. On the death of her husband the widow brought suit to have a homestead set aside for her continued occupancy. The couple's home was the separate property of her deceased husband subject to a valid mortgage. The husband's executors had paid insurance, taxes, and interest on the mortgage since the husband's death and sought reimbursement from the surviving spouse. The trial court ordered the wife to reimburse the estate for these payments. The wife did not contest the payment of taxes, but appealed the order to pay for the insurance and the

from *Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 SW. HIST. Q. 369 (1983).

125. 624 S.W.2d 335, 336 (Tex. Ct. App.—Corpus Christi 1981, writ ref'd n.r.e.).

126. *Id.*

127. The appellant relied upon *Hill v. Aldrich*, 242 S.W.2d 465, 466 (Tex. Civ. App.—San Antonio 1951, writ dism'd).

128. 624 S.W.2d at 337 (quoting *Jones v. Dewbre*, 13 S.W.2d 233, 234 (Tex. Civ. App.—Austin 1928, no writ) (emphasis in original)).

129. 624 S.W.2d at 337; see *Rancho Oil Co. v. Powell*, 142 Tex. 63, 68, 175 S.W.2d 960, 963 (1943); *Sparks v. Robertson*, 203 S.W.2d 622, 623 (Tex. Civ. App.—Austin 1947, writ ref'd).

130. 624 S.W.2d at 337.

131. *Hill v. Hill*, 623 S.W.2d 779 (Tex. Ct. App.—Amarillo 1981, writ ref'd n.r.e.).

interest on the mortgage. The court of appeals held that the homestead "contain[ed] every element of a life estate" and thus analogized the wife's duties and liabilities to those of a life tenant.¹³² Her obligations therefore included preservation of the estate by paying interest on the existing encumbrance. She was not, however, required to benefit the remaindermen by making payments toward retirement of the principal, nor was she bound to keep the property insured for protection of their future interests.¹³³

Homestead: Designation and Extent. Prior to the 1973 amendment to the Texas Constitution the homestead exemption extended only to the family, to the single adult acting as head of the family, or to the surviving family constituent.¹³⁴ The availability of the homestead protection necessarily turned on the existence of a family relationship, so the divorce of a childless couple terminated the existence of the homestead.¹³⁵ The 1973 amendment recognized, and the statute now provides, that the exemption extends to "a single, adult person, not a constituent of a family."¹³⁶ The creation of the single-adult homestead thus obviates the cessation of the homestead upon divorce of a childless couple when one spouse continues to maintain the property as a homestead.¹³⁷ In *Renaldo v. Bank of San Antonio*¹³⁸ the Texas Supreme Court determined that prior to the amendment creating a single-adult homestead, a possessory conservator of a child could establish a family homestead as a single parent after divorce.¹³⁹ The couple had entered into a separation agreement providing that the wife would receive the family residence as her separate property and the husband would receive another home to be purchased shortly thereafter. A divorce decree incorporating the agreement gave custody of the couple's only child to the wife and ordered the husband to make periodic support payments. Less than a year later the father executed a deed of trust covering his new home in order to secure a preexisting commercial debt. The loan proceeds were not used to purchase, pay taxes on, or improve the father's property. Because an enforceable lien may only attach to a homestead under those circumstances,¹⁴⁰ the father brought suit to invalidate

132. *Id.* at 780 (quoting *Sargeant v. Sargeant*, 118 Tex. 343, 352, 15 S.W.2d 589, 593 (1929)); see *Thompson v. Thompson*, 149 Tex. 632, 645, 236 S.W.2d 779, 787 (1951).

133. 623 S.W.2d at 780-81; see *Richardson v. McCloskey*, 276 S.W. 680, 684 (Tex. Comm'n App. 1925, opinion adopted); *Brokaw v. Richardson*, 255 S.W. 685, 688 (Tex. Civ. App.—Fort Worth 1923, no writ).

134. TEX. CONST. art. XVI, § 52; *Williams v. Williams*, 569 S.W.2d 867, 869 (Tex. 1978).

135. *Zapp v. Strohmeyer*, 75 Tex. 638, 639, 13 S.W. 9, 10 (1890); see *McKnight*, *supra* note 30, at 125, n.283.

136. TEX. CONST. art. XVI, § 50; TEX. REV. CIV. STAT. ANN. art. 3833 (Vernon Supp. 1982-1983).

137. See *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, writ *dism'd w.o.j.*).

138. 630 S.W.2d 638 (Tex. 1982).

139. *Id.* at 639.

140. TEX. CONST. art. XVI, § 50 provides in part:

The homestead of a family, or of a single adult person, shall be, and is hereby

the deed of trust, asserting that the property was his family homestead. The trial court found that the property was the father's homestead at the time the deed of trust was executed and therefore held the instrument invalid. The court of appeals reversed on the ground that the father had failed to establish the existence of his homestead at the time of divorce.¹⁴¹ On writ of error the supreme court held that the father "had the burden to prove he had established a family homestead . . . prior to the execution of the deed of trust."¹⁴² To sustain this burden the court required evidence that he was part of a family unit when the property acquired its alleged homestead character.¹⁴³ In reversing the appellate court's opinion that homestead rights must exist prior to divorce, the court noted that a family homestead can exist between a divorced spouse and a dependent child even though managing conservatorship may have been granted to the other spouse.¹⁴⁴ As long as the child is dependent and the father owes a duty of support, he is entitled to a homestead as the head of a family.¹⁴⁵ Moreover, the homestead claim is not limited to the spouse who remains on the original family homestead. The court found that the right derives from the relationship of the parent to his or her family so that continued residence by one spouse in the prior family residence does not affect the other's right to establish an independent homestead elsewhere.¹⁴⁶ The court concluded that the father had occupied the home prior to the execution of the deed and that he had the requisite intent to establish a homestead.¹⁴⁷ The end result, therefore, was judicial approval of concurrent family homesteads for the relationship of each parent to the same child.

Mere intention alone will not establish a homestead on property suffi-

protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon

An equitable charge may attach, however, to one spouse's separate homestead in order to secure the other spouse's right of reimbursement against the property or to secure payment of spousal indebtedness for the homestead interest awarded on divorce. See McKnight, *supra* note 30, at 125. A subsequent lender who discharges a prior lien validly fixed on homestead property is entitled to be subrogated to the position of the prior lienholder. Leonard v. Brazosport Bank, 628 S.W.2d 216, 219 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); cf. First Nat'l Bank v. McClung, 483 S.W.2d 935, 937 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.) (bank could not indirectly enforce lien and forced sale upon debtor's homestead); see also Abney v. Powell, Inc., 669 F.2d 348, 349-50 (5th Cir. 1982) (nature of lienholder's interest in homestead and impact of equity on discharge of judgment lien on homestead).

141. 626 S.W.2d 318, 319-20 (Tex. Civ. App.—Eastland 1981).

142. 630 S.W.2d at 639. "Apparently, [the] court [of appeals] was of the opinion that any homestead rights of a divorced person must have existed prior to the divorce. We disagree."
Id.

143. *Id.*

144. *Id.*

145. *Id.* The court cited Schulz v. L.E. Whitham & Co., 119 Tex. 211, 217, 27 S.W.2d 1093, 1095 (1930), Woods v. Alvarado State Bank, 118 Tex. 586, 589, 19 S.W.2d 35, 35 (1929), and other authorities as supporting the existence of a family homestead in the possessory conservator.

146. 630 S.W.2d at 640.

147. *Id.*

cient to insulate it from creditors' claims. In the absence of actual occupancy, some overt act of preparation must accompany actual intent in order to establish a homestead right.¹⁴⁸ The Corpus Christi court of appeals recently held that the purchase of building materials by a lot-owner along with the preparation of building plans was sufficiently overt to establish the existence of a homestead on an unoccupied and vacant lot. In *Clark v. Salinas*¹⁴⁹ the homestead claimant sought to protect a 50- by 135-foot lot from a judgment creditor's forced sale. The district court granted a temporary injunction enjoining execution on the property, and the creditor appealed. Although the property owner never resided upon, improved, or utilized the land in any manner, he had purchased construction materials that he stored at another location. In contemplation of building his own home, the owner had drawn up structural plans, but an injury had prevented him from beginning actual construction. In view of these facts the judgment creditor argued "that the absence of any activity on the land must be equated with an absence of any overt act required for a homestead claim."¹⁵⁰ The court rejected this argument and determined that the necessary overt act must evidence an intent to occupy the land, not actual occupation itself. The proof of an overt act, in the court's view, merely serves "to corroborate the claimant's testimony that he did intend to occupy the property as a homestead."¹⁵¹ The court perceived no reason that the proof must relate to activities on the land itself and found the acts conducted by the lot owner sufficient to establish his single adult homestead.¹⁵² The few facts that can be elicited from the opinion are consistent with the outcome, but one must question how overt acts must be in order to evidence the requisite intent for establishing the homestead. In light of *Clark* an owner of unimproved property might arguably insulate his raw land from creditors' claims by conveniently obtaining building plans and some construction materials in anticipation of future home building. The *Clark* decision espouses a very liberal interpretation of the proof necessary to prove the homestead exemption.¹⁵³

A Houston court of appeals agreed that proof of concurrence of act and intent on the part of the owner is required to prove homestead use and added the anachronistic comment that the husband, as head of the family, must select the homestead.¹⁵⁴ In a suit to determine ownership of certain real property, parents brought suit against both their sons and their respec-

148. See *Cheswick v. Freeman*, 287 S.W.2d 171, 173 (Tex. 1956); *Gilmore v. Dennison*, 131 Tex. 398, 400, 115 S.W.2d 902, 902 (1938); *McKnight*, *supra* note 30, at 126.

149. 626 S.W.2d 118 (Tex. Ct. App.—Corpus Christi), *writ ref'd n.r.e. per curiam*, 628 S.W.2d 51 (Tex. 1982).

150. 626 S.W.2d at 120.

151. *Id.* (citing *Vaughan v. Sterling Nat'l Bank & Turst Co.*, 124 S.W.2d 440, 445 (Tex. Civ. App.—El Paso 1938, *writ ref'd*)).

152. 626 S.W.2d at 120.

153. *Cf. Bush & Proctor, Piercing the Homestead: The Trial of an Excess Value Case*, 34 BAY. L. REV. 387 (1982).

154. *Ellisor v. Ellisor*, 630 S.W.2d 746, 747 (Tex. Ct. App.—Houston [1st. Dist.] 1982, *no writ*).

tive wives. The trial court rendered judgment for the parents and imposed a constructive trust on that part of the property that one of the sons and his wife alleged was their homestead. The son and daughter-in-law were subsequently divorced and only the ex-wife appealed, alleging that a portion of the property was her homestead. Although she was the sole appellant, the court said that her ex-husband's intent was conclusive as to the homestead designation.¹⁵⁵ The appellate court found that the evidence amply supported the jury's findings that a joint venture relationship existed between the appellant's ex-husband and his father and that he did not intend the home to be his permanent homestead.¹⁵⁶ The son and his wife lived rent-free in a dwelling for which the father paid. The father had bought the land and had built the house with the father's proceeds from selling another house. The son had agreed to live in the house only until the father found a buyer. Any profits were to be divided by the father and the son. In commenting on the husband's intention and the "settled law" giving the husband the sole right to select the homestead, the court introduced an entirely extraneous issue into the discussion, which provokes argument concerning the amendment to the Texas Constitution providing for equality under the law for both sexes.¹⁵⁷ The court should have said that one cotenant (who is not a surviving spouse) cannot assert a right of homestead against another without an enforceable agreement that the claimant holds the right of homestead occupancy.¹⁵⁸ It was therefore the father's intention, not the son's, that was relevant in this situation. But because the son-husband as cotenant asserted no agreement with his father, and the father implicitly denied any such understanding in bringing his suit, the homestead claim could not be maintained.

Homestead: Exemption in Bankruptcy. Under section 541 of the Bankruptcy Code the debtor's property becomes that of the bankruptcy estate upon commencement of bankruptcy proceedings.¹⁵⁹ At that point the debtor has the option of choosing to exempt property, including the homestead, under either the rather restricted list of exemptions enumerated in section 522(d),¹⁶⁰ or of asserting that the property is exempt under other federal provisions or applicable state law, unless the state of domicile prohibits such an option.¹⁶¹ Texas has taken no action inconsistent with the

155. *Id.*

156. *Id.* at 748.

157. *Id.* at 747; see TEX. CONST. art. I, § 3a, adopted in November 1972. In *Burk Royalty Co. v. Riley*, 475 S.W.2d 566, 568 (Tex. 1972), the court had restated the old rule but hinted that it might not be viable much longer. *Id.* at 569.

158. See *Scoggins v. Taylor*, 248 S.W.2d 549, 552 (Tex. Civ. App.—Amarillo 1952, writ ref'd).

159. 11 U.S.C. § 541 (Supp. III 1979).

160. *Id.* § 522(d). That section provides a list of eleven types of property that may be claimed as exempt.

161. *Id.* § 522(b)(2)(A) (Supp. III 1979); see *Dole, The New Federal Bankruptcy Code: An Overview and Some Observations Concerning Debtors' Exemptions*, 17 HOUS. L. REV. 217 (1980); Comment, *The New Bankruptcy Code: A Comparison of Texas and Federal Exemptions*, 17 HOUS. L. REV. 373 (1980). See also *Field & Young, The Constitutionality of Bank-*

debtor's right to exercise that option. Texas debtors choosing to use the state exemption system invoke the protection of articles 3833, 3835 and 3836 to exempt their homestead and other property from administration in bankruptcy.¹⁶²

In bankruptcy proceedings the issue often arises whether the debtor can sufficiently prove the establishment of the homestead in order to invoke the protection of the statutory exemption. The debtor bears the initial burden of demonstrating the nature of the property and its use during the relevant time in order to establish its homestead character.¹⁶³ The homestead laws are liberally construed in favor of the homestead claimant, however, and once he proves those rights the burden shifts to the creditor to show by clear and satisfactory evidence¹⁶⁴ its termination by alienation, abandonment, or other divestiture.¹⁶⁵ The question of abandonment is one of fact, and Texas courts require a showing of departure from the residence with a fixed intention not to return. A number of cases in the bankruptcy court for the northern district of Texas addressed the abandonment issue and evinced a generally liberal attitude toward granting homestead protection. One case recognized the continued existence of a homestead although the co-owners of the property had left the county after their divorce and had leased the property to a third party for over four years.¹⁶⁶ The court held that the creditor failed to show that the debtor had a fixed intention not to return.¹⁶⁷ The court was persuaded by the debtor's testimony that he had left because of the lack of employment opportunities but planned to return when economic conditions improved.¹⁶⁸

In *In re Hays*¹⁶⁹ the court similarly concluded that a married rural-dweller could claim a homestead in rural acreage of not more than two hundred acres although he did not reside there but had used it to provide for his family.¹⁷⁰ In *Hays* the debtor had borrowed money and purported to put a lien on an undeveloped tract of land located seventy miles from his rural residence. Although the debtor failed to show overt acts sufficient to establish a rural homestead for residential use, the court concluded that recent cases suggested the availability of a rural business homestead if the claimant were a rural dweller in the same general area.¹⁷¹ In invalidating

ruptcy Code § 522(b)(1) and State Bankruptcy Exemptions, or: Does § 522(b)(1) Mean What It Says?, 36 PERS. FIN. L.Q. REP. 52 (1982).

162. TEX. REV. CIV. STAT. ANN. arts. 3833, 3835, 3836 (Vernon Supp. 1982-1983).

163. See *supra* notes 148-58 and accompanying text.

164. See *West v. Austin Nat'l Bank*, 427 S.W.2d 906, 912 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.); *Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.); see also *Norman v. First Bank & Trust*, 557 S.W.2d 797, 801 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (proof of new homestead establishes abandonment as matter of law).

165. See *Sullivan v. Barnett*, 471 S.W.2d 39, 43 (Tex. 1971); *Woods v. Alvarado State Bank*, 118 Tex. 586, 595, 19 S.W.2d 35, 38 (1929).

166. *In re Floyd*, No. 281-00149 (Bankr. N.D. Tex. Mar. 10, 1982).

167. *Id.*, slip op. at 3.

168. *Id.*

169. No. 282-00023 (Bankr. N.D. Tex. Aug. 4, 1982).

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

171. *Id.*, slip op. at 6; see *Sims v. Beeson*, 545 S.W.2d 262, 263-64 (Tex. Civ. App.—Tyler

the lien the court held that evidence of clearing, irrigating, and farming the land, coupled with the expenditure of significant amounts of money in doing so, were sufficient overt acts to exempt the land as a place where the debtor provided for his family.¹⁷²

In *In re Orman*¹⁷³ a single adult claimed rural homestead entitlement to 110 acres. The debtor had resided on the property for nine years, but the residence was destroyed by fire, causing the debtor and his wife to move to a rented house in a nearby town. The couple was then divorced. The debtor lived in the rental property for over five years and was residing there when the bankruptcy proceeding was commenced. He had continued limited farming on the alleged homestead but derived the majority of his income from other sources. His intentions to return and rebuild a residence were vague and indefinite, and the judgment creditor argued that the debtor had clearly abandoned his homestead. The court held, however, that the creditor failed to show that the debtor had a fixed intention not to return and that merely nominal productivity of the property was inconclusive.¹⁷⁴ The court granted the homestead exemption for one hundred acres of the tract, the maximum acreage allowed to a single adult under article 3833.¹⁷⁵ When an urban residential and business homestead are both claimed they must be located in the same urban area.¹⁷⁶ Clearly then, if one is claiming an urban business homestead without an urban residential homestead the business homestead must be in the same urban area as the dwelling place. The analogous rule with respect to a claim of a rural nonresidential homestead is recognized in *In re Hays*.¹⁷⁷ The difficulty with the conclusion in *Orman* is that the claimant had become an urban dweller and had asserted a nonresidential rural homestead contrary to the rule in *Exall v. Security Mortgage & Title Co.*¹⁷⁸ But if the claimant was asserting a rural residential homestead and the trustee was unable to show abandonment, the conclusion is incontestable.¹⁷⁹

Exempt Personalty. Article 3836 exempts a family's personal property not in excess of \$30,000.¹⁸⁰ This exemption from seizure for the satisfaction of liabilities extends to tools, equipment, apparatus, and books necessary to

1976, writ ref'd n.r.e.). *But see* *Cocke v. Conquest*, 35 S.W.2d 673, 677 (Tex. 1931) (residence normally an element of homestead). The court in *Hays* allowed the assertion of a rural business homestead although the debtors did not have a rural residential homestead; analogizing it to cases in which debtors were permitted to claim an urban business homestead without an urban residential homestead. No. 282-00023, slip op. at 6. The court cited *Lewis v. Morrison Supply Co.*, 231 F.2d 632, 634 (5th Cir. 1956); *City of El Paso v. Long*, 209 S.W.2d 950, 954 (Tex. Civ. App.—El Paso 1947, writ ref'd n.r.e.).

172. No. 282-00023, slip op. at 7-8.

173. No. 582-000333 (Bankr. N.D. Tex. June 16, 1982).

174. *Id.*, slip op. at 5-6.

175. For the text of the single adult, rural homestead provision, see TEX. REV. CIV. STAT. ANN. art. 3833(a)(2) (Vernon Supp. 1982-1983).

176. *Id.*

177. *See supra* note 169.

178. 39 S.W. 959 (Tex. Civ. App.—Dallas 1897, writ ref'd).

179. *Id.* at 960.

180. TEX. REV. CIV. STAT. ANN. art. 3836 (Vernon Supp. 1982-1983). Related provisions

the family, as well as certain types of motor vehicles. Under section 522(f) of the Bankruptcy Act, if a debtor has waived his exemptions in favor of an unsecured creditor, he may avoid a nonpossessory, non-purchase-money lien that impairs an exemption of "implements, professional books, or tools of the trade."¹⁸¹

The Fifth Circuit in a Louisiana case, *In re McManus*,¹⁸² recently analyzed whether an exemption is allowable for encumbered personal property in this situation. The case consolidated actions of couples who sought to avoid nonpossessory, non-purchase-money chattel mortgages on certain household goods and furnishings. The couples sought to invoke section 522(f), but the court held that the debtors must first be entitled to an exemption under section 522(b) as the court interpreted subsection (f) to provide.¹⁸³ Subsection (b) expressly grants the state the power to allow its debtors to use either the federal list of exemptions or those provided by other federal or state law. Because the court found that Louisiana had chosen to limit its debtors to the state list of exemptions, and because household goods and furnishings that have been encumbered by a chattel mortgage are specifically not entitled to an exemption under Louisiana law,¹⁸⁴ the debtors were not entitled to the benefits of section 522(f). At least one bankruptcy court in Texas has noted the similarity of the Louisiana statute to the Texas personalty exemption statute and held that the Fifth Circuit's holding controls the attempted exemption of Texas personalty under section 522(f).¹⁸⁵ Whereas Louisiana law specifically states that encumbered moveables are not exempt, Texas law merely allows such property to be encumbered without any specific statutory provision.¹⁸⁶ Following *McManus* and the literal language of the statute, the court held in *In re Evans*¹⁸⁷ that a bankrupt orthodontist could not exempt his validly encumbered dental or orthodontic tools and equipment nor the cash value of insurance policies on his life that had been assigned to a lender as col-

of TEX. TAX CODE ANN. § 11.16 (Vernon Supp. 1982-1983) are construed in TEX. ATT'Y. GEN. OP. MW-451 (1982).

181. 11 U.S.C. § 522(f) (Supp. III 1979). It must be emphasized that Texas exempt personalty is subject to encumbrance without any waiver, but the exempt homestead cannot be encumbered for purposes not enumerated in the Texas Constitution even if the owner or manager of the property purports to waive its exempt character.

182. 681 F.2d 353 (5th Cir. 1982).

183. *Id.* at 355. "Significantly, the avoidance provisions of section 522(f) are available to debtors seeking to avoid a lien only 'to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b)' of section 522." *Id.* The dissent argued, however, that the Bankruptcy Code does not grant the states authority to preempt any subsection of § 522 other than (b), which concerns the exemption. The dissent reads the majority decision to hold that a state "can by statute preclude a debtor from availing himself of the loan avoidance provisions found in § 522(f)." *Id.* at 358 (Dyer, J., dissenting); see 11 U.S.C. § 522(b) (Supp. III 1979).

184. LA. REV. STAT. ANN. § 13:3885 (West Supp. 1983).

185. *In re Evans*, 25 Bankr. 105 (Bankr. N.D. Tex. 1982).

186. TEX. REV. CIV. STAT. ANN. art. 3836(a) (Vernon Supp. 1982-1983). The phrase "except for encumbrances properly fixed thereon" in art. 3836(a) refers to the computation of the exempt amount and not to this Texas rule.

187. 25 Bankr. at 110.

lateral.¹⁸⁸ The court can be excused for following *McManus* because the Fifth Circuit court itself seems to have been misled by the draftsman of the federal act. Actually neither Louisiana nor Texas law clearly fits the situation addressed by subsection (f), which seems to be directed to those states that prohibit encumbrance of exempt personalty but allow waiver of the prohibition. But if the subsection was meant to avoid non-purchase-money liens on exempt property generally (as it can be construed to mean and as the report of the House Judiciary Committee suggests), then the benefits of subsection (f) should be claimable in both Louisiana and Texas. Even if the Fifth Circuit court was correct in its analysis of Louisiana law, the court seemed to leave the way open for reaching a different conclusion as to Texas law when it said that “[i]f Louisiana had not expressly defined mortgaged household goods and furnishings out of the list of exempt property, the result would be arguably different.”¹⁸⁹ Hence *In re Maricle*,¹⁹⁰ earlier decided by the same court that rendered the opinion in *Evans*, is the preferable holding.

The choice between federal and state exemption systems under section 522 permits each debtor in a joint bankruptcy proceeding to claim exemptions under either system.¹⁹¹ In *In re Hoeffner*¹⁹² the wife chose the federal exemption scheme and the husband sought protection under Texas law. The court concluded that in light of the Fifth Circuit’s decision in *In re Cannady*,¹⁹³ “a debtor-spouse . . . may claim the exemption in the entire community ownership interest in real or personal property” that his creditors could reach, regardless of the fact that the debtor-spouse owns only an undivided one-half interest in that property.¹⁹⁴ Hence, because the wife’s creditors can reach community property over which she has sole or joint management, she can exempt more than her one-half property interest subject only to the dollar limitations placed upon the exemption by applicable federal law. The court also determined that the husband could not claim an exemption under Texas law for his wife’s current wages and federal pension.¹⁹⁵ He wanted to do so because his wife had chosen the federal exemption, but he was precluded because those assets were not subject to the payment of his debts. Rather, they were community prop-

188. *Id.* at 108. The court determined, however, that the divorced debtor could claim the family personal property exemption of up to \$30,000, to the extent that it was unencumbered property, because he had a clear duty to support his minor daughter as possessory conservator and a moral obligation to support his two sons attending universities. He was, therefore, deemed to be “head of a family” for exemption purposes. *Id.* at 107-08; see *Crow v. Burmeister*, 26 S.W.2d 447 (Tex. Civ. App.—El Paso 1930, no writ).

189. *In re McManus*, 681 F.2d at 357.

190. 25 Bankr. 36, 37-38 (Bankr. N.D. Tex. 1982).

191. 11 U.S.C. § 522(m) (Supp. III 1979); see also *In re Maitland*, 13 Bankr. 928 (Bankr. S.D. Tex. 1981).

192. No. 581-00061 (Bankr. N.D. Tex. Feb. 16, 1982).

193. 653 F.2d 210 (5th Cir. 1981); see McKnight, *supra* note 30, at 127-28.

194. No. 581-00061, slip op. at 2.

195. *Id.* at 3-4.

erty subject to the sole management of the wife.¹⁹⁶

Article 3826(a)(3) sets out the specific provisions for exemption of motor vehicles.¹⁹⁷ One court has held that the enumeration of specific types of travel precludes an exemption claim of similar means of travel as tools of trade under article 3836(a)(2).¹⁹⁸ A recent decision took a different tack in denying an attempt to avoid a lien on a tractor and two cattle trailers on the grounds that the debtors had leased the vehicles to others, thus making them lessors of rolling stock. Hence, the vehicles were not "tools, equipment or apparatus" of a trade but only items of leasing inventory.¹⁹⁹ Another bankruptcy decision held that the use of a truck by a mechanic-debtor to transport his tools to and from work was not "a reasonably necessary tool or implement of his trade" entitling him to an exemption from a nonpossessory, non-purchase-money lien.²⁰⁰ This interpretation seems inordinately narrow.

IV. DIVISION ON DIVORCE

Property Settlement Agreements. Texas courts encourage settlement agreements to facilitate divorce and the division of marital property.²⁰¹ If the provisions of a valid agreement are not incorporated in the decree, they are enforceable under general principles of contract law.²⁰² If the settlement agreement is set forth in the decree or is incorporated by reference and approved by the trial court, it is accorded the same finality as any other judgment and binds the parties.²⁰³ The settlement terms merge into the judgment and preclude the parties from raising contractual defenses to en-

196. *Id.* at 4; see TEX. FAM. CODE ANN. §§ 5.22, 5.61 (Vernon 1975). *But see In re Barnes*, 14 Bankr. 788 (Bankr. N.D. Tex. 1981).

197. TEX. REV. CIV. STAT. ANN. art. 3836(a)(3) (Vernon Supp. 1982-1983), construed in TEX. ATT'Y GEN. OP. MW-502 (1982).

198. *In re Gavin*, No. 74-G-27 (Bankr. S.D. Tex. July 7, 1975). For a critical evaluation of *Gavin*, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 152-53 (1979).

199. *In re Dickerson*, No. 281-00148, slip op. at 3 (Bankr. N.D. Tex. Jan. 5, 1982).

200. *In re Maricle*, 25 Bankr. 36, 38 (Bankr. N.D. Tex. 1982).

201. See, e.g., *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967); *Mikeska v. Mikeska*, 584 S.W.2d 565, 566 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ). On the underlying scope of spousal freedom to change the character of their marital property generally, see Comment, *Amendment to Article XVI, § 15 of the Texas Constitution: Greater Uniformity Among the Community Property States*, 21 SO. TEX. L.J. 239 (1982); Comment, *The Texas Marital Property Amendment: An Analysis of Its Meaning and Effect*, 33 BAY. L. REV. 307 (1982).

202. *Deen v. Deen*, 631 S.W.2d 215, 216-17 (Tex. Ct. App.—Amarillo 1982, no writ); *Kennedy v. Kennedy*, 619 S.W.2d 409, 410 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Vickers v. Vickers*, 553 S.W.2d 768, 769-70 (Tex. Civ. App.—Beaumont 1977, no writ); *Boyd v. Boyd*, 545 S.W.2d 520, 523 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); *O'Benar v. O'Benar*, 410 S.W.2d 214, 217 (Tex. Civ. App.—Dallas 1966, writ dism'd); *Simpson v. Simpson*, 387 S.W.2d 717, 719 (Tex. Civ. App.—Eastland 1965, no writ); *Eagle Lumber Co. v. Trainham*, 365 S.W.2d 702, 704 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).

203. *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979); *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967); see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 34 Sw. L.J. 115, 146-47 (1980).

forcement.²⁰⁴ Inasmuch as the provisions of Family Code section 3.631(c) seem to allow the court discretion to give contractual alimony provisions effect,²⁰⁵ those provisions are an exception to the rule of merger because the court otherwise lacks general authority to order post-divorce ex-spousal maintenance.²⁰⁶

Two recent cases dealt with decrees incorporating settlement agreements with contractual alimony provisions entered long prior to the effective date of section 3.631. In *Chess v. Chess*²⁰⁷ the ex-husband discontinued support payments to the ex-wife required by a property settlement agreement approved by the trial court. Upon suit by the ex-wife to enforce the agreement the husband argued that the wife had breached the contract by failing to provide full support for their minor child as they had agreed.²⁰⁸ The trial court awarded the full amount of the unpaid contractual support to the ex-wife, and the appellate court affirmed.²⁰⁹ The court denied the husband's interposition of a contractual defense and found the action to be an impermissible collateral attack upon the prior judgment, which required the mother to support the child but not as a condition for receiving payments of support.²¹⁰ In *Conner v. Bean*²¹¹ the ex-wife brought suits for breach and anticipatory breach of a contractual alimony agreement incorporated in the decree. The court held that the husband's contractual defenses were barred because the making of them amounted to a collateral attack on the final divorce decree.²¹² If these conclusions are sound, section 3.631 merely codifies existing principles of law. In *Conner* the court also rejected the ex-husband's argument that the contractual duty to pay alimony allowed termination of payments on subsequent remarriage of the ex-wife. The court concluded that the settlement was a property division and that a settlement of a fixed sum in lieu of property rights remains

204. *Ex parte* Goren, 595 S.W.2d 841 (Tex. 1979); *Peddicord v. Peddicord*, 522 S.W.2d 266 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 86 (1976).

205. TEX. FAM. CODE ANN. § 3.631(c) (Vernon Supp. 1982-1983).

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

207. 627 S.W.2d 513 (Tex. Ct. App.—Corpus Christi 1982, no writ).

208. *Id.* at 515. The agreement provided for maintenance of the ex-wife but did not include specific child support provisions. The ex-wife was awarded custody of the child and was required to provide "all necessities and support, including but not limited to educational expenses of said minor child." Six years later the mother found the child unmanageable and sent the child to reside with the ex-husband. *Id.*

209. *Id.* at 516.

210. *Id.* In *Nagle v. Nagle*, 633 S.W.2d 796 (Tex. 1982), the post divorce dispute had gone a step further. The parties had composed their differences concerning breach of the settlement agreement on the basis of an undertaking of one to convey land to the other. But the agreement to convey was not evidenced by a writing so that it could be enforced. *Id.* at 788-89.

211. 630 S.W.2d 697 (Tex. Ct. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

212. *Id.* at 699. Compare *Walker v. Walker*, 619 S.W.2d 196 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (ex-wife's suit to accelerate payments amounted to collateral attack on the divorce decree).

unaffected by the wife's remarriage.²¹³ The court went on to say that payment imposed by an agreement need not be expressly referable to any particular property owned by the parties.²¹⁴ But if an agreement is to be construed as a property division, logic seems to require that a provision for support as an incident of division must refer to the existence of some property to be divided.

Disputes over ownership and beneficial rights in insurance policies often arise out of property settlement agreements made in a divorce context. In *Gillespie v. Moore*²¹⁵ the former wife sued an insurance company, claiming the proceeds of her ex-husband's life insurance policy as named beneficiary. On divorce the ex-spouses had entered into a property settlement agreement, incorporated in the divorce decree, that transferred to the husband all interest in a \$10,000 life insurance policy. The ex-husband remarried, but failed to change the designation of the ex-wife as beneficiary. In determining whether the settlement agreement prevented the ex-wife from receiving the proceeds, the court distinguished ownership rights from beneficial rights in the policy. The court noted that a spouse can convey an ownership interest in a policy without necessarily losing the right to receive the proceeds as the designated beneficiary.²¹⁶ If, however, the agreement clearly provides that the spouse is surrendering any claim to the proceeds as beneficiary, those rights are lost.²¹⁷ The court found that the language in the property settlement agreement was unambiguous and that it expressed an intention by the ex-wife to relinquish all ownership and beneficial interest in the policy.²¹⁸

In *Teaff v. Ritchey*²¹⁹ both the insured's ex-wife and surviving wife claimed the proceeds from a \$50,000 policy on the life of the deceased husband. After his remarriage the insured designated his surviving spouse as the primary beneficiary. In a court-approved property settlement agreement the husband had earlier agreed to take "all personal effects" while the ex-wife received "all other community property" not expressly given the husband. The court of appeals held that the phrase "personal effects" did not include the insurance policies; so the ex-wife received the proceeds as community property under the residuary clause of the agreement.²²⁰ Because she had sole ownership of the policies, the change of beneficiary

213. 630 S.W.2d at 700; see Annot., 48 A.L.R.2d 270, 302 (1956).

214. 630 S.W.2d at 700 (citing *Miller v. Miller*, 463 S.W.2d 477 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.)). In *Cohen v. Cohen*, 632 S.W.2d 172 (Tex. Ct. App.—Waco 1982, no writ), the ex-husband filed suit for a declaratory judgment seeking to avoid two provisions of a property settlement agreement incorporated in a divorce decree. The court held that a declaratory judgment action is an impermissible collateral attack on a prior judgment and affirmed the trial court's dismissal of the action. *Id.* at 173.

215. 635 S.W.2d 927 (Tex. Ct. App.—Amarillo 1982, writ ref'd n.r.e.).

216. *Id.* at 928; see *Pitts v. Ashcraft*, 586 S.W.2d 685, 695-96 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); *Partin v. De Cordova*, 464 S.W.2d 956, 957 (Tex. Civ. App.—Eastland 1971, writ ref'd).

217. 4 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 27.114, at 655 (2d ed. 1960).

218. 635 S.W.2d at 928.

219. 622 S.W.2d 589 (Tex. App.—Amarillo 1981, no writ).

220. *Id.* at 591-92.

made by the insured had no effect.²²¹

In *McDonald v. McDonald*²²² the ex-husband died in an accident twenty-five days after the spouses were divorced. In the division of their marital estate the trial court awarded the husband all interest in insurance policies arising out of his employment. There were two such policies, and the ex-wife was the designated beneficiary of both. The husband failed to change those designations prior to his death. In a contest with respect to the proceeds, the court noted that Texas law recognizes the right to receive proceeds payable in the future as a property right in the nature of a chose in action.²²³ When purchased with community funds the chose belongs to the community,²²⁴ and the proceeds at maturity are also community property unless the designated beneficiary is a surviving spouse, in which case a gift of the policy rights is presumed to have been intended and perfected on death.²²⁵ The court, however, noted the "hotly contested" nature of the divorce and concluded that the evidence rebutted the usual presumption of gift in the absence of a change in the named beneficiary prior to death.²²⁶ Therefore, the divorce judgment effectively divested the ex-wife of her then-existing rights in the future proceeds of the policies.²²⁷

Exercise of Discretion. Trial courts are afforded broad discretion in dividing marital property in a suit for divorce.²²⁸ An abuse of discretion is only rarely found on appeal.²²⁹ The property division need not be equal, but some reasonable basis for decreeing an unequal division must be shown.²³⁰ The trial court must be presumed to have exercised its discretion properly and only a manifestly unjust division will mandate a reversal.²³¹

221. *Id.* at 592-93; *see* *Partin v. De Cordova*, 464 S.W.2d 956 (Tex. Civ. App.—Eastland 1971, writ ref'd) (husband awarded insurance policies under "all other community assets" provision of property settlement agreement).

222. 632 S.W.2d 636 (Tex. Ct. App.—Dallas 1982, no writ).

223. *Id.* at 638; *see* *Brown v. Lee*, 371 S.W.2d 694 (Tex. 1963) (Texas Supreme Court recognized right to receive insurance proceeds at future but uncertain date as "property" as provided in TEX. REV. CIV. STAT. ANN. art. 23(1) (Vernon 1969)).

224. *See* *Pope Photo Records, Inc. v. Malone*, 539 S.W.2d 224, 226 (Tex. Civ. App.—Amarillo 1976, no writ); *Givens v. Girard Life Ins. Co. of Am.*, 480 S.W.2d 421, 423 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

225. *Brown v. Lee*, 371 S.W.2d 694, 696 (Tex. 1963).

226. 632 S.W.2d at 638.

227. *Id.* at 638-39.

228. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982-1983); *see* *Tarin v. Tarin*, 605 S.W.2d 392 (Tex. Civ. App.—El Paso 1980, no writ); *McKibben v. McKibben*, 567 S.W.2d 538 (Tex. Civ. App.—San Antonio 1978, no writ). *See* Comment, *Division of Marital Property on Divorce: What Does the Court Deem "Just and Right"?*, HOUS. L. REV. 503 (1982).

229. *See* *McKnight*, *supra* note 30, at 140. Appellate courts look skeptically at charges of trial courts' abuse of discretion. *Murff v. Murff*, 615 S.W.2d 696, 699 (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); *see* *Barber v. Barber*, 621 S.W.2d 671 (Tex. Civ. App.—Waco 1981, no writ); *Mogford v. Mogford*, 616 S.W.2d 936 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).

230. *Zamora v. Zamora*, 611 S.W.2d 660, 662 (Tex. Civ. App.—Corpus Christi 1980, no writ); *Cooper v. Cooper*, 513 S.W.2d 229, 233 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

231. *Musick v. Musick*, 590 S.W.2d 582, 586 (Tex. Civ. App.—Tyler 1979, no writ); *Erger v. Erger*, 590 S.W.2d 186, 188 (Tex. Civ. App.—Fort Worth 1979, writ dism'd); *In re Mc-*

In *Vallone v. Vallone*²³² the trial court divided the couple's estate, which consisted primarily of corporate stock in a restaurant of which the husband's separate estate owned approximately forty-seven percent and the community owned the rest. The court valued the business at \$1,000,000 and awarded the wife seventy percent of the community stock. The decree further ordered that the corporation purchase the wife's stock for \$77,000 and a note for \$300,000 personally guaranteed by the husband. The court of appeals found that this arrangement constituted a reasonable award to the wife of 51.4 percent of the community estate as calculated by the court, but the intermediate appellate court went on to hold that the trial court abused its discretion by failing to consider in that calculation the large increase in the value of the husband's separate shares by reason of community labor.²³³

In a five-to-four decision the Texas Supreme Court reversed the finding of the court of civil appeals and affirmed the trial court's division of the marital estate.²³⁴ In concluding that the trial court did not abuse its discretion by ignoring the enhanced value of the corporate shares, the supreme court rejected the wife's contention that the corporation existed as the alter ego of the husband and that its assets should therefore be treated as community property. This argument was disposed of on the procedural ground that the alter ego issue was a question of fact that the appellate court lacked jurisdiction to adjudicate because the trial court had factually determined the issue.²³⁵ The court also dispensed with the wife's claim of reimbursement on the procedural grounds of insufficient pleadings.²³⁶ Finally, the court cited the traditional authorities in support of the trial court's broad powers of division and the presumption of proper exercise of discretion.²³⁷ Although the majority decision did not directly address the issue, the court implicitly held that the increase in the husband's separate property attributable to community labor remains the separate property of the husband under Texas marital property law.²³⁸

The wife in *Jensen v. Jensen*²³⁹ argued that the trial court abused its discretion in its mischaracterization of the enhanced value of corporate stock as the husband's separate property and that the trial court's failure to

Curdy, 489 S.W.2d 712, 719 (Tex. Civ. App.—Amarillo 1973, writ dismissed), *rev'd on other grounds*, 554 S.W.2d 137 (Tex. 1977).

232. 644 S.W.2d 455 (Tex. 1982).

233. 618 S.W.2d 820, 824 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ granted); *see* McKnight, *supra* note 30, at 141-42.

234. 644 S.W.2d at 460. The court cited *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975), and *Goetz v. Goetz*, 567 S.W.2d 892 (Tex. Civ. App.—Dallas 1978, no writ).

235. 644 S.W.2d at 460. The court noted that the alter ego issue was preserved on appeal as a "greater weight and preponderance of the evidence" point, and thus was a factual determination. *Id.* On the alter ego issue, see also *Martin v. Martin*, *supra* notes 46-52.

236. *Id.* at 459; see *infra* notes 332-39 for a discussion of the reimbursement issue in the *Vallone* decision.

237. 644 S.W.2d at 460 (citing *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977); *McKnight v. McKnight*, 543 S.W.2d 863 (Tex. 1976)).

238. See Justice Sondock's dissent, 644 S.W.2d at 460.

239. 629 S.W.2d 222 (Tex. Ct. App.—Tyler 1982, no writ).

characterize property as community constituted reversible error. The appeals court agreed, but added that the spouse who makes that assertion must prove that "the trial court would have made a different division if the property had been properly characterized."²⁴⁰ The appellate court concluded, however, that by characterizing the enhanced value of the stock in question as separate property, the trial court awarded the husband almost five times as much community property as it awarded the wife. Accordingly, the appellant satisfied her burden of proof, and the court held that the disproportionate division constituted an abuse of discretion.²⁴¹

Other appellate courts have rejected the assertion that the trial court abused its discretion in dividing marital property in suits for divorce. In *Baker v. Baker*²⁴² the ex-husband complained that the trial court's division of the parties' property was unjust. The court cited the Texas Supreme Court holdings in *Young v. Young*²⁴³ and *Murff v. Murff*²⁴⁴ for the proposition that a trial court may consider fault in making a property division. The trial judge in *Baker* had before him jury findings of cruelty by both parties, but the judgment recited insupportability as the basis of the divorce. The appellate court held, however, that the trial court had the discretion to consider both cruelty and the husband's mishandling of community property in dividing the estate of the parties.²⁴⁵ Similarly, the Forth Worth court of appeals found no abuse of discretion in *Stephens v. Stephens*²⁴⁶ when the trial court refused to reopen the divorce proceeding to allow the wife to introduce evidence relative to community property accumulated during the eight months between oral pronouncement of divorce and the date of final judgment.²⁴⁷ The appellate court also held that the trial court properly disregarded the value of the goodwill of the husband's professional practice despite the fact that the wife had worked so that her husband could pursue his education and make a start in busi-

240. *Id.* at 225, see *Smith v. Smith*, 620 S.W.2d 619, 625 (Tex. Civ. App.—Dallas 1981, no writ).

241. 629 S.W.2d at 226; see *Copeland v. Copeland*, 544 S.W.2d 183, 185 (Tex. Civ. App.—Amarillo 1976, no writ) (cause remanded due to erroneous classification of spouse's retirement benefits as separate property); see also *In re York*, 613 S.W.2d 764 (Tex. Civ. App.—Amarillo 1981, no writ) (trial court abused its discretion because property division made on basis of erroneous classification). But see *Spiller v. Spiller*, 535 S.W.2d 683, 684-85 (Tex. Civ. App.—Tyler 1976, writ dismissed) (error in characterization of property as community rendered harmless by award of it to appellant).

242. 624 S.W.2d 796 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).

243. 609 S.W.2d 758 (Tex. 1980).

244. 615 S.W.2d 696 (Tex. 1981); see *McKnight*, *supra* note 30, at 141; see also *Horrigan v. Horrigan*, 635 S.W.2d 556 (Tex. Ct. App.—El Paso 1981, no writ).

245. 624 S.W.2d at 798. Shortly before the parties' separation the husband had sold 20% of his company's assets worth more than \$130,000 to his relatives for \$3,000. He also closed the company for the two years prior to the date of the divorce. *Id.*

246. 625 S.W.2d 428 (Tex. Ct. App.—Fort Worth 1981, no writ).

247. *Id.* at 430-31. The court held that the reopening of the case to receive additional evidence was a matter within the discretion of the trial judge. Further, the wife had waived her right to appeal the exclusion of additional evidence by failing to request the trial court to reopen the proceedings and by neglecting to specify which evidence would be established if the court should permit further hearing. *Id.*

ness.²⁴⁸ Nor did the trial court err in considering the wife's civil service retirement benefits in making the property division.²⁴⁹

In *Campbell v. Campbell*²⁵⁰ the Fort Worth court of appeals concluded that an award of more than \$80,000 of the community to the wife and \$3,500 to the husband, who also was ordered to pay the wife's \$20,000 attorneys' fees, did not constitute an abuse of discretion by the trial judge.²⁵¹ The court noted that the large separate estate of the husband, coupled with his ownership in a profitable business, justified the trial court's disparate division of the estate.²⁵² The court added the dubious observation that the order granting temporary alimony pending appeal of the decree was interlocutory and thus not appealable.²⁵³ The court then qualified its decision by stating that even if the order were appealable, it was within the trial court's authority to grant temporary support under section 3.59 of the Family Code.²⁵⁴

In *Janik v. Janik*²⁵⁵ a Houston court of appeals affirmed a trial court's award granting more than \$49,000 to the wife and approximately \$22,700 to the husband. The court awarded the community home to the wife and a retirement fund to the husband, and the husband asserted that he was unfairly burdened with the greater share of the liabilities. The appellate court, however, concluded that the trial court had acted reasonably in ordering that each debt follow the asset that secured it and that each party discharge one-half of the income tax liability.²⁵⁶ Further, in light of the husband's greater earning capacity, the court found no manifest unfairness in the division of assets.²⁵⁷ In *In re Read*²⁵⁸ the Amarillo court of appeals indulged "every reasonable presumption in favor of a proper exercise of discretion by the trial court in dividing the properties of the parties."²⁵⁹

248. *Id.* at 431; see *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972) (goodwill accrued in husband's medical practice not properly divisible on divorce); see also *Freed & Foster, Family Law in the Fifty States: An Overview*, 16 FAMILY L.Q. 289, 300-11 (1983); Comment, *Identifying, Valuing, and Defining Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 TULSA L.J. 313 (1981).

249. 625 S.W.2d at 431.

250. 625 S.W.2d 41 (Tex. Ct. App.—Fort Worth 1981, writ dismissed).

251. *Id.* at 43.

252. *Id.* The husband had a separate estate of approximately \$1,000,000. Moreover, the wife had been hospitalized several times for alcoholism and was unemployed because of her drinking problem. *Id.*; see also *Hausler v. Hausler*, 636 S.W.2d 874 (Tex. Ct. App.—Waco 1982, no writ) (no abuse of discretion in trial court's speculation as to future income of spouses).

253. 625 S.W.2d at 44; cf. *Van Dyke v. Van Dyke*, 624 S.W.2d 800 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ) (order dividing marital estate held to be final judgment and appealable).

254. 625 S.W.2d at 44; see TEX. FAM. CODE ANN. § 3.59 (Vernon Supp. 1982-1983). *But see Belz v. Belz*, 638 S.W.2d 158, 159 (Tex. Ct. App.—Dallas 1982, no writ) (temporary order of spousal support made after perfection of appeal).

255. 634 S.W.2d 323 (Tex. Ct. App.—Houston [14th Dist.] 1982, no writ).

256. *Id.* at 325.

257. *Id.*

258. 634 S.W.2d 343 (Tex. Ct. App.—Amarillo 1982, writ dismissed).

259. *Id.* at 345 (citing *Thompson v. Thompson*, 380 S.W.2d 632, 636 (Tex. Civ. App.—Fort Worth 1964, no writ)); see also *Leal v. Leal*, 628 S.W.2d 168, 169-70 (Tex. Ct. App.—San Antonio 1982, no writ) (presumption that trial court considered allegations of husband's

The court affirmed the trial court's award to the wife of the community property portion of a ready asset account in which community property and the wife's separate property had been commingled, assuming that the trial court considered the mixed nature of the account in making its division.²⁶⁰

The trial judge's appointment of a receiver to distribute and divide the marital estate was held to be an abuse of discretion in *Whitehill v. Whitehill*.²⁶¹ The judgment provided that a receiver would be appointed to divide the community personalty through an alternating property selection process. The court of appeals found that the process of division was to be conducted without judicial approval after entry of the decree, and thus held that the judgment was in violation of the mandatory provision of Family Code section 3.63 requiring the trial court to order a property division.²⁶² Moreover, the court noted that a receiver should be appointed only when "reasonably necessary for the preservation of the property."²⁶³ The appointment of a receiver to file the ex-spouses' tax returns and to sell their residence, two activities that were properly the rights of the parties, thus constituted an abuse of discretion requiring reversal of the lower court's decision.²⁶⁴

Divestiture of Separate Property. The principle seems finally settled that the trial court's broad discretion to divide the marital estate on dissolution does not extend to divesting one spouse of title to separate property, whether realty or personalty, and transferring it to the other spouse.²⁶⁵ The Texas Supreme Court recently reaffirmed the holding in favor of nondivestiture of separate personalty in *Cameron v. Cameron*.²⁶⁶ The court did so, however, by way of obiter dictum and affirmed the trial court's division of federal savings bonds acquired in common-law jurisdictions with the husband's earnings. The lower appellate court had held that the bonds were the husband's separate property and, therefore, under *Eggemeyer v. Eggemeyer*,²⁶⁷ could not be divested upon divorce.²⁶⁸ The wife

dissipation of community funds in making property division); *Hourigan v. Hourigan*, 635 S.W.2d 556, 557 (Tex. Ct. App.—El Paso 1981, no writ) (presumption that trial court considered circumstances of parties in division of property in absence of findings of fact and conclusions of law).

260. 634 S.W.2d at 345-46.

261. 628 S.W.2d 148 (Tex. Ct. App.—Houston [14th Dist.] 1982, no writ).

262. *Id.* at 150; see TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp. 1982-1983).

263. 628 S.W.2d at 151.

264. *Id.*

265. See *Fitts v. Fitts*, 14 Tex. 443 (1855) (fixing trust on wife's separate personalty, which was given to her by her husband, for husband's maintenance does not violate rule that separate property should remain with its original owner on divorce); see also *Campbell v. Campbell*, 23 Tex. Sup. Ct. J. 391 (June 7, 1980), *withdrawn*, 613 S.W.2d 236 (Tex. 1980) (nondivestiture rule applied to separate personalty); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977) (nondivestiture rule applied to separate realty).

266. 641 S.W.2d 210 (Tex. 1982). Prior to the decision in *Cameron*, however, the Dallas court of appeals held tenaciously to the contrary view. See *Whittington v. Whittington*, 638 S.W.2d 92, 93-94 (Tex. Ct. App.—Dallas 1982, writ *dism'd*).

267. 554 S.W.2d 137 (Tex. 1977).

268. 608 S.W.2d 748, 751 (Tex. Civ. App.—Corpus Christi 1980, writ granted). *Contra*

asserted that *Eggemeyer* should be overruled and that separate personalty should be treated differently from separate realty. For the court Justice Pope held that *Eggemeyer* correctly states the law in Texas on nondivestiture of separate personalty.²⁶⁹

The court observed that article XVI, section 15 of the Texas Constitution provides the exclusive definition of separate property, and to allow a court to transmute such separate property of one spouse into the separate property of the other would be an unconstitutional enlargement of that definition.²⁷⁰ Second, the court said the power of the court to order a "division of the estate of the parties" under Family Code section 3.63 refers only to the community property of the spouses and inferentially prohibits divestiture of separate property.²⁷¹ Further, the use of the term "division" impliedly excludes the divestiture of separate property. The court also rejected the contention that divestiture was permissible under the state's police power, because the legislature has consistently failed to assert such an intention in its legislative reform of section 3.63.²⁷² The court found that the Texas policy against post-divorce ex-spousal support does not sustain divestiture, and the majority refused to grant it in the absence of legislative authorization.²⁷³

After extending the *Eggemeyer* holding to include separate personalty,²⁷⁴ the court addressed the fact that the property in question was acquired in common-law states and was characterized as separate property by the appellate court. The supreme court pointed out that the Texas Constitution precludes division of separate property acquired during marriage by gift, devise, or descent. Hence the constitution does not prohibit the division of property that is termed "separate property" elsewhere, but which is acquired in the same manner as community property is acquired in Texas.²⁷⁵ The court therefore concluded that the trial court's division of non-Texas "separate property" does not constitute an unconstitutional taking because the acquiring spouse loses no more in a Texas divorce than he would lose under a common-law state's equitable distribution law.²⁷⁶

Coote v. Coote, 592 S.W.2d 52, 55-56 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (Hughes, J., dissenting) (separate personalty interests acquired in common-law state are not separate property under Texas Constitution and hence are properly divisible upon divorce).

269. 641 S.W.2d at 213-19.

270. *Id.* at 213; see TEX. CONST. art. XVI, § 15.

271. 641 S.W.2d at 214-15; see TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982-1983).

272. 641 S.W.2d at 215-16.

273. *Id.* at 218-19.

274. In his concurrence Justice McGee would have refused to extend the holding in *Eggemeyer* to the divestiture of separate personalty. Because the entire court concluded that savings bonds acquired in common-law states were not "separate property" in the constitutional sense, the concurring opinion considered the comments on *Eggemeyer* as mere obiter dicta. Further, Justice McGee disagreed with the majority's construction of the statutory language "estate of the parties" and asserted that § 3.63 permits a division of separate and community property. Moreover, the concurrence asserted that *Eggemeyer's* exclusive definition of separate property was an incorrect explication of the Texas Constitution. *Id.* at 223-28 (McGee, J., concurring).

275. *Id.* at 220.

276. *Id.* at 222-23; see *Berle v. Berle*, 97 Idaho 452, 546 P.2d 407, 409 (1976) (state court

Thus, the court judicially adopted the principles of section 3.63(b) enacted at the 1981 legislative session and precluded any argument that these principles violate the due process provisions of the Texas Constitution.²⁷⁷

In *McLemore v. McLemore*²⁷⁸ the trial court awarded to the wife the title to a home the husband's parents had purchased and had conveyed to the spouses as a gift. The Tyler court of appeals cited several decisions holding that a gift by a third person to both spouses vests each marital partner with a one-half undivided interest in the property, each half characterized as separate property.²⁷⁹ Thus, divesting one spouse of separate real property and awarding it to the other spouse constituted a prima facie abuse of discretion by the lower court.²⁸⁰ In a somewhat more complicated fact situation another court erred in an analogous case. In *Maxie v. Maxie*²⁸¹ the court rejected the husband's assertion that he had been divested of his separate property when his wife was awarded the home purchased prior to marriage. The husband, in contemplation of marriage, purchased a home twenty-six days before marriage and made a down payment of \$800, to which the wife-to-be contributed \$300 of her separate property. The property was conveyed to the husband while single. The court found that because the wife invested her separate funds in the property when the property was purchased, a purchase-money resulting trust had been created for her benefit.²⁸² That conclusion, however, does not negate the fact that the property was substantially the husband's separate property from inception of title. The husband's prior representation that

recognized rights of spouses to equitable division of common-law separate property upon divorce).

277. 641 S.W.2d at 221-22. TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1982-1983) reads:

(b) 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 to 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 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.

See TEX. CONST. art. XVI, § 15; Sampson, *Interstate Spouses, Interstate Property and Divorce*, 13 TEX. TECH L. REV. 1285 (1982); Comment, *The Division of Marital Property Upon Divorce and Quasi-Community Property Law in Texas: The Texas Legislature Amends Section 3.63 of the Family Code*, 23 SO. TEX. L.J. 139 (1982).

278. 641 S.W.2d 395 (Tex. Ct. App.—Tyler 1982, no writ).

279. *Id.* at 397; see *Bradley v. Love*, 60 Tex. 472 (1883); see also *White v. White*, 590 S.W.2d 587 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *King v. Summerville*, 80 S.W. 1050 (Tex. Civ. App.), *aff'd*, 98 Tex. 332, 83 S.W. 680 (Tex. 1904). Though this line of cases rests in presumed intention of the donor, the rule precluding a gift to the community is elsewhere said to rest on the constitutional definition of separate property in terms of gift. *Kellett v. Trice*, 95 Tex. 160, 169, 66 S.W. 51, 54 (1902).

280. 641 S.W.2d at 398 (citing *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977)).

281. 635 S.W.2d 175 (Tex. Ct. App.—Houston [1st Dist.] 1982, writ *dism'd*).

282. *Id.* at 177.

the funds invested would be used to purchase a marital homestead was carried out. The wife had an interest in the property proportionate to her initial \$300 contribution.²⁸³

Military Retirement Benefits. After the United States Supreme Court held in *McCarty v. McCarty*²⁸⁴ that military retirement benefits cannot be divided on divorce pursuant to state community property law, a great many disputes arose due to cessation of payments, and in new cases the courts were beset by difficulty in applying the federal Supreme Court's guidelines. As months passed following the *McCarty* decision, it was rumored that Congress would pass an act to relieve the problems *McCarty* had caused. Finally, on September 8, 1982, the President signed the Uniformed Services Former Spouses' Protection Act, effective February 1, 1983.²⁸⁵ A new era of confusion had begun.

From the day on which *McCarty* was decided, June 26, 1981, to the enactment of the congressional bill, the courts devoted much attention to pre-*McCarty* decrees and *McCarty's* effect upon them. Although the Fifth Circuit had applied the doctrine of res judicata to a final pre-*McCarty* judgment dividing military benefits in *Ersan v. Badgett*,²⁸⁶ in a post-divorce partition suit the Texas Supreme Court in *Trahan v. Trahan*²⁸⁷ refused to divide military retirement benefits left undivided on divorce. Because no prior judicial decree had dealt specifically with division of the benefits,²⁸⁸ the court concluded that the principle of res judicata was inapplicable to the situation before it. Hence, the supreme court denied an award of accrued and anticipated benefits to the ex-wife in reliance on *McCarty* and the principle of federal supremacy. Because the case was on appeal at the time *McCarty* was decided, the court in *Trahan* held that no final judgment on the merits had been rendered, and the *McCarty* decision therefore had the immediate effect of precluding any further partition of military retirement benefits by a state court.²⁸⁹ The court distinguished the

283. *Id.* at 177-78. The court distinguished *Villarreal v. Villarreal*, 618 S.W.2d 99 (Tex. Civ. App.—Corpus Christi 1981, no writ), in which the court refused to characterize a home purchased prior to marriage as community property. In *Villarreal*, however, the wife failed to contribute any part of the down payment, unlike the wife in *Maxie*. See also *Swearingen v. Swearingen*, 578 S.W.2d 829, 833 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (where \$6,000 down payment on married couple's home was paid with gift from husband's father, and judgment gave husband \$6,000 reimbursement, court did not divest husband of separate property), discussed in *McKnight*, *supra* note 203, at 148.

284. 453 U.S. 210 (1981); Note, *Military Retirement Pay Not Subject to Division as Community Property Upon Divorce: McCarty v. McCarty*, 34 BAY. L. REV. 335 (1982); see *Mattern v. Mattern*, 624 S.W.2d 400 (Tex. Ct. App.—Fort Worth 1981, no writ). But whether other types of federal benefits are divisible depends on the particular language of congressional enactments. See *Anthony v. Anthony*, 624 S.W.2d 388, 390 (Tex. Ct. App.—Austin 1981, writ dismissed) (federal workers' compensation benefits received in lieu of federal Civil Service Disability Retirement Funds were divisible).

285. Pub. L. No. 97-252, §§ 1001-1006, 96 Stat. 730 (1982).

286. 659 F.2d 26, 28 (5th Cir. 1981), cert. denied, 102 S. Ct. 1443, 71 L. Ed. 2d 658 (1982).

287. 626 S.W.2d 485 (Tex. 1981); see *McKnight*, *supra* note 30, at 144-45.

288. The decree, however, effectively created a tenancy in common in property that had been undivided community.

289. 626 S.W.2d at 487-88.

Fifth Circuit's application of *res judicata* in *Erspar* as involving a suit to enforce a prior unappealed divorce decree that divided the husband's military retirement benefits.²⁹⁰ *Trahan*, on the other hand, was an appeal from a judgment partitioning previously undivided benefits and was not, therefore, a final adjudication having a *res judicata* effect.²⁹¹

The post-*McCarty* habeas corpus cases considered by Texas courts indicate an inconsistent application of the *res judicata* doctrine to a final judgment that has previously awarded military benefits to the nonmilitary spouse. In *Ex parte Buckhanan*²⁹² one panel of the San Antonio court of appeals held that *McCarty* allowed a relator to attack a divorce decree collaterally through a habeas corpus proceeding.²⁹³ The court found that under the supremacy clause the federal statutory scheme, designed to provide military retirement pay, preempted the trial court's power to divide such pay and rendered the judgment void.²⁹⁴ Conversely, another panel of the same court refused to give the *McCarty* decision full retroactive effect in *Ex parte Rodriguez*.²⁹⁵ In that case an ex-husband was held in contempt for failure to comply with an agreement incorporated in his divorce decree that entitled his wife to a percentage of his military retirement pay. The agreement placed the "total retirement entitlements" in trust and designated the husband as the trustee. The ex-husband ceased making payments. In a habeas corpus proceeding seeking relief from a contempt commitment, he argued that the effect of *McCarty* was to render the divorce order void or unenforceable. The court denied his application for the writ and held that *McCarty* should not be accorded full retroactive

290. *Id.* *Erspar* involved a suit to enforce a 1963 divorce decree awarding the wife one-half of the husband's military retirement benefits. Sitting en banc, the Fifth Circuit held that the divorce decree was a final unappealed judgment to be given a *res judicata* effect. 659 F.2d at 28. Further, the court found no suggestion in the *McCarty* decision that the Supreme Court intended to upset prior valid state court judgments dividing military pay. The Fifth Circuit's decision allows trial courts to deny retroactive effect to *McCarty* in favor of giving a *res judicata* effect to prior final divorce judgments. See Kahn, *McCarty Revisited—Its Repercussions Continue to Echo*, 16 TRIAL LAW. F., April-June 1982, at 11, 12; Raggio & Raggio, *McCarty v. McCarty: The Moving Target of Federal Pre-emption Threatening All Non-Employee Spouses*, 13 ST. MARY'S L.J. 505, 514 (1982).

291. See *Moore v. Jones*, 640 S.W.2d 391 (Tex. Ct. App.—San Antonio 1982, no writ), in which an ex-wife was denied a partition of increases in her husband's military retirement pay. The court held that the prior divorce decree constituted a final adjudication of the amount being paid at the time of divorce. Citing *Trahan*, the court said that although no final adjudication regarding the increases was made, *McCarty* necessarily precluded the division of any future increase in military benefits. *Id.* at 393-94; see also *In re Grant*, 638 S.W.2d 254 (Tex. Ct. App.—Amarillo 1982, no writ) (*McCarty* precluded division of military retirement benefits pursuant to divorce decree that has not become final).

292. 626 S.W.2d 65 (Tex. Ct. App.—San Antonio 1981, no writ).

293. *Id.* at 68.

294. *Id.*; see *Ex parte Johnson*, 591 S.W.2d 453 (Tex. 1979) (division of Veterans Administration disability benefits by state court held void because of preemption by federal statute); see also *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940) (state courts' attempts to exercise jurisdiction over preempted subject matter are "nullities and vulnerable collaterally"); *Ex parte Acree*, 623 S.W.2d 810, 811-12 (Tex. Ct. App.—El Paso 1981, no writ) (relator held not in contempt and divorce decree dividing military benefits held void under *Buckhanan*).

295. 636 S.W.2d 844 (Tex. Ct. App.—San Antonio 1981, no writ).

effect.²⁹⁶ In its analysis the court found that *McCarty* did not meet the retroactivity standards articulated by the Supreme Court in an earlier decision.²⁹⁷ Moreover, the *McCarty* rationale did not mandate a retroactive application that would have a "devastating" effect on the stability of family law.²⁹⁸

Several appellate courts followed the lead of the court in *Rodriguez* and have refused to apply *McCarty* to invalidate prior final divorce judgments that divided military retirement benefits. In *Ex parte Gaudion*²⁹⁹ the Austin court of appeals declined to follow *Buckhanan*. The court held that a final divorce judgment was collaterally unassailable in a habeas corpus proceeding and was protected by the doctrine of *res judicata*.³⁰⁰ In *Ex parte Hovermale*³⁰¹ the San Antonio court of appeals expressly disapproved its earlier decision in *Buckhanan* and held that *McCarty* was not to be given retroactive effect in order to relieve the ex-husband of his obligation to pay his former wife military retirement pay.³⁰² The court concluded that retroactive application of *McCarty* "would affect the objectives of Congress only minimally, compared to the potentially destructive effect upon the settled jurisprudence of our State."³⁰³ In rejecting writs of habeas corpus in *Rodriguez* and *Gaudion* without opinion, the Texas Supreme Court seems to have avoided a logical extension of its curious conclusion in *Trahan*.³⁰⁴

In *McCarty* the Supreme Court effectively held that the military retirement system preempted the application of a state's community property law to divide military retirement benefits upon divorce.³⁰⁵ The Supreme Court then held in *Ridgway v. Ridgway*³⁰⁶ that federal law under the Servicemen's Group Life Insurance Act (SGLIA) preempted inconsistent state law, thus allowing the insured service member to designate a beneficiary and to alter that choice without notice to any prior beneficiary.³⁰⁷ The imposition of a constructive trust by state law in favor of the insured's children was inconsistent with the SGLIA's anti-attachment provision, and the ex-husband was therefore able to circumvent the terms of the divorce decree ordering him to hold the policies for the benefit of his children.³⁰⁸

296. *Id.* at 848.

297. *Id.* The court agreed with Justice Klingeman's dissent in *Buckhanan* and cited *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), as controlling precedent on the issue of retroactivity.

298. 636 S.W.2d at 849.

299. 628 S.W.2d 500 (Tex. Ct. App.—Austin 1982, no writ).

300. *Id.* at 502-03.

301. 636 S.W.2d 828, 836-37 (Tex. Ct. App.—San Antonio 1982, no writ).

302. *Id.* at 836-37.

303. *Id.* at 836; see also *Ex parte Forderhase*, 635 S.W.2d 198 (Tex. Ct. App.—Tyler 1982, no writ); *Ex parte Welch*, 633 S.W.2d 691 (Tex. Ct. App.—Eastland 1982, no writ); *Balazik v. Balazik*, 632 S.W.2d 939 (Tex. Ct. App.—Fort Worth 1982, no writ).

304. See Ray, *Recent Family Law Decisions of the Texas Supreme Court—1981-82*, 82 St. B. NEWSLETTER FAM. L. 8, 10-11 (1982).

305. 453 U.S. 210, 233 (1981).

306. 454 U.S. 46 (1981).

307. *Id.* at 55-56.

308. *Id.* at 60; see Kahn, *supra* note 290, at 17-18.

But in *Ryan v. Ryan*³⁰⁹ the Beaumont court of appeals held that the provisions of the Employee Retirement Income Security Act did not preempt state law under *McCarty* and thus did not prohibit division of a pension and retirement plan on divorce.³¹⁰

Congressional enactment of the Uniformed Services Former Spouses' Protection Act authorizes state courts to divide military pension benefits on divorce in accordance with local property law.³¹¹ Under the Act a state court may treat nondisability disposable military retirement or retainer funds payable to a member for pay periods beginning after June 25, 1981, either as the sole property of the service member or as the property of both spouses pursuant to the law in the state court's jurisdiction.³¹² A court may consider retirement pay as divisible property only if the court has jurisdiction over the member because of his residence (other than military assignment in the jurisdiction) or because the member is domiciled in the jurisdiction or consents to jurisdiction.³¹³ The bill does not create any right or interest that can be "sold, assigned, transferred, or otherwise disposed of," including disposition through inheritance, by a spouse or ex-spouse.³¹⁴ The act entitles a spouse to receive direct payments from the military for court-awarded alimony, child support, and division of property if the spouse or former spouse was married to the military member during at least ten years of service.³¹⁵ Direct payments, however, can comprise no more than fifty percent of the military member's retirement or retainer pay.³¹⁶ The effective date of the act is February 1, 1983.³¹⁷

It was apparently intended that the Act apply to final orders entered prior to the *McCarty* decision. The Act, however, does not recognize subsequent modifications to the decree made in response to the holding in *McCarty* or to the enactment of the federal statute. Payments to the non-military spouse, therefore, should be made pursuant to the decree in effect at the date of the *McCarty* decision, June 26, 1981.³¹⁸ The Act's provisions will also apply to court orders made after the *McCarty* decision. Post-*McCarty* final divorce decrees that treat military retirement benefits as separate property of the service member are, nevertheless, likely to be given full effect.³¹⁹

309. 626 S.W.2d 103 (Tex. Ct. App.—Beaumont 1981, writ ref'd n.r.e.).

310. *Id.* at 105.

311. Pub. L. No. 97-252, §§ 1001-1006, 96 Stat. 730 (1982).

312. Pub. L. No. 97-252 § 1002(a), 96 Stat. 730 (to be codified at 10 U.S.C. § 1408(c)(1) (1982)).

313. *Id.* (to be codified at 10 U.S.C. § 1408(c)(4) (1982)).

314. *Id.* (to be codified at 10 U.S.C. § 1408(c)(2) (1982)).

315. *Id.* (to be codified at 10 U.S.C. § 1408(d)(2) (1982)).

316. *Id.* (to be codified at 10 U.S.C. § 1408(e)(1) (1982)); *see also id.* (to be codified at 10 U.S.C. § 1408(e)(4)(B) (1982)).

317. *Id.* § 1006(a) (to be codified at 10 U.S.C. § 1408 note).

318. H.R. REP. No. 749, 97th Cong., 2d Sess. 49, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1569, 1571.

319. Although the draftsmen of the Act seem to have assumed that all divorce decrees are subject to modification, final post-*McCarty* divorce decrees that treated military retirement benefits as the separate property of the service member are not subject to modification under Texas law. A nonmilitary spouse, therefore, might attempt to set aside the final judg-

Little has been said about the Act's application to suits tried after its effective date. The broadest interpretation of the Act is to treat it as providing that military retirement benefits should be dealt with as though *McCarty* was not decided.³²⁰ At the other extreme, section 1408(c)(1) can be construed literally to mean that "a court may treat disposable retired or retainer pay . . . for pay periods beginning after June 25, 1981, [only] . . . as property of the member and his spouse in accordance with the law of the jurisdiction of such court."³²¹ By that reading all benefits accrued prior to June 26, 1981, are treated as not subject to division and subject to the *McCarty* decision with a community interest accruing for each month of married service thereafter. In the context of a pre-*McCarty* order the Supreme Court of Texas adopted a middle ground in *Cameron v. Cameron*.³²² The divorce decree had awarded the wife thirty-five percent of the retired husband's present and future benefits. Because the court construed the Act to limit any division of the pay to periods beginning after June 25, 1981, it affirmed the trial court's award for thirty-five percent of the payments, but only for payments accruing after that date.³²³ Because several months' time may elapse between the date of a final order and the time required by the military services to process the order for direct payments, the order should require the service member to make the payments until direct payments commence.

Reimbursement. The equitable right of reimbursement of the community estate for community funds expended for the benefit of a spouse's separate property does not amount to an interest in the property.³²⁴ The Dallas court of appeals followed this rule in *Anderson v. Gilliland*,³²⁵ holding that a husband's quitclaim to his wife of any right he might have in the wife's separate property was ineffective to convey his future equitable right of reimbursement for one-half of the community funds he expended on his wife's separate property.³²⁶ In *Anderson* the wife, as executrix of her deceased husband's estate, refused to include as an asset in the husband's estate his right of reimbursement for community funds he had used to improve the value of the wife's separate realty. The wife claimed that an earlier quitclaim the husband had executed transferred to her the reim-

ment by bill of review. It is doubtful, however, that the proponent could allege and prove a meritorious defense (e.g., the Supremacy Clause and preemption) to the cause of action. For a thorough analysis of the Act's effect on divorce decrees, see Sampson & Friday, *McCarty Redux: Construing the Uniformed Services Former Spouses Protection Act*, 82-3 ST. B. SEC. REP. FAM. L., Fall 1982, at 7.

320. *Id.*

321. Pub. L. No. 97-252 § 1002(a), 96 Stat. 730 (to be codified at 10 U.S.C. § 1408(c)(1) (1982)).

322. 641 S.W.2d 210 (Tex. 1982).

323. *Id.* Some question exists whether the court's analysis of the Act was accurate. See Sampson & Friday, *supra* note 319, at 7-10.

324. See *Burton v. Bell*, 380 S.W.2d 561, 564-65 (Tex. 1964); *Dakan v. Dakan*, 125 Tex. 305, 316-17, 83 S.W.2d 620, 627 (1935).

325. 624 S.W.2d 243 (Tex. Ct. App.—Dallas 1981, writ ref'd n.r.e.).

326. *Id.* at 244.

bursement right. The court concluded that the right of reimbursement was "only a claim for money and return of funds and not a right, title, or interest in the land."³²⁷ Moreover, a matured right of reimbursement arises only upon dissolution of the community. Thus, the execution and delivery of the quitclaim during the existence of the community estate conveyed nothing to the wife because the grantor had neither a matured right of equitable reimbursement nor a transferable interest in the property.³²⁸

In *Ervin v. Ervin*³²⁹ the Eastland court of appeals held that a quitclaim executed by an ex-wife after the spouses had separated released the wife's claim to reimbursement for the enhancement in value of the husband's separate estate from community funds and efforts, although it did not change the character of the property.³³⁰ The quitclaim deed conveyed to the husband all "right, title, and interest" in his separate real estate and recited that the husband would assume all indebtedness, including an \$11,000 debt entered into by both spouses. On a motion for rehearing the Eastland court disagreed with the Dallas court's approach in *Anderson* and held that because the parties were separated when the quitclaim was executed, the wife's claim for reimbursement was "sufficiently matured to constitute a claim against appellee's land and that the claim was released by the quitclaim deed."³³¹ While the conclusion in *Anderson* seems unsailable, the difference in the two opinions may be attributed to the interpretation of the two deeds' different language.

Although the supreme court in *Vallone v. Vallone*³³² characterized certain shares in the family corporation as separate, the court noted that such a characterization did not necessarily preclude the right to reimbursement for appreciation in value of those shares.³³³ The court further held that the right "arises when community time, talent and labor are utilized to benefit and enhance a spouse's separate estate, beyond whatever care, attention, and expenditure are necessary for the proper maintenance and preservation of the separate estate, without the community's receiving adequate compensation."³³⁴ This is a significant departure from the intimation of the court in *Norris v. Vaughan*³³⁵ that an owner is entitled to expend a reasonable amount of nonreimbursable time on separate property to make

327. *Id.* (quoting *Burton v. Bell*, 380 S.W.2d 561, 564 (Tex. 1964)).

328. 624 S.W.2d at 244; see *Lott v. Lott*, 370 S.W.2d 463, 465 (Tex. 1963) (quitclaim conveys presently owned interest in land). In a vigorous dissent, Justice Stephens disagreed with the majority's strict construction of the form and language of the quitclaim deed and found that the circumstances of the conveyance suggested an intention by the grantor to release and extinguish all present and contingent claims against the grantee. 624 S.W.2d at 248.

329. 624 S.W.2d 264 (Tex. Ct. App.—Eastland 1981, writ *dism'd*).

330. *Id.* at 267 (citing *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964)).

331. 624 S.W.2d at 268.

332. 644 S.W.2d 455 (Tex. 1982); see 3 O. SPEER, TEXAS FAMILY LAW § 22.38 (5th ed. 1976).

333. 644 S.W.2d at 458.

334. *Id.* at 459.

335. 152 Tex. 491, 260 S.W.2d 676 (1953).

it productive.³³⁶ The claimant of a right of reimbursement bears the burden of pleading and proving that the expenditures and improvements were made and are properly reimbursable.³³⁷ In her pleadings the wife in *Val-lone* prayed for equitable relief if community funds or property were used to enhance the value of the husband's separate property without adequate compensation to the community. The trial court had found that the profits from the restaurant were used to benefit the spouses' community estate. The wife failed to plead that the community was entitled to reimbursement due to time, talent, and labor expended by the husband. The court concluded that failure to plead reimbursement specifically premised upon these grounds amounted to waiver of any equitable relief in that regard.³³⁸ Because the right was effectively waived, the court held that the lower court's failure to consider the matter did not constitute reversible error.³³⁹

Attorneys' Fees. Although no specific statutory authority expressly mandates an assessment of attorneys' fees against either spouse in a divorce proceeding, such fees may be awarded under the court's equitable power to divide the parties' estate in a manner that is just and fair.³⁴⁰ Attorneys' fees are considered as a factor in making an equitable division of the community, taking into account the conditions and needs of the parties as well as the surrounding circumstances.³⁴¹ Texas courts have recognized that the practical effect of a decree ordering one spouse to pay attorneys' fees may be to award that spouse less of the community estate than the other spouse.³⁴²

The award of attorneys' fees is within the discretion of the court.³⁴³ A prerequisite to such an award is proof that the amount sought is reasonable.³⁴⁴ In *Leal v. Leal*³⁴⁵ the court held that the reasonableness of

336. *Id.* at 495-98, 260 S.W.2d at 678-80.

337. 644 S.W.2d at 459; *see* Wachendorfer v. Wachendorfer, 615 S.W.2d 852 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); West v. Austin Nat'l Bank, 427 S.W.2d 906 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.).

338. 644 S.W.2d at 459-60 (citing *Burton v. Bell*, 380 S.W.2d 561, 567 (Tex. 1964); *Wachendorfer v. Wachendorfer*, 615 S.W.2d 852, 854 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); *Gaston v. Gaston*, 608 S.W.2d 332, 335 (Tex. Civ. App.—Tyler 1980, no writ); *Pruske v. Pruske*, 601 S.W.2d 746, 749 (Tex. Civ. App.—Austin 1980, writ dismissed).

339. 644 S.W.2d at 459.

340. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982-1983); *see* *Carle v. Carle*, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950); *In re Read*, 634 S.W.2d 343, 345 (Tex. Ct. App.—Amarillo 1982, writ dismissed).

341. *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 (1950).

342. *Carle v. Carle*, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950); *see also* *Mendoza v. Mendoza*, 621 S.W.2d 420 (Tex. Civ. App.—San Antonio 1981, no writ) (award of \$1,000 in attorneys' fees affirmed despite no indication in record that they were considered in making property division).

343. *See* *Farrell, Proof of Court-Awarded Attorney Fees in Texas Courts*, 45 TEX. B.J. 857 (1982).

344. *See* *Fambro v. Fambro*, 635 S.W.2d 945, 949 (Tex. Ct. App.—Fort Worth 1982, no writ) (award of attorneys' fees rests within sound discretion of trial judge); *Treadway v. Treadway*, 613 S.W.2d 59, 60 (Tex. Civ. App.—Texarkana 1981, writ dismissed) (\$5,000 attorney fee bears reasonable relationship to amount in controversy). *See* *McKnight, Division of Texas Marital Property On Divorce*, 8 ST. MARY'S L.J. 413, 455-61 (1976).

345. 628 S.W.2d 168 (Tex. Ct. App.—San Antonio 1982, no writ).

attorneys' fees is a question of fact that must be supported by competent evidence and may be determined by a jury.³⁴⁶ In that instance the court reversed the award of \$3,000 in attorneys' fees after an examination of the record revealed no proof of the reasonableness of the fees. The court severed the claim for attorneys' fees and remanded the case, noting that the trial court retained the discretion to award attorneys' fees upon proper proof.³⁴⁷

Enforcement. If one party bound by a divorce decree fails to discharge his or her duties pursuant to it, the court may exercise its contempt powers in order to enforce the judicial order. To hold a person in contempt for disobeying a court order, the decree must articulate the details of compliance in "clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him."³⁴⁸ In *Ex parte Smiley*³⁴⁹ the relator brought a habeas corpus proceeding after being held in contempt for failure to pay his former spouse a part of his military retirement benefits. The court held that the contempt and commitment order was void because the order of the divorce court merely awarded the wife "[a]ll of the military retirement benefits monthly check accrued in the name of Benjamin Smiley," who was in turn ordered to do nothing. The contempt order was similarly nonmandatory in its terms.³⁵⁰ The court further found that the contempt order not only fined the relator in excess of the statutory limits but also made no distinction between the amount owing to the ex-wife for arrearages and the amount of the penalty owed to the state.³⁵¹ Resort to the divorce decree was futile because it suffered from the same infirmities of ambiguity and equivocation as the contempt order.

In *Ex parte Tarpley*³⁵² the relator sought a writ of habeas corpus after being adjudged in contempt for failure to provide temporary alimony. In March 1981 the trial court entered a temporary order requiring the husband to pay alimony pendente lite "until further order" of the court. In July 1981 a trial on the merits was held, and in November the wife filed a motion for contempt. In the habeas corpus proceeding the husband as-

346. *Id.* at 170. Some appellate courts had previously held that the reasonableness of attorneys' fees is not a jury question, but a matter entrusted to the trial judge that can be adjudicated without the benefit of evidence. *See, e.g.,* American Income Life Ins. Co. v. Davis, 334 S.W.2d 486 (Tex. Civ. App.—Amarillo 1960, no writ); Franklin Life Ins. Co. v. Woodyard, 206 S.W.2d 93 (Tex. Civ. App.—Galveston 1947, no writ). These holdings were disapproved in *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901 (Tex. 1966).

347. 628 S.W.2d at 170-71. For a discussion of the severability of claims for attorneys' fees, see *Uhl v. Uhl*, 524 S.W.2d 534 (Tex. Civ. App.—Fort Worth 1975, no writ); *Schecter v. Folsom*, 417 S.W.2d 180 (Tex. Civ. App.—Dallas 1967, no writ).

348. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967).

349. 626 S.W.2d 817 (Tex. Ct. App.—San Antonio 1981, no writ).

350. *Id.* at 818-19; *see Ex parte Duncan*, 42 Tex. Crim. 661, 670-71, 62 S.W. 758, 760 (1901) (for court to punish for disobedience of order, such order must "speak definitely the meaning and purpose of the court in ordering").

351. 626 S.W.2d at 818; *see* TEX. REV. CIV. STAT. ANN. art. 1911(a), § 2(a) (Vernon Supp. 1982-1983).

352. 636 S.W.2d 21 (Tex. Ct. App.—Eastland 1982, no writ).

serted that at the trial on the merits the judge orally awarded a divorce to the parties and took under advisement the prospective division of property. The husband contended, therefore, that the pronouncement of divorce was a "further order" relieving him of his temporary support obligation. Although no record was made of the judgment, the appellate court held that the husband conclusively established that the trial court did in fact make a pronouncement of divorce,³⁵³ which constituted a further order terminating the husband's obligations under the prior temporary order.³⁵⁴ The order was merely interlocutory,³⁵⁵ however, and not final as the court seems to suggest.³⁵⁶

Post-Divorce Claims. In *Cohen v. Cohen*³⁵⁷ a trial court in January 1975 rendered a judgment of divorce, and no appeal was taken. Almost six years later the ex-husband brought a declaratory judgment action in an attempt to hold void two provisions concerning property in the divorce decree. The husband asserted that the award of ten percent interest exceeded the allowable interest on judgments under Texas law and that the provision allowing a floating principal amount, based upon a cost of living index, was void as a deprivation of property without due process. The ex-wife filed a plea in bar, arguing that the Texas Declaratory Judgment Act forbade the use of a declaratory judgment as a remedy against a prior judgment. The Waco court of appeals held that the use of a declaratory judgment action was a collateral attack on a prior judgment and could not be used to compel a trial court to interpret the judgment.³⁵⁸ The court might have added that the remedy sought went considerably beyond an interpretation. The only ground for a collateral attack on an unappealed judgment that is regular on its face is that the rendering court had no personal, subject matter, or competency jurisdiction.³⁵⁹

Eleven years after a divorce decree was rendered, the ex-wife in *Jacobs v. Cude*³⁶⁰ brought suit seeking to partition the ex-husband's retirement benefits. The trial court granted the husband summary judgment and found the cause of action barred by res judicata. The divorce decree contained a residuary clause providing that the husband would receive all community property not specifically mentioned in the decree, but made no

353. *Id.* at 23.

354. 636 S.W.2d at 23 (citing *Leone v. Leone*, 543 S.W.2d 681 (Tex. Civ. App.—Beaumont 1976, no writ), which was a case of final judgment, however).

355. *In re Johnson*, 595 S.W.2d 900 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.); see also McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law* 33 Sw. L.J. 99, 122-23 (1979); McKnight, *supra* note 99, at 122-23; McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 110, 118 (1977).

356. 636 S.W.2d at 23 (citing *Leatherwood v. Holland*, 375 S.W.2d 517 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.), *rev'd*, 597 S.W.2d 345 (Tex. 1980)).

357. 632 S.W.2d 172 (Tex. Ct. App.—Waco 1982, no writ).

358. *Id.* at 173; see *Sutherland v. Sutherland*, 560 S.W.2d 531 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); *Speaker v. Lawler*, 463 S.W.2d 741 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.).

359. 632 S.W.2d at 174; *Hardin v. Hardin*, 597 S.W.2d 347 (Tex. 1980); *Austin Indep. School Dist. v. Sierra Club*, 495 S.W.2d 878 (Tex. 1973).

360. 641 S.W.2d 258 (Tex. Ct. App.—Houston [14th Dist.] 1982, no writ).

express reference to the ex-husband's retirement benefits. The court of appeals held that the cause of action was properly barred by the lower court's decree and that the retirement benefits were included by inference in the residuary clause.³⁶¹ The court refused to allow the appellant to "collaterally 'chip away' at the ownership status of property already adjudicated by [the] court."³⁶²

In *First National Bank v. Dyes*³⁶³ a divorced wife who had been awarded shares of stock pursuant to a divorce decree sought to compel the issuer and its stock transfer agent to transfer those shares and all accrued dividends to her. The trial court held that the ex-wife was entitled to the shares under Texas Business and Commerce Code section 8.317.³⁶⁴ The judge ordered the issuer and its agent to issue a new certificate in the wife's name and further ordered the husband to relinquish control of his stock certificate. The appellate court reversed the lower court decision and held that section 8.317(b) provides no right to the issuance of a new certificate when the old certificate has not been reduced to possession by a public officer or by the issuer.³⁶⁵ Because neither the issuer nor the stock transfer agent was the owner or holder of the old stock certificate, the trial court erred in compelling the issuance of a new certificate and the cancellation of the old one.³⁶⁶

361. *Id.* at 259-60; see *Bloom v. Bloom*, 604 S.W.2d 393, 394 (Tex. Civ. App.—Tyler 1980, no writ) (residuary clause in divorce decree disposing of all property not otherwise mentioned constituted adjudication of ownership in retirement benefits).

362. 641 S.W.2d at 260; see *Austin Indep. School Dist. v. Sierra Club*, 495 S.W.2d 878 (Tex. 1973).

363. 638 S.W.2d 957 (Tex. Ct. App.—Eastland 1982, no writ).

364. TEX. BUS. & COM. CODE ANN. § 8.317 (Vernon 1968).

365. 638 S.W.2d at 959.

366. *Id.* at 960.

