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FAMILY LAW: HUSBAND AND WIFE

by

*Joseph W. McKnight**

I. STATUS

INFORMAL Marriage. Three elements are necessary for an informal marriage in Texas. The parties must (1) agree to be husband and wife, (2) cohabit as such, and (3) hold each other out as husband and wife.[1] A Texas federal district court adopted a strict construction of these requirements in *Conlon v. Schweiker*.[2] This case was a child's suit for survivor's benefits in which the child claimed that she was the issue of a valid informal marriage between her mother and the decedent. Although in an earlier suit involving the mother, the child, and the decedent a Texas court had found that a valid marriage had existed,[3] the federal court was not satisfied that the evidence supported that conclusion. The evidence of cohabitation was clear, but the court found that the mother's testimony that the decedent was introduced to friends as "hers" was not enough evidence of a holding out as husband and wife.[4] Although the court recognized that Texas law allows circumstantial evidence of the agreement element to prove the marriage, the court held that the mother's testimony that she and the decedent had lived together for about two weeks, along with the other evidence adduced, was not sufficient to raise an inference of an agreement to be married.[5]

Texas courts, like those of many other jurisdictions, have never recognized any right of support or compensation for household services performed by an unmarried cohabitant.[6] Property rights in such a relationship arise from a contract between the parties or on the basis of the amount each party contributed for the acquisition.[7] In a recent New Jersey case,

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1. TEX. FAM. CODE ANN. § 1.91(a)(2) (Vernon 1975); *see* Morris v. Morris, 403 S.W.2d 295, 296 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ); Rosales v. Rosales, 377 S.W.2d 661, 663 (Tex. Civ. App.—Corpus Christi 1964, no writ).

2. 537 F. Supp. 158 (N.D. Tex. 1982).

3. A domestic relations court in Dallas County found that a marriage had existed and granted the petitioning woman a divorce. *Id.* at 160-61.

4. *Id.* at 164-65.

5. *Id.* at 164.

6. *See* Meador v. Ivy, 390 S.W.2d 391, 393-94 (Tex. Civ. App.—San Antonio 1965, no writ); Timmons v. Timmons, 222 S.W.2d 339, 341 (Tex. Civ. App.—Galveston 1949, no writ).

7. *See, e.g.*, Flaglie v. Williams, 569 S.W.2d 557, 566 (Tex. Civ. App.—Austin 1978,

however, the court held that when one unmarried cohabitant sues to enforce an alleged agreement between the parties, a temporary injunction requiring the defendant to allow the claimant the use of the home until the dispute is resolved may be proper.[8] The court emphasized that such an injunction should issue only when necessary to prevent irreparable harm and noted that in this case one cohabitant was threatened with the loss of a place to live at a time when she was wholly without support.[9] A Texas court might arrive at a similar conclusion concerning alleged cotenants.

During the 1983 regular session of the Texas Legislature, two bills dealing with informal marriage were defeated. One of the bills would have increased the filing fee for informal marriage declarations and would have required a portion of those fees, along with part of the marriage license fees, to be allocated for the enforcement of child abuse laws.[10] The other proposal was designed to abolish informal marriage altogether by providing that persons could not marry in Texas without the acquisition of a marriage license and the performance of a ceremony.[11]

Entering into Marriage. The Attorney General of Texas rendered several opinions in 1983 concerning persons authorized to conduct marriage ceremonies. Section 1.83 of the Texas Family Code[12] authorizes retired judges and justices of the peace with at least fifteen aggregate years of service to perform marriages. The attorney general construed this statute to allow persons with such years of service to perform marriages if they continue to serve the state in a nonjudicial capacity.[13]

In another opinion, the attorney general concluded that the equal protection clause of the United States Constitution forbids a justice of the peace from refusing to perform interracial marriages.[14] In a third opinion, the attorney general stated that a judge of a court of record who receives a full-time salary may receive a fee or donation for performing a marriage ceremony, even if he conducts the ceremony during regular working hours.[15] The attorney general reasoned that because judges are under no duty to perform marriages and have no assigned working hours, they may perform marriages and receive fees for doing so whenever they wish.[16] These latter two opinions are inconsistent in that they accord differing

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writ ref'd n.r.e.); Meador v. Ivy, 390 S.W.2d 391, 394 (Tex. Civ. App.—San Antonio 1965, no writ); Fort Worth & R.G. Ry. v. Robertson, 121 S.W. 202, 204-07 (Tex. Civ. App.—Fort Worth 1909), *rev'd*, 103 Tex. 504, 131 S.W. 400 (1910); *see also* 31 A.L.R.2D 1255, 1299-1307 (1953).

8. Crowe v. DeGioia, 90 N.J. 126, 447 A.2d 173 (1982).

9. *Id.* at 176. The court also required the defendant to pay the claimant's support while the action was pending. *Id.* at 178.

10. Tex. H.B. 75, 68th Leg. (1983).

11. Tex. H.B. 937, 68th Leg. (1983).

12. TEX. FAM. CODE ANN. § 1.83 (Vernon Supp. 1984).

13. Op. Tex. Att'y Gen. No. MW-589 (1982).

14. Op. Tex. Att'y Gen. No. JM-1 (1983), *conforming with* Loving v. Virginia, 388 U.S. 1 (1966).

15. Op. Tex. Att'y Gen. No. JM-22 (1983).

16. *Id.*

levels of discretion to judges to decide whether or not to perform marriages.

The inconsistency is of little moment, however, in light of the fact that the Texas Legislature amended Family Code section 1.83 in 1983 to forbid not only racial discrimination in performing marriage ceremonies but also discrimination on the basis of religion or national origin.[17] The amendment also prohibits discrimination by all state officials authorized to perform marriages, rather than merely justices of the peace.[18] The legislature also enacted the Venereal Disease Control Act,[19] which repealed provisions of the Family Code that required premarital blood tests for syphilis.[20] The drafters of the Family Code had considered such action in 1968 but rejected it on medical advice.[21]

Interspousal Testimony. An alleged spouse by informal marriage is competent to testify against an accused in Texas if the accused offers no evidence of the informal marriage at trial.[22] In a recent federal case in California[23] a woman who was a party to an informal union sought to invoke the marital privilege in order to avoid having to testify against her companion in a grand jury proceeding. The court, however, refused to allow a privilege to be invoked in a grand jury proceeding by a party to an informal relationship that is not there recognized as a marriage.[24] In so holding, the court emphasized that privileges must be narrowly construed in the context of grand jury proceedings because of the strong public interest in discovering criminal evidence.[25]

A proposed amendment to article 38.11 of the Texas Code of Criminal Procedure[26] was introduced in the legislature in 1983.[27] The amendment was designed to allow prosecutors to compel a person to testify against his spouse when the spouse is accused of certain serious crimes[28] or when the

17. Act of Aug. 29, 1983, ch. 437, § C, 1983 Tex. Gen. Laws 2798, 2799 (codified at TEX. FAM. CODE ANN. § 1.83(c) (Vernon Supp. 1984)). No effort was made to allow marriage between persons of the same sex. *See* Murphy v. State, 653 S.W.2d 567, 569 (Tex. App.—San Antonio 1983, pet. ref'd).

18. TEX. FAM. CODE ANN. § 1.83(c) (Vernon Supp. 1984).

19. Texas Venereal Disease Control Act, ch. 493, 1983 Tex. Gen. Laws 2889 (codified at TEX. REV. CIV. STAT. ANN. art. 4445d (Vernon Supp. 1984)).

20. TEX. FAM. CODE ANN. § 1.25 (Vernon 1975) (formerly required applicants for marriage licenses to undergo seriologic tests for syphillis. This section and *id.* §§ 121-138 were repealed by the Texas Venereal Disease Control Act.

21. McKnight, *Title 1, Husband and Wife, Texas Family Law Symposium*, 5 TEX. TECH L. REV. 281, 290 (1974).

22. Salayandia v. State, 651 S.W.2d 825, 827 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd).

23. *In re* Grand Jury Proceedings Witness Ms. X, 562 F. Supp. 486 (N.D. Cal. 1983).

24. *Id.* at 488.

25. *Id.* at 487-88. For a general critique of the federal law on interspousal immunity, see Lempert, *A Right to Every Woman's Evidence*, 27 L. QUADRANGLE NOTES, Apr.-June 1983, at 26-33.

26. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979).

27. Tex. H.B. 71, 68th Leg. (1983).

28. *Id.* The spouse may be compelled to testify against his or her spouse when the spouse is accused of violating TEX. PENAL CODE ANN. §§ 19, 21, or 22 (Vernon 1974 &

victim of the crime is a child of either spouse under sixteen years of age.[29] The proposed legislation was defeated, however, and the current version of article 38.11, which allows only voluntary testimony by one spouse against the other under limited conditions, remains in effect.[30]

Interspousal Immunity. In *Flynn v. Flynn*[31] a federal district court in Ohio addressed the question of whether one spouse may be held liable in damages for at-home illegal wiretapping of telephone conversations between the other spouse and a third person. Holding that a spouse may indeed be liable for such activity,[32] the court reached a different result from that of the Fifth Circuit in *Simpson v. Simpson*,[33] a case from Alabama. In *Simpson* the Fifth Circuit held that spouses could not sue each other for illegal wiretapping because Congress, when it enacted the federal wiretapping statute,[34] did not intend to override the doctrine of interspousal immunity.[35] In *Flynn* the court disagreed with this reasoning, observing that a number of states have abandoned the interspousal immunity doctrine and that this *federal* statute expressly created the cause of action for illegal wiretapping.[36]

Recovery for Loss of Consortium and Wrongful Death. Within three years both a federal district court[37] and a Texas appellate court[38] have held that a right of recovery exists for loss of consortium under the Texas Wrongful Death Act[39] for injury of a spouse by a third person. Further, in *Soriano v. Medina*[40] the San Antonio court of appeals held that a husband could recover damages for mental anguish resulting from the loss of his wife in an

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Supp. 1984). The specific crimes included are murder, manslaughter, criminally negligent homicide, incest, and any other sex- or assault-related offense.

29. Tex. H.B. 71, 68th Leg. (1983).

30. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979) provides in part:

> However, a wife or husband may voluntarily testify against each other in any case for an offense involving any grade of assault or violence committed by one against the other or against any child of either under 16 years of age, or in any case where either is charged with incest of a child of either, or in any case where either is charged with bigamy, or in any case where either is charged with interference with child custody, or in any case where either is charged with nonsupport of his or her spouse or minor child.

31. 560 F. Supp. 922 (N.D. Ohio 1983).

32. *Id.* at 924-25.

33. 490 F.2d 803, 808-09 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

34. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982).

35. 490 F.2d at 808-09.

36. 560 F. Supp. at 924. The court noted that "[t]here is also substantial doubt whether a doctrine of state tort law should have any influence in defining a cause of action expressly created by federal statute, particularly when Congress could have included a similar provision in the statute and failed to do so." *Id.* For an analysis of interspousal tort liability, see Note, *Interspousal Tort Immunity*, 6 TEX. S.U.L. REV. 419 (1981).

37. Stanford v. McLean Trucking Co., 506 F. Supp. 1252, 1257-58 (E.D. Tex. 1981).

38. Missouri Pac. R.R. v. Dawson, 662 S.W.2d 740, 742-43 (Tex. App.—Corpus Christi 1983, no writ).

39. TEX. REV. CIV. STAT. ANN. arts. 4671-4678 (Vernon 1952 & Pam. Supp. 1941-1983).

40. 648 S.W.2d 426 (Tex. App.—San Antonio 1983, no writ).

automobile accident involving both spouses.[41] Rather than allowing recovery under the Wrongful Death Act, the court emphasized that the claim for mental suffering was part of the plaintiff's own injuries and thus was recoverable in addition to his claims under the Wrongful Death Act.[42] A federal court sitting in Illinois, however, held that the right to consortium is not an interest protected by the Constitution or federal law, but is merely a right under state tort law.[43] In this case a wife claimed that her husband's arrest resulted in loss of consortium and thus gave rise to a section 1983 civil action against the police department for deprivation of her rights.[44] The court denied this claim, holding that consortium is not an interest protected by the Constitution or federal law, but is merely a matter for state regulation.[45]

In an appeal from the Southern District of Texas[46] the Fifth Circuit addressed the question of whether the Death on the High Seas Act[47] gives the surviving spouse of a seaman a cause of action for wrongful death based on unseaworthiness[48] when the decedent has previously settled his injury claim. In holding that the spouse has such a cause of action, the court stated that the Act was designed to provide for persons who are left without financial support as a result of a seaman's death.[49] The seaman's claim against his employer for his injuries and his spouse's claim for wrongful death are, therefore, distinct causes of action.[50] Hence a recovery for an injury action does not bar a spouse's later recovery for wrongful death.

Grounds for Divorce. In *Trickey v. Trickey*[51] the wife argued that a divorce

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41. *Id.* at 429.
42. *Id.* at 430.
43. Walters v. Village of Oak Lawn, 548 F. Supp. 417, 419 (N.D. Ill. 1982).
44. 42 U.S.C. § 1983 (1976 & Supp. V 1981). Section 1983, on which the wife in *Walters* relied, provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.
45. 548 F. Supp. at 419.
46. Bodden v. American Offshore, Inc., 681 F.2d 319 (5th Cir. 1982).
47. 46 U.S.C. §§ 761-768 (1976).
48. 681 F.2d at 331-32.
49. *Id.* at 331. The Death on the High Seas Act provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 761 (1976).
50. 681 F.2d at 332-33.
51. 642 S.W.2d 47 (Tex. App.—Fort Worth 1982, writ dism'd).

court lacked jurisdiction to dissolve a marriage "performed in a church under the Holy Bible" except on Biblical grounds. The Fort Worth court of appeals responded in kind: "[S]uch a law . . . would constitute cruel and unusual punishment and actually place one of the spouses, in effect, in a prison from which there was no parole".[52]

II. CHARACTERIZATION OF MARITAL PROPERTY

Deed Recitals. Although property acquired during marriage is presumed to be community property,[53] this presumption may be overcome when the property is acquired with the separate property of a spouse.[54] In the case of realty a deed recital to that effect is a useful element of proof of that fact.[55] In *Little v. Linder*[56] a husband was an active participant in a purchase of land that was conveyed to the wife as her separate property, and the deed recited that the consideration was paid with the wife's separate estate. In concluding that the land was the wife's separate property, the Tyler court of appeals stated that when a deed contains such a recital the property will be treated as the separate property of the wife.[57] This rule applies even when the consideration is actually community property or the husband's separate estate and even if the husband denies that he intended to make a gift to the wife.[58] This outcome is an effect of the parol evidence rule as enunciated in *Lindsay v. Clayman*.[59] In *Little* the court further stated that when a husband is a party to a purchase for the purported separate interest of the wife, the court generally will presume the recitals in the deed to be true, whether or not the husband's name appears in the purchase documents.[60] The court also held that when a wife and husband purport to make a joint conveyance of the wife's separate property to a third person and reserve a mineral interest in the grantors, coownership of the mineral interest does not result, because the husband had no interest and thus cannot reserve an interest in the property.[61] The purported reservation in favor of the husband is merely an attempted reservation for a third party to the transaction, which under Texas law is inoperative.[62]

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52. *Id.* at 50.

53. Brownlee v. Brownlee, 573 S.W.2d 878, 879 (Tex. Civ. App.—El Paso 1978, no writ); Poulter v. Poulter, 565 S.W.2d 107, 110 (Tex. Civ. App.—Tyler 1978, no writ).

54. The burden is on the party asserting that the property is separate, and such party must overcome the community presumption by "clear and satisfactory evidence." Poulter v. Poulter, 565 S.W.2d 107, 110 (Tex. Civ. App.—Tyler 1978, no writ).

55. United States & Fidelity & Guar. Co. v. Milk Producers Ass'n, 383 S.W.2d 181, 183 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.).

56. 651 S.W.2d 895 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

57. *Id.* at 900.

58. *Id.* at 898.

59. 151 Tex. 593, 596, 254 S.W.2d 777, 779-80 (1952).

60. 651 S.W.2d at 898.

61. *Id.* at 900; *see* Ryan v. Fort Worth Nat'l Bank, 433 S.W.2d 2, 7-8 (Tex. Civ. App.—Austin 1968, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 24 Sw. L.J. 49, 51-52 (1970).

62. 651 S.W.2d at 900-01. In order for the husband to have any interest in the mineral reservation, the wife would have had to convey such interest to him before conveying the

Income From Trusts. In *Wilmington Trust Co. v. United States*[63] seven trusts were created for the benefit of a wife during her marriage. Her parents created six of the trusts and her husband created the seventh. Under each trust the wife was entitled to all the income for life, and on her death the corpus of each trust was to pass to others. With but one exception, the wife's interest in all the trusts was not subject to anticipation by her and was immune from her creditors' claims. The trustee held significant undistributed income when the husband died, and the Internal Revenue Service took the position that the undistributed income and the wife's investments with distributed income should be treated as community property for purposes of taxing the husband's estate. The United States Court of Claims analyzed the Texas[64] and the Fifth Circuit[65] cases on the subject. The court concluded that the Texas cases treated the income from trusts as the separate property of the beneficiary and that the Fifth Circuit cases had misconstrued Texas law in concluding that trust income is community property. Hence the court reasoned that neither undistributed income held by the trustees on the death of the husband nor investments made by the wife with trust income received should be included in the husband's estate for estate tax purposes.[66] Thus the income from the trust was the true subject matter of the gifts in trust from the settlors to the wife.[67]

Separate Corporate Interest. In 1982 the Texas Supreme Court said by way of obiter dicta in *Vallone v. Vallone*[68] that the appreciation in value of separate stock in a closely held corporation is separate property[69] and that the other spouse is entitled to reimbursement for the uncompensated labor of the owner spouse that has caused the appreciation.[70] In *Jensen v. Jensen*[71] a very similar case was before the court. Shortly before his marriage,

land to a third party. *See* Canter v. Lindsey, 575 S.W.2d 331, 334-35 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

63. 221 Ct. Cl. 686, 510 F.2d 703 (1983).

64. Herring v. Blakeley, 385 S.W.2d 843, 846-47 (Tex. 1965); Martin Brown Co. v. Perrill, 77 Tex. 199, 204, 13 S.W. 975, 976-77 (1890); Hutchison v. Mitchell, 39 Tex. 487, 492-93 (1883); *In re* Long, 542 S.W.2d 712, 717 (Tex. Civ. App.—Texarkana 1976, no writ); Buckler v. Buckler, 424 S.W.2d 514, 516 (Tex. Civ. App.—Fort Worth 1967, writ dism'd); Mercantile Nat'l Bank v. Wilson, 279 S.W.2d 650, 653-54 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.); McClelland v. McClelland, 37 S.W. 350, 357-58 (Tex. Civ. App. 1896, writ ref'd); Shepflin v. Small, 4 Tex. Civ. App. 493, 495-96, 23 S.W. 432, 432-33 (1893, no writ).

65. Commissioner v. Porter, 148 F.2d 566, 568 (5th Cir. 1945); Commissioner v. Wilson, 76 F.2d 766, 769 (5th Cir. 1935).

66. 610 F.2d at 711-15.

67. *See* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 SW. L.J. 105, 112-13 (1977). Even assuming that trust income is community property, the court in Cluck v. Cluck, 647 S.W.2d 338, 340-41 (Tex. App.—San Antonio 1982, writ dism'd), held that neither spouse had standing to object to its division in favor of the other spouse because some third person's right might thereby be infringed.

68. 644 S.W.2d 455 (Tex. 1982); *see* Ray, *Comments on* Cameron *and* Vallone, ST. B. SEC. REP., FAM. L., Winter 1982, at 6; Comment, *Closely Held Corporations in the Wake of* Vallone: *Enhancement of Stock Value by Community Time, Talent and Labor*, 35 BAYLOR L. REV. 47 (1983).

69. 644 S.W.2d at 558.

70. *Id.* at 489. The plaintiff, however, had not pled a claim for reimbursement.

71. 665 S.W.2d 107 (Tex. 1984).

the husband in *Jensen* purchased a majority of the stock in a closely held corporation. During the marriage, he expended approximately ninety percent of his time running the business, and as a result the value of the stock greatly increased. The trial court ruled that the community was not entitled to receive the value of the appreciation in the shares, because the community had been adequately compensated by the salary and dividends the husband had received from the corporation. The court of appeals reversed, holding that the enhanced value of the stock was itself community property because it resulted from the time and labor of the husband.[72]

The supreme court first affirmed the court of appeals holding in *Jensen*,[73] but on motion for rehearing the court reversed, affirming the judgment of the trial court.[74] On a second motion for rehearing the court remanded the case for determination of the amount of reimbursement owing, if any.[75] In order to arrive at the amount to which the community is entitled the trial court must find the value of the labor expended and subtract "salary, bonus, dividends and other fringe benefits" as well as the value of efforts "reasonably necessary to manage and preserve the separate estate."[76] It is striking that the court directed deduction of the stockholder-employee's dividends, which are community profit from his separate property, but did not include the value of the corporation's retained earnings in its formula. But this formulation is perhaps understandable if

72. Jensen v. Jensen, 629 S.W.2d 222, 224 (Tex. App.—Tyler 1983), *rev'd*, 665 S.W.2d 107 (Tex. 1984). For a discussion of the intermediate appellate court's opinion, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 37 Sw. L.J. 65, 69 (1983).

73. 26 Tex. Sup. Ct. J. 480 (July 6, 1983). For an historical analysis of the antecedents of this rule, see Vallone v. Vallone, 644 S.W.2d 455, 458-60 (Tex. 1982). The *Vallone* case also involved the question of whether the community has an interest in the increase in value of a spouse's separately owned stock resulting from the expenditure of community time and labor. Although the majority in *Vallone* limited its discussion to procedural grounds, Justice Sondock's dissent directly addressed the increased-stock-value issue. Justice Sondock concluded that the increase in value of the stock must belong to the community estate. 644 S.W.2d at 460-63. For a discussion of Justice Sondock's dissent in *Vallone*, see McKnight, *supra* note 72, at 68-69.

74. 27 Tex. Sup. Ct. J. 68, 70 (Nov. 9,1983), *discussed in* Note, *The Community's Interest in Separate Corporate Stock*: Jensen v. Jensen, 37 Sw. L.J. 1203 (1984).

75. 665 S.W.2d 107 (Tex. 1984). The supreme court concluded that the trial court's finding was based on testimony relating to the husband's stock ownership rather than the value of labor expended and was therefore "without adequate support." *Id.* at 110. Although this formulation may be difficult to square with the stricture of TEX. REV. CIV. STAT. ANN. art. 1728 (Vernon Supp. 1984) (prohibiting supreme court from reversing on basis of insufficient evidence, a fact question, but permitting reversal based on "no evidence", a question of law), it seems unlikely that the court meant to depart from its previous interpretation of that standard. Thus, it appears the court decided *Jensen* on the ground that no evidence supported the trial court's finding.

A concurring justice in *Jensen* observed that the majority's remand evidenced the court's withdrawal from the rule announced in *Vallone* that a claimant must plead the right of reimbursement in order to assert it. 665 S.W.2d at 110-11 (Robertson, J., concurring). The court's handling of *Jensen* is better viewed, however, as an instance of trial by consent with respect to the reimbursement issue, as demonstrated by the evidence at trial and the trial court's findings. It seems very unlikely, moreover, that the court intended to depart from the rule of pleading announced in *Vallone*.

76. 665 S.W.2d at 110. The burden of establishing reimbursement is on the claimant.

it is assumed that the employee's labor will be valued in light of the success of the business, which must be measured to some degree by the amount of its retained earnings. Enhancement of the shares is irrelevant to the computation, but it is apparent that in the outcome of the division on divorce the other shareholders enjoy enhancement of their shares at the expense of the shareholder whose efforts produced the enhancement.

The court added that, if on remand a "right to reimbursement is proved, a lien shall not attach to Mr. Jensen's separate property shares. Rather, a money judgment may be awarded."[77] Thus, the court seemed to reject as meaningless the customary practice of fixing a lien or charge on corporate shares or other personalty awarded to one party for the purpose of securing the payment of a money judgment to the other party.[78] But if the claimant of reimbursement should have seized the shares as a means of securing payment of a money judgment, it would seem that the divorce court might not be precluded from fashioning appropriate prospective relief in the case of nonpayment of the judgment. The court in *Jensen* did not appear to deny divorce courts the power of fixing a lien on realty when necessary to give security for payment of a money judgment for improvements made on the realty.

Business Goodwill. In *Finn v. Finn*[79] the court considered the character of a member's interest in a legal partnership. During twenty years of marriage, the husband had worked for and had become a partner in a large law firm. The partnership agreement, which contained a formula for determining the value of a partner's interest in case of death or withdrawal from the firm, denied compensation for accrued goodwill. In light of this provision the Dallas court of appeals held that it was proper for the trial court to instruct the jury not to consider the law firm's goodwill or future earning capacity when placing a value on the community interest in the husband's law practice.[80] The court distinguished an earlier case[81] in which the structure of the corporation was such that the goodwill enhanced the value of the community interest and was thus subject to division upon divorce.

Case law has defined a two-part test for determining whether the goodwill of a professional practice is subject to division.[82] First, the goodwill must exist independently of the personal skills of the professional spouse.

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77. *Id.*

78. The court's earlier allusion to "proving a charge upon the shares," *id.*, is apparently a mere figure of speech. The court apparently treated placing a lien on the shares as meaningless because it offers no appropriate means of enforcement. *See* TEX. BUS. & COM. CODE ANN. § 8.317 (Tex. UCC) (Vernon Supp. 1984); TEX. R. CIV. P. 641.

79. 658 S.W.2d 735 (Tex. App.—Dallas 1983, no writ).

80. *Id.* at 742.

81. Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, writ dism'd). In *Geesbreght* the court held that the corporation's goodwill existed apart from the personal ability of the husband. This corporate goodwill had a commercial value; hence to the extent that goodwill enhanced the value of the community stock, it was subject to division upon divorce. *Id.* at 436.

82. 658 S.W.2d at 740-41 (citing Nail v. Nail, 486 S.W.2d 761 (Tex. 1972); Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, writ dism'd)).

Second, the court must determine whether the goodwill has a commercial value in which the community estate is entitled to share. In *Finn* the court indicated that the husband's law firm had goodwill independent of the husband's professional ability, since a large part of the firm's reputation had risen from the professional abilities of both the husband's predecessors in the firm and his present partners and professional employees.[83] Furthermore, the court held the goodwill of a long established firm has commercial value.[84] The court in this instance reasoned, however, that the community estate was not entitled to a greater interest than that to which the husband was entitled.[85] Since the partnership agreement did not provide a means of realizing the value of goodwill directly, the only means by which the husband might realize such value was through continuing to practice law as a member of the firm. This inability to realize the value of the firm's goodwill convinced the court that the goodwill of the firm was not community property.[86]

Retirement Benefits. On June 26, 1981, the United States Supreme Court concluded in *McCarty v. McCarty*[87] that nondisability military retirement benefits were not community property for purposes of division on divorce.[88] In 1982 the President signed the Uniformed Services Former Spouses' Protection Act,[89] by which Congress apparently intended to nullify the effect of the *McCarty* decision. Texas appellate courts have since been very concerned about the mutual effects of *McCarty* and the Act, particularly with respect to final divorce decrees in which military retirement benefits were divided as community property prior to the decision in *McCarty*.[90] In *Segrest v. Segrest*[91] the Texas Supreme Court held that the

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83. 658 S.W.2d at 741.

84. *Id.*

85. *Id.* at 740-41.

86. *Id.* The court was careful to point out, however, that while goodwill and future earning capacity do not affect the value on the community interest in a spouse's law practice, the court may consider the extent to which the spouse's earning potential is enhanced by his continued participation in the law firm when assessing any disparity in earning capacity of the spouses. *Id.* at 742; *see also* Cluck v. Cluck, 647 S.W.2d 338, 343 (Tex. App.—San Antonio 1982, writ dism'd) (upholding disparate community division due to husband's retention of his entire professional practice). The result in *Finn* is consistent with the holding in *In re* Aufmuth, 89 Cal. App. 3d, 152 Cal. Rptr. 668 (1979). For a discussion of earlier Texas cases on business goodwill, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 SW. L.J. 99, 111-12 (1979). *See also* Crutchfield, *Professional Degrees and Spousal Rights*, 88 CASE & COMMENT, Nov.-Dec. 1983, at 14; Raggio, *Professional Goodwill and Professional Licenses as Property Subject to Distribution Upon Dissolution of Marriage*, 16 FAM. L.Q. 147 (1982); Udinsky, *Goodwill Depreciation: A New Method for Valuing Professional Practices in Marital Dissolution*, 9 COMM. PROP. J. 307 (1982).

87. 453 U.S. 210 (1981).

88. *Id.* at 232-36.

89. 10 U.S.C. § 1408 (1982). For an analysis of the Act, see Reppy, *Reconsidering the Rules for Military Benefits*, 5 FAM. ADVOC., Spring 1983, at 30. *See also* Segrest v. Segrest, 649 S.W.2d 610, 613 n.2 (Tex. 1983).

90. *Compare Ex parte* Acree, 623 S.W.2d 810, 812 (Tex. App.—El Paso 1981, no writ) (giving retroactive application to *McCarty*), *with Ex parte* Guadion, 628 S.W.2d 500, 502-03 (Tex. App.—Austin 1982, no writ) (refusing to give *McCarty* retroactive application).

91. 649 S.W.2d 610 (Tex.), *cert. denied*, 104 S. Ct. 242, 78 L. Ed. 2d 232 (1983).

McCarty rule is inapplicable to divorce decrees that were final prior to the announcement of that decision.[92] In *Segrest* the ex-husband sought a declaratory judgment that a 1974 divorce decree dividing military retirement pay was unenforceable. The trial court ruled in his favor, and the court of appeals affirmed.[93] The supreme court in *Segrest* rejected the husband's contention on two grounds. First, the court held that the *McCarty* decision was not intended to be retroactive[94] and thus was inapplicable to divorce decrees that were final before *McCarty* was decided.[95] The court reasoned that any retroactive application would place an inequitable burden upon former spouses for whom divisions of the community estate were based upon the assumption that military retirement benefits constituted community assets.[96] Second, the court determined that the prior divorce decree should be viewed as being merely erroneous rather than void, and that the final, unappealed, and valid judgment could not be set aside.[97]

The Texas Supreme Court also considered apportionment of the value of a pensioner's retirement benefits when a couple is divorced prior to the pensioner-spouse's retirement. In *Berry v. Berry*[98] a couple was divorced after twenty-six years of marriage, during which time the husband had worked for a particular company and had accumulated rights toward retirement. When the husband retired twelve years after the divorce, the wife brought a partition suit to recover her share of the retirement benefits, which the divorce decree had not divided. The supreme court held that the benefits in such a case had to be apportioned to the spouses on the basis of the value of the community interest in the pension upon divorce.[99] The ex-wife, therefore, was entitled to one half of the amount that the husband would have received had he retired at the date of divorce.[100] The

92. 649 S.W.2d at 612-13. For a discussion of cases in which the divorce decree was not final at the time of the *McCarty* decision and the proper characterization of retirement benefits in such cases, see *infra* notes 274-306 and accompanying text.

93. 649 S.W.2d at 611. The court of appeals decision is unpublished. *Id.* n.1.

94. *Id.* at 612. The court cited a three-element test promulgated in Chevron v. Huson, 404 U.S. 97, 105-08 (1971), for determining whether and to what extent a judicially modified or abrogated rule of law should be given retroactive operation. In *Segrest* the court stated that this test inquires "(1) Whether the holding in question 'decid[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases; (2) 'whether retrospective operation will further or retard [the] operation' of the holding in question; and (3) whether retroactive application 'could produce substantial inequitable results' in individual cases." 649 S.W.2d at 612 (quoting *Chevron*, 404 U.S. at 106-07).

95. 649 S.W.2d at 613.

96. *Id.* It should be noted that art. 5783, § 10 of the Texas statutes, which provides death and disability payments to members of Texas military forces, has been amended to increase the amount of both death and disability payments. Act of May 10, 1983, ch. 104, 1983 Tex. Gen. Laws 508 (codified at TEX. REV. CIV. STAT. ANN. art. 5783, § 10 (Vernon Supp. 1984)).

97. 649 S.W.2d at 613.

98. 647 S.W.2d 945 (Tex. 1983).

99. *Id.* at 947.

100. *Id.* at 946-47. In this case the husband actually would not have been entitled to any benefits had he retired at the date of divorce, because the company only paid benefits to those retiring after reaching age 60. The court, however, determined the amount of benefits at the date of divorce by calculating the amount the husband would have received had he been 60 years old at the time of divorce. *Id.* at 945-46.

Texas Supreme Court rejected the division the court of appeals had made of the benefits, which would have awarded the wife half of 26/38 of the benefits, based on the ratio of the length of time the couple was married to the number of years the husband was employed.[101] Such an award, the supreme court stated, would invade the separate property of the husband, because it would allow the wife to share in benefits earned by the husband after the divorce as well as increased benefits produced by subsequent union contract agreements, which had no relation to rights accrued during marriage.[102] Unfortunately, however, the court failed to comment on whether the wife should share in post-divorce pension adjustments for mere cost of living increases. Although such increases are arguably in the nature of post-divorce gifts and hence the pensioner's separate property, federal law[103] provides the employer tax incentives for making such adjustments, which serve, moreover, to establish the employer's goodwill in the eyes of present employees. Thus, pension adjustments representing cost of living increases should not be treated as gifts to the employee, and, therefore, it would seem that they should be reflected in the entitlement of the employee's former spouse. Further, if pension benefits are fully matured before divorce and cost-of-living increments are added to them, and nothing more, the rule in *Berry* seems inapplicable because the pensioner has acquired no new interest as a result of his labor following divorce. In the alternative, it would seem that in a post-divorce partition situation the pensioner's former spouse should be entitled to interest on the amount of her unpaid entitlement dating from receipt of the benefits by the pensioner. The opinion in *Berry*, however, does not address either alternative. Those points aside, the courts and counsel will nevertheless have practical difficulty in giving effect to *Berry* in many instances. In particular, testimony as to the value of the benefits that the pensioner will receive when he retires will be necessary so that the judgment entered at the time of divorce will not require future clarification. Courts and practitioners will also encounter difficulty in structuring formulae of division that will comply with the *Berry* doctrine in the context of economic realities. The Austin court of appeals has twice wrestled with the holding in *Berry* in the context of federal civil service retirement benefits earned, in one case, before, during, and after the termination of a marriage,[104] and in the other,[105] merely during marriage and following divorce. Both cases exemplify the problems inherent in applying the *Berry* rule.

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101. Berry v. Berry, 636 S.W.2d 865, 866-67 (Tex. Civ. App.—Eastland 1982), *rev'd*, 647 S.W.2d 945 (Tex. 1983).

102. 647 S.W.2d at 946-47. The court noted that during the husband's 12 additional years of work after the divorce, he received numerous pay raises which resulted in increases to his retirement benefits. *Id.* For a pre-*Berry*, pre-*McCarty* divorce division case anticipating the results in *Berry*, see Moore v. Jones, 640 S.W.2d 391, 393-94 (Tex. App.—San Antonio 1982, no writ).

103. Employee Retirement Income Security Program, 29 U.S.C. §§ 1001-1461 (1982).

104. Heisterberg v. Standridge, 656 S.W.2d 138, 142-43 (Tex. App.—Austin 1983, no writ).

105. Boniface v. Boniface, 656 S.W.2d 131, 134 (Tex. App.—Austin 1983, no writ).

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

Joint Tenancy. McCarver v. Trumble[106] involved an attempt on the part of foreign domiciliaries to create a joint tenancy in Texas land. Using two equal checks drawn on their respective bank accounts, domiciliaries of Colorado, a noncommunity property state, bought a tract of Texas land and took title as a joint tenancy with a right of survivorship. After the husband's death a dispute arose with respect to title to the property. Claimants on behalf of the husband asserted that the property was presumptively community.[107] The widow, however, demonstrated that the checks used in making the cash purchase were the separate property of each spouse under Colorado law. Thus the acquisition of title in joint tenancy was not subject to the line of Texas authority holding that a purported acquisition of a joint tenancy with Texas community property is ineffective.[108]

After-Acquired Property. A case in the Waco court of appeals[109] presented issues of considerable difficulty. A couple purchased the land at issue as their community property in the 1950s. Title was apparently taken in the names of both spouses, but the court did not treat the formal state of the title as relevant. In 1965, in anticipation of divorce, the wife conveyed the property to a third person with a covenant of warranty to satisfy the payment of a loan and with an intent to defraud her husband of his interest in the land under the Texas fraudulent conveyance statute.[110] Although the couple was then domiciled in Iowa, Texas law gave the husband management of the community estate.[111] The court in the couple's subsequent divorce did not dispose of the property, and so it became a tenancy in common of the former spouses by operation of law.[112] The grantee therefore asserted that the former wife's portion of the land passed by operation of the after-acquired title doctrine.

The former husband argued that the wife's conveyance was void as a fraud on him and that the wife's warranty was also void. On the fraud point the court of appeals sustained the husband's argument under Texas

106. 660 S.W.2d 595 (Tex. App.—Corpus Christi 1983, no writ).

107. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975) provides that "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property."

108. 660 S.W.2d at 598. The Texas cases striking down attempt acquisitions of joint tenancies with Texas community property include Maples v. Nimitz, 615 S.W.2d 690, 693-95 (Tex. 1981); Williams v. McKnight, 402 S.W.2d 505, 508 (Tex. 1966); Hilley v. Hilley, 161 Tex. 569, 575-77, 342 S.W.2d 565, 569-70 (1961).

109. Pascoe v. Keuhnast, 642 S.W.2d 37 (Tex. App.—Waco 1982, no writ), *appeal dismissed*, 103 S. Ct. 3528, 77 L. Ed. 2d 1381 (1983).

110. Tex. Rev. Civ. Stat. art. 3996 (1925), *repealed by* Act of Sept. 1, 1967, ch. 785, § 1, 1967 Tex. Gen. Laws 2343, *reenacted as* TEX. BUS. & COM. CODE ANN. § 24.02 (Vernon 1968).

111. Tex. Rev. Civ. Stat. art. 4619 (1925), *repealed by* Act of Jan. 1, 1968, ch. 309, § 1, 1967 Tex. Gen. Laws 735, 738, *reenacted as* TEX. FAM. CODE ANN. § 5.02 (Vernon 1975).

112. Busby v. Busby, 457 S.W.2d 551 (Tex. 1970).

law.[113] But even a void conveyance with a valid warranty would support the operation of the after-acquired title doctrine, and it is on this point that the court's reasoning in favor of the former husband foundered. The court relied on a Texas Supreme Court decision[114] of 1893 for the proposition that a married woman's warranty has no effect because of her lack of contractual capacity resulting from disabilities of coverture, but such reliance was misplaced. What the court seemed to overlook was that those disabilities were removed by statute in 1963.[115] Hence it would seem that the wife's one-half interest in the property passed to the grantee. If so, the same result would obtain if during marriage either spouse purported to dispose of jointly managed community property or property subject to the sole management of the other spouse and the grantor later acquired part or all of that property as his separate estate.

After-acquired property may also be the subject of a contractual will. In *Perl v. Howell*[116] the husband and his first wife made contractual wills by which all property of the first to die would pass to the survivor and on the death of the survivor all property of the survivor would pass to their children. After his first wife's death, the husband remarried and made a new will with different dispositive provisions. After the father's death the children of the first marriage fixed a constructive trust on the takers of the second will to carry out the first will's provisions. The decedent's share of the second community estate therefore passed to the children of the first marriage by the terms of the contractual will.[117]

Post Mortem Liability. The Family Code[118] provides for the liability of jointly managed community property[119] of living spouses, while the Probate Code[120] deals with such liability when a debtor dies. Neither Code, however, specifically addresses the situation when the debtor spouse survives the nondebtor spouse. In *Carlton v. Estate of Estes*[121] the Texas Supreme Court recently rendered a per curiam opinion in such a case, but some of the facts must be gleaned from the opinion of the court below.[122] During marriage, a judgment was rendered against the husband in a suit to which the wife was not a party and the judgment was abstracted in the county where community realty was located. After the wife's death the

113. 642 S.W.2d at 40 (citing Biccochi v. Casey-Swasey Co., 91 Tex. 259, 42 S.W. 963 (Tex. 1897)); *see* STATE BAR OF TEXAS, CREDITORS' RIGHTS IN TEXAS 356 (1963).

114. Wadkins v. Watson, 86 Tex. 194, 197, 24 S.W. 385, 385-86 (1893).

115. Act of June 10, 1963, ch. 472, § 4, 1963 Tex. Gen. Laws 1188. The consequences of this act are codified as TEX. FAM. CODE ANN. § 4.03 (Vernon 1975).

116. 650 S.W.2d 523 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

117. *Id.* at 525.

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

119. When recovery is sought against jointly managed community property, it is immaterial whether the liability stems from tortious or nontortious conduct. *Id.*

120. TEX. PROB. CODE ANN. § 156 (Vernon 1980). For a discussion of § 156, see McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 SW. L.J. 31, 44-45 (1972).

121. 664 S.W.2d 322 (Tex. 1983).

122. Carlton v. Estate of Estes, 654 S.W.2d 36 (Tex. App.—Fort Worth 1983), *rev'd*, 664 S.W.2d 322 (Tex. 1983).

judgment creditor filed his claim against the wife's estate in an attempt to satisfy his judgment against the realty, which was in both spouses' names and subject to inter vivos joint management. The wife's executor apparently did not assert the marshalling provisions of section 5.62 of the Family Code.[123] The executor apparently argued that the property was not subject to liability because the wife was not a party to the suit. The executor succeeded before both the probate court and the Fort Worth court of appeals.[124]

Section 5.61(c) of the Family Code, provides: "The community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by him or her before or during marriage."[125] Because the creditor in *Carlton* had abstracted his judgment in the county where the realty was located, the only serious question was whether section 5.61(c) should be read literally. In effect, the court answered in the affirmative, holding that the jointly managed community property was liable for the husband's judgment debt.[126] The court might have raised two other points. First, it might have been argued that because the wife was not a party to the suit against her husband, her executor should have been able to employ the marshalling statute[127] so that liability would fall first on the husband's separate property, then on the community property subject to his sole management, and only thereafter on the judgment creditor's share of the formerly jointly managed community.

Second, some lawyers have wondered whether a levy of execution or similar remedy is proper with respect to property in both spouses' names when the judgment is in the name of only one spouse.[128] A literal reading of section 5.61(c) seems to dispose of this argument. Ultimately it would make no difference whether the wife were living or dead when foreclosure of the lien was sought, as long as she was living when the judgment was abstracted. In contrast, in a case in which the creditor has not acquired his lien during the marriage by filing an abstract of judgment or otherwise, and the non-debtor spouse has died, dissolution of the marriage causes a partition of the community estate so that a community tract becomes undivided shares of separate property. Section 156 of the Probate Code[129] clearly applies only in an instance when the debtor spouse dies first, and section 5.61(c) of the Family Code[130] only concerns liability with respect to community property. The result is that a creditor who waits until the

123. TEX. FAM. CODE ANN. § 5.62 (Vernon 1975).

124. 654 S.W.2d 36, 37 (Tex. App.—Fort Worth 1983), *rev'd*, 664 S.W.2d 322 (Tex. 1983).

125. TEX. FAM. CODE ANN. § 5.61(c) (Vernon 1975).

126. 664 S.W.2d at 323.

127. TEX. FAM. CODE ANN. § 5.62 (Vernon 1975).

128. *See* McKnight, *supra* note 86, at 148; McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 78-79 (1974); McKnight & Dorsaneo, *Management and Liability of Community Property and the Joinder of Spouses in Suits in Texas Family Law and Procedure—Advanced Family Law Refresher Course* F11-F12 (State Bar of Texas 1976).

129. TEX. PROB. CODE ANN. § 156 (Vernon 1980).

130. TEX. FAM. CODE ANN. § 5.61(c) (Vernon 1975).

debtor spouse dies before attempting to enforce his judgment loses his opportunity to enforce his lien against the non-debtor spouse's interest in the former community estate.[131]

Thus in the context of liability, as opposed to that of joint management,[132] the doctrine of virtual representation has not been abandoned in Texas. Indeed, the language of section 5.61 clearly ordains the employment of this doctrine in certain circumstances. Hence, the nonobligated spouse should seek the protection of section 5.62 to avoid the immediate consequences of section 5.61. But whether or not section 5.62 is utilized, on termination of the marriage the nonobligated spouse may still assert a right of reimbursement for his or her share of community funds used to discharge any liability that the obligated spouse would more properly have borne alone.

It is fundamental, however, that if the sole manager of community property is properly deprived of that property, the other spouse's interest is lost as well.[133] Further if one spouse wishes to buy property that will perforce be that spouse's solely managed community, that spouse acting alone may fix a valid lien on such property to secure a loan for the purchase money. At this date it is startling that a contrary view might be entertained.[134]

Homestead: Designation and Extent. The Texas Constitution of 1876 defined the urban homestead in terms of the value of an urban lot or lots and the rural homestead in terms of acreage.[135] The five thousand dollar amount, without improvement, by which the urban homestead was defined[136] amply covered the combined value of residential and business realty in the late nineteenth century. After the 1950s, however, fewer and fewer urban residential lots were available for five thousand dollars or less. Thus in 1970 the constitution was amended to increase the urban home-

131. Thus, a creditor's right of enforcement of an unsecured debt against part of the community may be precluded by death just as by divorce. *See* Miller v. City Nat'l Bank, 594 S.W.2d 823, 825-26 (Tex. Civ. App.—Waco 1980, no writ). But the mere filing of a suit for divorce does not affect the right of secured or unsecured creditors, nor does the appointment of a receiver by a divorce court interfere with a creditor's rights. *See* Mussina v. Morton, 657 S.W.2d 871, 874 (Tex. App.—Houston [1st Dist.] 1983, no writ). For the consequences of bankruptcy following divorce, the authorities are collected in Comment, *Bankruptcy After Divorce: Rights and Liabilities of Former Spouses in Texas*, 23 S. TEX. L.J. 173 (1982).

132. *See* Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200 (Tex. 1974). In Carr v. Galvan, 650 S.W.2d 864, 869-70 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.), the San Antonio appellate court was called upon to reverse an adjudication in which only the husband was involved for a deceptive trade practices claim relating to the wife's separate property.

133. Flynn v. Savings & Profit Sharing Plan, 558 F. Supp. 861, 866-67 (N.D. Tex. 1982).

134. *But see* McKenzie v. U.S. Home Corp., 704 F.2d 778, 779 (5th Cir. 1983).

135. TEX. CONST. art. XVI, § 51 (1876, amended 1970). For the early history of the development of Texas homestead law, see McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evaluation of a Legal Principle*, 86 SW. HIST. Q. 369 (1983).

136. Law of Apr. 26, 1897, ch. 101, § 1, 1897 Tex. Gen. Laws 131, 10 H. GAMMEL, LAWS OF TEXAS 1185 (1898).

stead exemption to ten thousand dollars.[137] Within a decade, price inflation had again overtaken the value. It therefore seemed wise to redefine the urban homestead in terms of either value or area, at the claimant's choice, or else to define it in terms of area alone. The new definition, which was ultimately proposed[138] and adopted in the general election of 1983,[139] speaks in terms of area alone and expressly applies to homesteads previously established.[140] It must be pointed out, however, that although an urban homestead claimant may assert the amendment's applicability to a homestead previously defined in terms of value, the new definition nevertheless does not seem to apply with respect to debts the homestead owner incurred prior to the effective date of the amendment.[141] The consequence of the new amendment, which defines the urban homestead as consisting of "not more than one acre of land, together with any improvements on the land,"[142] is that the urban homestead may again effectively cover "a home, or . . . a place to exercise the calling or business of the homestead claimant . . . ."[143]

In *Steenland v. Texas Commerce Bank National Ass'n*[144] the court considered the rights of a debtor when his creditor attempts to satisfy a judgment from that part of a tract in excess of the portion that is exempt as an urban homestead according to the former definition in terms of value. The creditor bank in *Steenland* obtained a judgment against a debtor and requested an order authorizing the forced sale of the debtor's homestead and the appointment of a receiver. The bank argued that pursuant to article 3827a[145] the court had jurisdiction to determine the extent of the debtor's exemption in his property and to appoint a receiver. The debtor opposed

137. TEX. CONST. art. XVI, § 51 (1876, amended 1970).

138. Tex. H.R.J. Res. 105, 68th Leg., 1983 Tex. Gen. Laws 6724-25.

139. *Id.* The election was held on Nov. 8, 1983. The effective date of the amendment was Nov. 29, 1983. The general election concerning the amendment was authorized by and conducted under TEX. CONST. art. XVII, § 1.

140. Tex. H.R.J. Res. 105, § 2, 68th Leg., 1983 Tex. Gen. Laws 6724.

141. *See* U.S. CONST. art. 1, § 10 (prohibiting state laws impairing contract obligations); Edwards v. Kearzey, 96 U.S. 595, 599-602 (1877); Gunn v. Barry, 82 U.S. (15 Wall.) 610, 622-24 (1873); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 539-47 (1944).

142. Tex. H.R.J. Res. 105, 68th Leg., 1983 Tex. Gen. Laws 6724; TEX. CONST. art. XVI, § 50 (1876, amended 1973).

143. Tex. H.R.J. Res. 105, 68th Leg., 1983 Tex. Gen. Laws 6274-75; TEX. CONST. art. XVI, § 50 (1876, amended 1973). The legislature amended TEX. REV. CIV. STAT. ANN. art. 3833(a) (Vernon Supp. 1982-1983) so that the urban homestead would be redefined when and if the constitutional amendment proposed in Tex. H.R.J. Res. 105 was adopted. Act of June 19, 1983, ch. 976, § 3, 1983 Tex. Gen. Laws 5309, 5309-10 (amending TEX. REV. CIV. STAT. ANN. art. 3833 (Vernon Supp. 1982-1983), now codified before amendment in TEX. PROP. CODE ANN. § 41.001 (Vernon Pam. 1983)). As under prior law the claimant will have to establish the designation of the business homestead. *See In re* Sandlin, No. 583-0056, slip op. at 1-6 (Bankr. N.D. Tex. Sept. 22, 1983).

144. 648 S.W.2d 387 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

145. TEX. REV. CIV. STAT. ANN. art. 3827a (Vernon Supp. 1984) provides in part:

> (a) A judgment creditor whose judgment debtor is the owner of property, including present or future rights to property, which cannot readily be attached or levied on by ordinary legal process and is not exempt from attachment, execution, and every type of seizure for the satisfaction of liabilities, is

the motion on the issue of excess value of his homestead and demanded a jury trial. The trial court overruled the debtor's motion and, without the aid of a jury, determined the excess value of the homestead and appointed a receiver to sell the property. The debtor appealed, asserting that article 3827a is merely a procedural device to be used by creditors in collection of their judgments and does not authorize a court to make factual determinations regarding excess value of homestead property. The debtor argued further that he was entitled to a jury trial on the factual issue of excess value. The court of appeals agreed, holding that article 3827a is a purely procedural collection statute pertaining only to execution and not to the substantive issue of the exempt status of homestead property.[146] In order to secure a determination of excess value, a creditor must allege and prove such value.[147] Further, since the debtor in *Steenland* had made a timely demand for a jury trial on the fact issues relating to value, he was entitled to a jury.[148] The new definition of the urban homestead by area rather than by value will cause cases like *Steenland* to occur with far less frequency.[149]

The San Antonio court of appeals considered the effect of renunciation of homestead rights in property that the owner does not yet occupy in *Miles Homes v. Brubaker*.[150] In that case a husband and wife purchased unimproved property on which they planted grass, installed a water system, and put in a gravel driveway. They then entered into a contract with

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entitled to aid from a court of appropriate jurisdiction by injunction or otherwise in reaching the property to satisfy the judgment.

(b) The court may order the property of the judgment debtor referred to in Subsection (a) of this section, together with all documents or records related to the property, that is in or subject to the possession or control of the judgment debtor to be turned over to any designated sheriff or constable for execution or otherwise applied toward the satisfaction of the judgment. The court may enforce the order by proceedings for contempt or otherwise in case of refusal or disobedience.

(c) The court may appoint a receiver of the property of the judgment debtor referred to in Subsection (a) of this section, with the power and authority to take possession of and sell the nonexempt property and to pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

(d) These proceedings may be brought by the judgment creditor in the same suit in which the judgment is rendered or in a new and independent suit.

146. 648 S.W.2d at 390.

147. *Id.* at 389; *see also In re* Shaw, No. 583-00094, slip op. at 6 (Bankr. N.D. Tex. Sept. 22, 1983). In *Steenland* the court noted that art. 3827a, a newly enacted statute, had been construed only once. 648 S.W.2d at 389 (citing Pace v. McEwen, 617 S.W.2d 816 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ)). In *Pace* the court held that art. 3827a gave the trial court jurisdiction to determine the exempt status of property alleged to be homestead. 617 S.W.2d at 819. The issue of excess nonexempt value of homestead property was not present in that case.

148. 648 S.W.2d at 391. The court recognized that the right of trial by jury is a valuable right that state courts should closely guard. *Id.*

149. An amendment to TEX. REV. CIV. STAT. ANN. art. 3841 (Vernon 1966) will be necessary, however, to define clearly a claimant's right to designate his urban homestead. Under the old value definition of the urban homestead, a new valuation of the whole property has been said to be necessary when the area of the homestead was increased. *See In re* Sandlin, No. 583-00056, slip op. at 4 (Bankr. N.D. Tex. Sept. 22, 1983).

150. 649 S.W.2d 791 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

a builder to construct a home on the premises. Prior to delivery of any materials, the husband and wife signed and returned to the builder a deed of trust, which contained a clause stating that the property was not their homestead.[151] When the couple stopped making payments on the contract, the builder attempted to foreclose on the property. The husband and wife brought suit to prevent foreclosure, claiming that the property was their homestead and that the deed of trust was not a valid mortgage or encumbrance. The trial court granted the relief sought, relying on the Texas Supreme Court's decision in *Kempner v. Comer*.[152] The court of appeals reversed, holding that the disclaimer in the deed of trust estopped the couple from asserting a homestead right.[153] The court noted, however, that the disclaimer would have been ineffective had the property been in actual use and occupancy as a homestead at the time the plaintiffs executed the disclaimer.[154] The court failed to explain why the lien would not have been enforceable even absent the disclaimer, if the contract was for improvement of property claimed as homestead.

Legislation has long provided that the proceeds of sale of a homestead are exempt for six months.[155] Thus if a debtor who has recently sold his home files a petition in bankruptcy, he may claim the proceeds as exempt.[156] But a bankruptcy court has concluded that if the debtor acquires a new homestead, he cannot also claim proceeds on hand from the sale of the former home as exempt.[157] Another bankruptcy court held that personalty acquired in connection with the negotiation of a valid lien on homestead property is not exempt.[158]

Homestead: Abandonment and Its Effects. In *Rimmer v. McKinney*[159] the Fort Worth court of appeals concluded that a husband did not abandon his homestead interest merely by moving out of the family home in anticipation of divorce.[160] Exclusion from the premises by court order does not

151. The disclaimer clause stated:

> [T]he property hereinabove mentioned and conveyed to said party of the second part [the trustee] forms no part of any property by them [the owners] owned, used, occupied or claimed as their homestead or as exempt from forced sale under the laws of the State of Texas, and disclaim and renounce all and every claim thereof.

Id. at 793.

152. 73 Tex. 196, 202-03, 11 S.W. 194, 195 (1889) (once owner executes disclaimer, issue of intent to use as homestead a moot issue).

153. 649 S.W.2d at 793.

154. *Id.; see also In re* Parker, 27 Bankr. 932 (Bankr. N.D. Tex. 1983) (recitations in mortgages puporting to designate specific homestead ineffective when contrary to actual conditions). For a liberal interpretation of designation by sporadic occupancy, see *In re* Shaw, No. 583-00094, slip op. at 3-5 (Bankr. N.D. Tex. Sept. 22, 1983).

155. TEX. REV. CIV. STAT. ANN. art. 3834 (Vernon 1966). The legislature enacted art. 3834 in 1897, codifying the rule in Hunter v. Wooldert, 55 Tex. 433, 436-37 (1881).

156. *In re* Harlan, 32 Bankr. 91, 92 (Bankr. W.D. Tex. 1983).

157. *In re* Cereghino, No. 583-00065, slip op. at 3-4 (Bankr. N.D. Tex. July 20, 1983).

158. *In re* Cannon, Nos. 581-00115, 583-0030, slip op. at 2-5 (Bankr. N.D. Tex. Apr. 14, 1983).

159. 649 S.W.2d 365 (Tex. App.—Fort Worth 1983, no writ).

160. *Id.* at 367.

exclude continuation of a spouse's homestead interest,[161] and therefore his mere voluntary removal while divorce proceedings are pending would not do so. Following the divorce in *Rimmer* the former wife obtained a declaratory judgment against her former husband's judgment creditor that her homestead was not affected by the creditor's abstract of judgment filed before the husband moved out of the home. A further bar to such a creditor's immediate right to reach the husband's interest in the community homestead lies in the rule of law that neither spouse can seek an involuntary partition of the community short of divorce. Because a spouse's creditor may not ordinarily obtain a remedy that his debtor could not achieve, the creditor may not force partition of the community homestead to reach the debtor spouse's interest therein.[162]

The circumstances in *Rimmer* raise the issue whether a spouse may acquire an independent homestead pending divorce. The Texas Supreme Court held in *Renaldo v. Bank of San Antonio*[163] that a divorced parent may acquire a family homestead, with the result that each divorced parent could then have a homestead even though at that time a single adult could not acquire a homestead. It would seem to follow from *Renaldo* that an undivorced parent could establish an independent homestead without jeopardizing his spouse's quiet enjoyment of the prior family homestead, although the nonoccupant's homestead claim might be lost.[164]

In several bankruptcy cases[165] the issue of abandonment of the homestead was before the court.[166] After a careful weighing of the facts in each case, the court must determine whether the claimant has abandoned an established homestead. In such cases the burden of proof of abandonment is upon the contestant.[167] Hence those instances in which the creditor suc-

161. *See* Speer & Goodnight v. Sykes, 102 Tex. 451, 454, 119 S.W. 86, 87 (1909) (ex-wife given sole occupancy of premises after divorce); Sakowitz Bros. v. McCord, 162 S.W.2d 437, 438-39 (Tex. Civ. App.—Galveston 1942, no writ) (husband temporarily enjoined from entering homestead property pending divorce).

162. The federal government, however, is capable of achieving this result as a creditor. Broday v. United States, 455 F.2d 1097, 1099 (5th Cir. 1972) (federal tax lien); *see* J. McKNIGHT & W. REPPY, TEXAS MATRIMONIAL PROPERTY LAW 198 n.2 (1983).

163. 630 S.W.2d 638 (Tex. 1982); *see also In re* Barnett, 33 Bankr. 70, 71 (Bankr. N.D. Tex. 1983) (rural family homestead for divorced father).

164. *See In re* Cumpton, 30 Bankr. 49 (N.D. Tex. 1983).

165. In bankruptcy the facts existing at the time the petition is filed control claims to exemptions. *In re* Harlan, 32 Bankr. 91, 92 (Bankr. N.D. Tex. 1983) (exempt quality of proceeds of sale of homestead); *In re* Sandlin, No. 583-00050, slip op. at 3 (Bankr. N.D. Tex. Sept. 22, 1983) (designation of business homestead); *In re* Mack, No. 582-00057, slip op. at 4 (Bankr. N.D. Tex. Sept. 22, 1983) (assertion of homestead in different property after court awarded home originally claimed as exempt to bankrupt's wife in divorce proceeding pending prior to filing of bankruptcy petition).

166. *In re* Johnson, Nos. 583-0114, 583-0132 (Bankr. N.D. Tex. Sept. 22, 1983); *In re* Scarth, Nos. 282-00153, 283-0028 (Bankr. N.D. Tex. June 21, 1983); *In re* White, Nos. 582-00060, 583-0070 (Bankr. N.D. Tex. May 16, 1983). In these cases the courts applied the rule that if property is a homestead when it is mortgaged, the mortgage is void, but if the property is not a homestead at that time, the mortgage is valid. The homestead claimant is not estopped by a misrepresentation that the property was not a homestead when it was purportedly mortgaged. *In re* Parker, 27 Bankr. 932, 934 (Bankr. N.D. Tex. 1983).

167. Sullivan v. Barnett, 471 S.W.2d 39, 43 (Tex. 1971).

ceeds are not numerous.[168] In one recent case[169] the creditor asserted that the debtors' representation to the creditor that they then resided in New Mexico constituted a fraudulent assertion that they had abandoned their Texas homestead, but the court concluded that the creditor had not discharged the burden of showing fraud.[170]

In *Zable v. Henry*[171] the Dallas court of appeals considered the validity of an option to sell a homestead when the option was granted by the husband alone. In apparent anticipation of abandonment of the homestead or a prior suit for damages for the husband's failure to convey the homestead, the husband sought a declaratory judgment that the option was void because his wife had not joined in granting it. The husband conceded that before the enactment of section 5.81 of the Family Code[172] any conveyance of homestead property by one spouse without the consent of the other was not void but merely inoperative while the property continued to be a homestead.[173] He argued, however, that section 5.81 changed the law by specifically providing that one spouse may not sell, convey, or encumber a homestead without the consent of the other spouse.[174] The court disagreed with the husband's construction of the statute, holding that section 5.81 is no more than a statutory enactment of the constitutional provision against conveyance of homestead property without the joinder of both spouses.[175] The court thus refused to void the option and ruled that if the property were no longer the homestead of either spouse when the option became exercisable, the option would be enforceable by specific performance.[176] If, however, the property remained a homestead at that time, the purchaser of the option would have an action for damages against the husband.[177]

Homestead: Filing and Enforcing Liens. The exact nature of the homestead interest is uncertain under Texas homestead law.[178] Some courts

168. One such case is *In re* White, Nos. 582-00060, 583-0070, slip op. at 4-5 (Bankr. N.D. Tex. May 16, 1983). The court's argument is not very convincing, however.

169. *In re* Scarth, Nos. 282-00153, 283-0023 (Bankr. N.D. Tex. June 21, 1983).

170. *Id.*, slip op. at 7-8; *see In re* Reed, 12 Bankr. 41 (Bankr. N.D. Tex. 1981), *aff'd*, 700 F.2d 986 (5th Cir. 1983), *discussed in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 36 SW. L.J. 97, 128 (1982), *noted in* Note, *Use of the Texas Homestead Exemption to Shelter Assets in Bankruptcy*: First Texas Savings Association, Inc. v. Reed (In re Reed), 14 TEX. TECH L. REV. 648 (1983).

171. 649 S.W.2d 136 (Tex. App.—Dallas 1983, no writ).

172. TEX. FAM. CODE ANN. § 5.81 (Vernon 1975).

173. *See* Grissom v. Anderson, 125 Tex. 26, 30, 79 S.W.2d 619, 621 (1935); Weinert v. Cooper, 107 S.W.2d 593, 595-96 (Tex. Civ. App.—Texarkana 1937, writ dism'd).

174. TEX. FAM. CODE ANN. § 5.81 (Vernon 1975) provides: "Whether the homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber it without the joinder of the other spouse except as provided in Section 5.82, 5.83, 5.84, or 5.85 of this code or by other rules of law."

175. 649 S.W.2d at 139. TEX. CONST. art. XVI, § 50 (1876, amended 1973) provides: "The homestead of a family . . . shall be, and is hereby protected from forced sale . . . nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse . . . ."

176. 649 S.W.2d at 138.

177. *Id.*

178. For an overview of Texas homestead law, see W. SIMPKINS, TEXAS FAMILY LAW § 36.4 (O. Speer 5th ed. 1977).

have held that the homestead right is an estate in land,[179] while others have considered it merely a privilege of exemption from creditors' claims.[180] In *United States v. Rodgers*[181] the United States Supreme Court addressed this distinction and its relevance to an asserted federal tax lien on Texas homestead property. In *Rodgers* the Internal Revenue Service had assessed a tax deficiency against the defendant's husband. When the husband then died without having paid the tax, the Service attempted to foreclose the federal lien on his widow's homestead, which had been their community property.[182] The Fifth Circuit Court held that the Service could not foreclose a lien against the homestead of a spouse who owed no tax liability if, under state law, the homestead is in the nature of an estate in land rather than a mere exemption from creditors' claims.[183] The court based this ruling on its view that the federal tax lien statute[184] allows attachment of a lien only against a delinquent taxpayer's interest in a jointly held property and not against the entire property.[185] The Fifth Circuit Court concluded that because Texas considers the homestead a property right in the nature of an estate in land, the lien could not be foreclosed.[186]

The Supreme Court agreed with the Fifth Circuit that the Texas homestead right is a vested property right. The Court stated that the homestead laws grant rights that vest independently in each spouse regardless of

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179. Woods v. Alvarado State Bank, 118 Tex. 586, 590, 19 S.W. 35, 37 (1929); Orr v. Orr, 226 S.W.2d 172, 173 (Tex. Civ. App.—Amarillo 1949, no writ).

180. Dakan v. Dakan, 125 Tex. 305, 318-19, 83 S.W.2d 620, 625 (1935); Foster v. Johnson, 89 Tex. 640, 646-47, 36 S.W. 67, 69 (1896). For an analysis of this line of cases, see United States v. Rogers [sic], 649 F.2d 1117, 1126 n.16 (5th Cir. 1981), *rev'd*, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983).

181. 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983).

182. The property was the defendant's home and had been community property during the husband's lifetime. *Id.* at 2139, 76 L. Ed. 2d at 249.

183. United States v. Rogers [sic], 649 F.2d 1117, 1125-28 (5th Cir. 1981), *rev'd*, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983).

184. The federal tax lien statute provides in part:

> (a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.
>
> . . .
>
> (c) Adjudication and decree.—The court shall . . . proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property . . . and a distribution of the proceeds of such sale . . . .

I.R.C. § 7403 (1982).

185. 649 F.2d at 1127-28. Although its opinion is somewhat unclear, the court apparently reasoned that if the spouse had an actual property right in the homestead, the sale of the entire homestead to satisfy the lien would constitute an unjustified taking of the spouse's property that could not be adequately compensated.

186. *Id.* at 1126.

whether one spouse or both own the fee interest in the homestead.[187] The Court noted that Texas homestead laws effectively reduce the underlying ownership rights in homestead property to an interest similar to a remainder and vest in each spouse an interest analogous to an undivided life estate.[188] Furthermore, this interest may be lost only by death or abandonment, and it may not be compromised by the other spouse or his or her heirs.[189]

Despite its conclusion that the Texas homestead right is an estate in land rather than a mere exemption, the Supreme Court reversed the Fifth Circuit's holding and allowed the Service to foreclose the lien.[190] The Court rejected the construction of the federal lien statute as applying only to the delinquent taxpayer's interest in jointly owned property. The Court held that even if a delinquent taxpayer owns property jointly with another, the statute permits the sale of the entire property to satisfy the judgment.[191] The Court also disagreed with the Fifth Circuit's conclusion that the nontaxpayer-spouse's homestead interest is protected from a tax lien if it is in the nature of a property interest. The Court noted that no such exception appears on the face of the statute and that to read one into the statute would frustrate its policy.[192] Further, the Court stated that, under the supremacy clause of the United States Constitution, the federal statute must prevail over the state homestead law.[193] The fact that the Texas homestead law creates an estate in land rather than merely an exemption therefore will not prevent the federal government from forcing the sale of an entire property, even if a nondelinquent spouse has a homestead interest in the property.

The Supreme Court further stated, however, that district courts should exercise some discretion in ordering a sale of property under the tax lien statute when a nondelinquent spouse has a homestead interest.[194] The Court cited four factors that a district court should consider before ordering a sale: (1) the degree of prejudice to the federal government that the sale of only a partial interest would cause; (2) whether the nondelinquent spouse has a legally recognizable expectation that his or her interest will not be subject to forced sale; (3) the prejudice to the spouse in terms of undercompensation and dislocation costs; and (4) the relative character

187. 103 S. Ct. at 2138, 76 L. Ed. 2d at 248. In support of this proposition, the Supreme Court cited TEX. CONST. art. XVI, §§ 50, 51, 52 (1876, as amended).

188. 103 S. Ct. at 2138-39, 76 L. Ed. 2d at 248.

189. *Id.* The Court, quoting the Texas Supreme Court, stated that the nonowner spouse "has a vested estate in the land of which she cannot be divested during her life except by abandonment or a voluntary conveyance in the manner prescribed by law." *Id.* (quoting Paddock v. Siemoneit, 147 Tex. 571, 585, 218 S.W.2d 428, 436 (1949)).

190. 103 S. Ct. at 2141, 76 L. Ed. 2d at 252-53.

191. *Id.* at 2141-45, 76 L. Ed. 2d at 253. The Court stated that the Fifth Circuit's construction of the statute was clearly contrary to its plain meaning and noted that the statute allows the federal government to enforce its lien against any property in which the taxpayer has any right, title, or interest. *Id.*

192. *Id.* at 2146, 76 L. Ed. 2d at 257-58.

193. *Id.* at 2147, 76 L. Ed. 2d at 258.

194. *Id.* at 2149, 76 L. Ed. 2d at 261.

and value of the nonliable and liable interests in the property.[195] In making a partition of the property after the sale, the nonliable surviving spouse is entitled to the full value of his or her interest including a right of future occupancy.[196] Hence, depending on the price realized at a forced sale, the federal government's share could be less than half of such price.

In *Estate of Johnson v. Commissioner*[197] the Fifth Circuit court considered the nature of the Texas homestead in attributing the entire value of a separate homestead to the estate of a deceased spouse for estate tax purposes. In large measure the court relied on its discovery of the Texas Dower Act,[198] which was passed in 1839 and repealed with the enactment of the statutory definition of community property a year later, as controlling the nature of the homestead in this context. The court concluded that homestead rights in favor of a surviving widow, which were statutorily created in 1843, were in the nature of dower rights; hence the surviving spouse's homestead interest was part of the deceased spouse's gross estate for estate tax purposes.[199] Whether the 1843 act initially filled a conjectured "gap in the statutory scheme"[200] resulting from repeal of the Dower Act in 1840, as the court said, or whether it effectively replaced the widow's right to a fourth part of the husband's estate under Spanish law, which was also abolished on the same day in 1840, as the Texas Supreme Court held in 1856,[201] seems beside the point. What is relevant is the fact that the Texas homestead has become an estate in land that has no relation to common law dower. Somehow the court in *Johnson* lost sight of the development of the law since 1843.

Texas courts have generally acknowledged that in a suit for divorce a lien may be placed upon a spouse's homestead in order to secure the payment of a money judgment awarded to the other spouse for his or her homestead interest.[202] Such a lien is permissible because it amounts to one for purchase money. The homestead is not subject to imposition of other valid liens, except liens for improvements and taxes attributable to the

195. *Id.* at 2151-52, 76 L. Ed. 2d at 263-64.
196. *Id.* at 2148, 76 L. Ed. 2d at 260.
197. 718 F.2d 1303 (5th Cir. 1983).
198. Law of Jan. 26, 1839, 1839 Tex. Gen. Laws 149, 2 H. GAMMEL, LAWS OF TEXAS 149 (1898), *repealed by* Act of Feb. 5, 1840, 1840 Tex. Gen. Laws 172, 3 H. GAMMEL, LAWS OF TEXAS 346 (1898). Concerning the irrelevant and fleeting Dower Act, see McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CAL. W.L. REV. 117, 120 n.22 (1971). *See also* McKnight, Book Review, 46 TEX. L. REV. 297, 298 n.9 (1967).
199. 718 F.2d at 1312.
200. *Id.* at 1314.
201. Green v. Crow, 17 Tex. 180, 184 (1856).
202. Wierzchula v. Wierzchula, 623 S.W.2d 730, 732 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); Davis v. Davis, 108 S.W.2d 681 (Tex. Civ. App.—Fort Worth 1937, no writ). In Rimmer v. McKinney, 649 S.W.2d 365 (Tex. App.—Fort Worth 1983, no writ), a creditor of a valid lienholder on a homestead attempted to enforce the judgment lien. The lien arose pursuant to a decree of divorce, and the decree contained no bar to such enforcement. The court severed the question of enforceability for a separate trial. *Id.* at 367. The court also left unanswered the issue of whether one spouse's transfer of an interest in a homestead to the other on divorce might constitute a fraudulent conveyance as to the transferor's creditors. *Id.* For a more complete discussion of *Rimmer*, see *supra* notes 159-62 and accompanying text.

premises.[203] In *Lettieri v. Lettieri*[204] the husband argued that the trial court had placed an excessive lien on the homestead property. The trial court had awarded the husband the homestead and other property and had granted the wife a money judgment for her interest in those properties, with a lien on the property it awarded to the husband. Thus the amount of the lien on all the properties exceeded the value of the wife's interest in the homestead. The court of appeals affirmed this judgment.[205] The court noted that the trial court should have limited the lien on the homestead to the value of the wife's interest therein,[206] but as the court of appeals pointed out, the husband failed to obtain a finding as to the value of the community homestead.[207]

In *McGoodwin v. McGoodwin*[208] a husband attempted to avoid compensating his wife for her one-half interest in homestead property, which she had conveyed to him upon their divorce. At the time of the divorce, the trial court had awarded the husband the homestead and ordered him to pay the wife a specific sum for her one-half interest. The court, however, did not expressly impress a lien upon the property to secure payment of the judgment. The husband later remarried, claimed the property as a homestead, and refused to pay the judgment. The wife sued to enforce the judgment, arguing that it afforded her an equitable lien on the realty superior to the husband's claimed homestead right. The court of appeals agreed, holding that an equitable lien in favor of the wife could be inferred from the language of the divorce decree.[209] The decree had ordered the husband to execute all instruments necessary to comply with the judgment, and the appellate court concluded that this language required the husband to execute a deed of trust.[210] The court stated that a deed of trust is calculated to effect a purchase money lien, which is superior to a homestead interest.[211] The court indicated, however, that had the decree not contained such comprehensive language concerning the instruments to be executed, the court would not have found that an equitable lien had been impressed upon the property.[212]

A Houston court of appeals discussed the requirements necessary for the

203. Eggemeyer v. Eggemeyer, 623 S.W.2d 462, 466 (Tex. Civ. App.—Waco 1981, writ dism'd); Day v. Day, 610 S.W.2d 195, 199 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.); McKnight, *supra* note 170, at 125-26.

204. 654 S.W.2d 554 (Tex. App.—Fort Worth 1983, writ dism'd).

205. *Id.* at 559.

206. *Id.*; *accord* Eggemeyer v. Eggemeyer, 623 S.W.2d 462, 466 (Tex. App.—Waco 1981, writ dism'd); Brunell v. Brunell, 494 S.W.2d 621, 623 (Tex. Civ. App.—Dallas 1973, no writ).

207. 654 S.W.2d at 559.

208. 656 S.W.2d 202 (Tex. App.—Fort Worth 1983, writ granted).

209. *Id.* at 204.

210. *Id.*

211. *Id.* The Texas Constitution provides that liens and deeds of trust for purchase money are superior to the owner's homestead interest. TEX. CONST. art. XVI, § 50 (1876, amended 1973).

212. 656 S.W.2d at 204. The court cited Spence v. Spence, 455 S.W.2d 365, 368-69 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.), and Goldberg v. Goldberg, 425 S.W.2d 830, 831 (Tex. Civ. App.—Fort Worth 1968, no writ). These cases involved essen-

creation of a purchase money lien on homestead property in *Lifemark Corp. v. Merritt*.[213] There the husband's employer had transferred him from Houston to El Paso. To assist the couple in making the move, the employer made them a loan secured by a deed of trust on their Houston home. The couple then sold the Houston property and moved to El Paso, where they used a portion of the loan proceeds to purchase a new home. The employer later sued to recover the loan and demanded that the couple turn over the El Paso property in satisfaction of the judgment. The employer claimed a purchase money lien on the property, because of the fact that the couple had used part of the loan to purchase the new home. The trial court refused to order a turnover of the property, and the court of appeals affirmed.[214] The appellate court noted that the homestead exemption is not an effective bar to the foreclosure of a properly affixed purchase money lien.[215] In order to create a valid purchase money lien on a homestead, however, a lender must record an agreement in writing securing payment of the loan with the homestead property.[216] The mere fact that the couple used part of the loan money to purchase a new home was insufficient to create a purchase money lien on the home.[217]

In *Stewart v. American Industrial Linings, Inc*.[218] a house had been a debtor's homestead for several years when creditors abstracted judgments that would have reached nonhomestead property. In connection with selling the property, the debtor sued to clear his title of the purported liens. The trial court denied relief, holding that neither the owner nor the purchaser had standing to sue because the creditors had never attempted to enforce their liens. The court of appeals reversed, holding that because the owner had established the homestead exemption as a matter of law, the purchaser had standing to assert that the judgment liens had not attached to the property before he purchased it.[219] The court thus ruled that the property was free of any cloud cast by the abstracted judgments.[220]

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tially the same facts as *McGoodwin*, but the decrees did not order the execution of all necessary instruments. The courts in these cases refused to find equitable liens.

213. 655 S.W.2d 310 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

214. *Id.* at 316-18.

215. *Id.* at 318. TEX. CONST. art. XVI, § 50 (1876, amended 1973) provides: "The homestead of a family or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof . . . ."

216. Further, TEX. PROP. CODE ANN. § 41.002(a) (Vernon Pam. 1983) (formerly codified at TEX. REV. CIV. STAT. ANN. art. 3835 (Vernon Supp. 1982-1983)) states: "A homestead . . . of a family or a single adult . . . are exempt from attachment, execution, and forced sale for the payment of debts, except for encumbrances properly fixed on the property."

217. 655 S.W.2d at 318. For a dictum on the construction of the subcontractor's lien-retainage statute, TEX. REV. CIV. STAT. ANN. art. 5467 (Vernon Supp. 1982-1983) (now codified at TEX. PROP. CODE ANN. § 53.053 (Vernon Pam. 1983)), see James Mechanical Contractors, Inc. v. Tate, 647 S.W.2d 347, 349-50 (Tex. App.—Corpus Christi 1982, no writ).

218. 640 S.W.2d 654 (Tex. App.—El Paso 1982, no writ).

219. *Id.* at 656. In holding that the purchaser had standing, the court declined to follow the holding in Mauro v. Lavlies, 386 S.W.2d 825 (Tex. Civ. App.—Beaumont 1964, no writ). In *Mauro* the court held that homeowners who sued to remove judgment liens had established no justiciable controversy and thus had no standing to sue when the creditors had not attempted to enforce their liens against the homestead. 386 S.W.2d at 826-27.

220. 640 S.W.2d at 656.

Exempt Personalty. The Homestead Act of 1973[221] allowed exemptions for only two types of vehicle. The 1979 act[222] expanded article 3836 to allow exemptions for more vehicles, provided they are not used for business purposes.[223] Additional vehicles may also be exempt tools of trade.[224] Although in some circumstances more than two firearms might be exempt as tools of trade, the mere fact that a rifle has sentimental value to its owner as a gift from his mother does not qualify it for exemption as an "heirloom."[225] Nor does equipment in inventory constitute tools of trade for exemption purposes.[226] Although it is usually to the bankrupt's advantage to claim state exemptions rather than federal ones,[227] federal income retirement funds are exempt only if the debtor chooses federal exemptions.[228]

In *In re Allen*[229] a bankruptcy court in Texas felt compelled to reiterate restrictive interpretations of Bankruptcy Code section 522(f)[230] as applied to nonpossessory, non-purchase-money liens on tools of trade of Texas bankrupts, and the Fifth Circuit affirmed that construction.[231] The same bankruptcy court has, nonetheless, construed another part of the same section so as to interpret congressional intent perhaps too liberally in favor of the bankrupt.[232]

IV. DIVISION ON DIVORCE

Dividing All the Property. The trial court has wide latitude under Family Code section 3.63(a)[233] to divide property on divorce in a manner that is just and right. The trial court's division of the property will not be disturbed on appeal unless a clear abuse of discretion is shown.[234] If, how-

221. Ch. 588, § 1, 1973 Tex. Gen. Laws 1627, *amended by* Act of Mar. 19, 1979, ch. 302, art. 5, § 2, 1979 Tex. Gen. Laws 680, 688 (codified at TEX. REV. CIV. STAT. ANN. art. 7150.3 (Vernon Supp. 1984)).

222. TEX. REV. CIV. STAT. ANN. art. 3836(a) (Vernon Supp. 1982-1983) (now codified at TEX. PROP. CODE ANN. §§ 42.001-.002 (Vernon Pam. 1983)).

223. *Id.; see In re* Shaw, No. 583-00094, slip op. at 2 (Bankr. N.D. Tex. Sept. 22, 1983).

224. *See In re* Sandlin, No. 583-00056, slip op. at 7 (Bankr. N.D. Tex. Sept. 22, 1983).

225. *Id.*

226. *In re* Cereghino, No. 583-00065, slip op. at 2-3 (Bankr. N.D. Tex. July 20, 1983).

227. A bankrupt cannot claim both state and federal exemptions. *In re* Goff, 706 F.2d 574, 574 (5th Cir. 1983).

228. *Id.* at 579-80.

229. Nos. 582-00222, 583-0060, slip op. at 3-5 (Bankr. N.D. Tex. May 9, 1983).

230. 11 U.S.C. § 522(f) (Supp. 1982), *construed in In re* Evans, 25 Bankr. 105, 109-10 (Bankr. N.D. Tex. 1983); *In re* McManus, 681 F.2d 353, 355-57 (5th Cir. 1982), *discussed in* McKnight, *supra* note 72, at 88-89.

231. 725 F.2d 290, 292-93 (5th Cir. 1984). Relying on *In re* McManus, 681 F.2d 353 (5th Cir. 1982), which dealt with Louisiana law, the Fifth Circuit reached the conclusion that Texas bankrupts who claim state exemptions cannot avail themselves of the power provided in § 522(f) to avoid non-purchase-money liens on exempt personalty. 725 F.2d at 292. The court's conclusion is based on a very strained and peculiar construction of § 522(f).

232. *In re* Metzig, 33 Bankr. 620, 621-22 (Bankr. N.D. Tex. 1983) (construing 11 U.S.C. § 522(f) (1982)).

233. TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp. 1984).

234. Murff v. Murff, 615 S.W.2d 696, 698 (Tex. 1981); McKnight v. McKnight, 543 S.W.2d 863, 866 (Tex. 1976); Gonzalez v. Gonzalez, 659 S.W.2d 900, 902 (Tex. App.—El Paso 1983, no writ); Allen v. Allen, 646 S.W.2d 495, 496 (Tex. App.—Houston [1st Dist.]

ever, the trial court fails to divide some of a couple's community property, the appellate court must remand the case so that the division can be completed.[235] The trial court cannot merely reserve certain community from consideration. "The [trial] court must decree a division of the property of the parties when the jurisdiction of the court is invoked in a divorce action by the pleadings of either spouse."[236] Further, if a court makes a division of property and then grants a partial new trial with respect to items of property not previously disposed of, the former order cannot constitute the final division.[237] Hence, if community property was acquired prior to the latter order, it must be considered in rendering the court's ultimate division.

In exercising its discretion the trial court may consider a number of factors, including the fault of either party.[238] In *Vautrain v. Vautrain*[239] the Fort Worth court of appeals concluded that the trial court had not erred in its refusal to hear certain evidence of fault, because considering fault in making a division is discretionary.[240] The court did not suggest, however, that the trial court might refuse to hear *any* evidence with respect to the reason that the parties, or one of them, sought a divorce.[241] Although the trial court need not hear interminable evidence of fault after the general conduct of the parties has been established, it would be error to hold that the court need not hear any evidence of fault, because the surrounding circumstances might be relevant to the property division.

If as a result of a party's fraud the trial court does not have all the community property before it, the opposing party may be able to use a bill of review to achieve a reconsideration of the division.[242] The bill of review is an appropriate mechanism, however, only if the fraud was extrinsic rather than intrinsic; review is appropriate if the party seeking review can show "some deception, collateral to the issues in the formal trial, practiced by the adverse party, which prevent[ed] the applicant from fully presenting his claim or defense in the former action."[243] Thus in *Jones v. Jones*[244] the former husband succeeded in his bill of review when, through no fault of

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1982, no writ); Kopecinski v. Kopecinski, 627 S.W.2d 472, 474 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

235. Gutierrez v. Gutierrez, 643 S.W.2d 786, 787 (Tex. App.—San Antonio 1982, no writ) (citing Hailey v. Hailey, 160 Tex. 372, 376, 331 S.W.2d 299, 302 (1960)); Whitehill v. Whitehill, 628 S.W.2d 148, 150 (Tex. App.—Houston [14th Dist.] 1982, no writ).

236. Gutierrez v. Gutierrez, 643 S.W.2d 786, 787 (Tex. App.—San Antonio 1982, no writ (citing Hailey v. Hailey, 160 Tex. 372, 376, 331 S.W.2d 299, 302 (1960)).

237. Glud v. Glud, 641 S.W.2d 688, 691 (Tex. App.—Waco 1982, no writ).

238. *See* Murff v. Murff, 615 S.W.2d 696 (Tex. 1981).

239. 646 S.W.2d 309 (Tex. App.—Fort Worth 1983, writ dism'd).

240. *Id.* at 312.

241. *See* Harrington v. Harrington, 451 S.W.2d 797 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ). The *Harrington* court held that even if fault is not alleged as a ground for divorce, the court should be advised of the "cause of the parties' inability to live together as husband and wife, or the conduct that contributed to the divorce." *Id.* at 800.

242. Jones v. Jones, 641 S.W.2d 342, 345 (Tex. App.—Corpus Christi 1982, no writ).

243. *Id.* (citing Nelson, *The Requirement of Extrinsic Fraud*, 30 BAYLOR L. REV. 539, 540 (1978)).

244. 641 S.W.2d 342 (Tex. App.—Corpus Christi 1982, no writ).

his own, he was completely unaware of a $35,000 savings account that his former wife concealed at the time of divorce.[245]

In *Morrison v. Rathmell*[246] the Tyler court of appeals reversed the trial court's summary judgment against a former wife who brought a bill of review concerning property division.[247] The petitioner had alleged that her former husband had grossly undervalued his two businesses in negotiations for a property settlement and that he had forced her into the agreement by threatening to abandon the businesses and render them worthless if she persisted in her attempts to have the businesses appraised. The court concluded that the pleadings raised a genuine issue of material fact, which precluded summary judgment.[248] It would seem, however, that if those allegations were true, the court should have denied the bill of review because the fraud was intrinsic to the settlement negotiations.

Edwards v. Edwards[249] raised the issue of extrinsic fraud in a somewhat different context. The couple in *Edwards* went together to an attorney, who filed a petition for divorce, and the husband executed a waiver of service of citation. The couple then reached an agreement concerning the division of their property and the care and support of their children. The parties later made an attempt at reconciliation and resumed cohabitation, but the suit for divorce was not dismissed. After efforts at reconciliation had failed, the couple again discussed getting a divorce. The husband understood that the hearing would take place on July 13, but the wife's attorney procured an ex parte hearing on July 12. The court granted the divorce at the hearing, and on the basis of the wife's testimony the court modified the agreement concerning conservatorship. Upon discovering these events the husband filed a motion for a new trial and a date was set for a hearing. Both parties and their attorneys appeared at the hearing, but the parties agreed to attempt reconciliation again or else submit a new agreement to the court. Although no reconciliation was reached, for reasons not stated in the opinion a new agreement was not submitted to the court and the motion for new trial was dismissed. The husband appealed on the basis of the wife's extrinsic fraud. The Fort Worth court of appeals vacated the judgment, stating:

> The actions of the wife in attempting the reconciliation and resumption of cohabitation and thereafter going to court without notice to husband, and seeking a unilateral modification of their agreement, constituted extrinsic fraud. As this occurred subsequent to the original agreement and the executing of the waiver ultimately relied upon to obtain the divorce, the husband was entitled to notice of any hearing. To require no further notice would be unfair to the party who had previously given a waiver and violative of basic due process no-

245. *Id.* at 345 (citing Comment, *Bill of Review: The Requirement of Extrinsic Fraud*, 30 BAYLOR L. REV. 538, 540 (1978)).

246. 650 S.W.2d 145 (Tex. App.—Tyler 1983, writ dism'd).

247. *Id.* at 151.

248. *Id.*

249. 651 S.W.2d 940 (Tex. App.—Fort Worth 1983, no writ).

tice requirements.[250]

Another court held that a nonparticipating party like the husband in *Edwards* may also proceed by writ of error.[251]

Some attorneys have serious strategic reservations about joining a cause of action for an interspousal tort with a suit for divorce, because they fear either that the property will be divided in such a way that it takes the tortious injury into consideration or that the tort recovery, if substantial, will jeopardize a more generous property division in the client's favor. In *Ulrich v. Ulrich*[252] both the trial court and the appellate court refused a remittitur on the tort recovery, thus rejecting the tortfeasor spouse's arguments that the damages were excessive.[253]

Property Not Subject to Division. While the Texas Supreme Court was dealing with the characterization of the increased value of separate stock[254] and the appropriate disposition of federal retirement benefits[255] accrued during marriage, the lower appellate courts were applying these and related rules of characterization to the process of division of assets on divorce. Almost simultaneously, moreover, the Supreme Court of Texas and the legislature both concluded that property a spouse acquires while domiciled in another state is properly divisible on divorce as community property if it would have been community property had a Texas domiciliary acquired it.[256] This principle has since been reflected in only one appellate opinion.[257] The new rule concerning the community's right to reimbursement with respect to appreciation in value of separately owned stock in a close corporation has not had time to have any impact on decisions in the courts of appeal, but those courts have considered other business related aspects of characterization. In *Martin v. Martin*[258] the Fort Worth court of appeals reviewed a case in which community business property was so ill-defined that it was impossible to determine whether the

250. *Id.* at 943. The court relied on Rylee v. McMorrough, 616 S.W.2d 649, 652 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ dism'd), a bill of review case.

251. Stubbs v. Stubbs, 654 S.W.2d 838, 841 (Tex. App.—Dallas 1983, no writ).

252. 652 S.W.2d 503 (Tex. App.—Houston [14th Dist.] 1983, no writ).

253. *Id.* at 506-07.

254. Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1983), *discussed supra at* notes 71-78 and accompanying text.

255. Segrest v. Segrest, 649 S.W.2d 610 (Tex. 1983), *cert. denied*, 104 S. Ct. 242, 78 L. Ed. 2d 232 (1983), *discussed supra at* notes 91-97 and accompanying text.

256. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982), *discussed in* Note, Cameron v. Cameron: *Divestiture of Separate Property on Divorce*, 35 BAYLOR L. REV. 168 (1983), Comment, *Community Property—Division of Property Upon Divorce—Property Acquired During Marriage in a Common Law State Except By Gift, Devise or Descent Should Be Treated As Community Property*, 14 ST. MARY'S L.J. 789 (1983); TAX FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1984); *see* Reppy, *"Quasi-Community Property" Comes to Texas*, 9 COMM. PROP. J. 171 (1982); Stewart & Orsinger, *Fitting a Round Peg into a Square Hole: Section 3.63, Texas Family Code and the Marriage that Crosses State Lines*, 13 ST. MARY'S L.J. 477 (1982); Comment, *The Division of Marital Property Upon Divorce and Quasi-Community Property in Texas: The Texas Legislature Amends Section 3.63 of the Family Code*, 23 S. TEX. L.J. 139 (1982).

257. Heisterberg v. Standridge, 656 S.W.2d 138, 144 (Tex. App.—Austin 1983, no writ).

258. 628 S.W.2d 534 (Tex. App.—Fort Worth 1982, no writ).

trial court had dealt properly with the community assets and liabilities. It was necessary to remand the case for a more careful attention to the process of division.[259] In *Mundy v. Mundy*,[260] on the other hand, although a community partnership interest had been properly divided, the court observed that the spouse who was not a party to the partnership agreement did not by virtue of the divorce decree become a partner under the Texas Partnership Act.[261] In a nonbusiness association context the San Antonio court of appeals held that the trial court erred in divesting the husband of a country club membership and awarding it to the wife.[262] The club was a voluntary association organized as a nonprofit corporation. Membership was by invitation only, and the husband alone had been granted membership. According to the club's bylaws, even the spouse of a deceased member required approval in order to become a member. The membership, therefore, was personal to the husband, and the trial court had no authority to divest him of it.[263]

In *Bybee v. Bybee*[264] the court dealt with a dispute as to proportional ownership of land and its division on divorce. Prior to their marriage the couple had purchased the land for $28,000, with a cash down payment of $2000 and a note executed by the future husband, who paid $800 of the down payment. The woman he was about to marry paid $200, which the husband later asserted was a loan. A third person paid the remaining half of the down payment, and the husband subsequently recognized this interest by conveying an undivided one-half interest to that third person. In addition, during the marriage the husband made a soothing statement to his wife that "she owned the part of my half, half of my half was hers."[265] On the basis of this single remark, the trial court concluded that the wife owned an undivided one-fourth of the property and divided the marital estate accordingly. The court of appeals reversed this erroneous conclusion and remanded the case because "the overall division of the parties' property" was obviously thereby disturbed.[266] Under the inception of title doctrine, the wife's interest could not have been more than 1/140 of the entire property, and it would not even be that large if the future wife's contribution to the down payment was merely a loan.

In contrast to the remand in *Bybee* for redivision of the property, the Dallas appellate court in *Mundy v. Mundy*[267] held that mischaracterization of a community asset as separate property is not a ground for reversal unless the appellant shows that the mistake was reasonably calculated to

259. *Id.* at 536.
260. 653 S.W.2d 954 (Tex. App.—Dallas 1983, no writ).
261. *Id.* at 958 (citing TEX. REV. CIV. STAT. ANN. art. 6132b, § 27(1) (Vernon 1970)).
262. Cluck v. Cluck, 647 S.W.2d 338, 344 (Tex. App.—San Antonio 1982, writ dism'd).
263. *Id.* at 342 (citing Cline v. Insurance Exch., 140 Tex. 175, 166 S.W.2d 677 (1942); Brotherhood of R.R. Trainmen v. Price, 108 S.W.2d 239 (Tex. Civ. App.—Galveston 1937, writ dism'd)).
264. 644 S.W.2d 218 (Tex. App.—Fort Worth 1982, no writ).
265. *Id.* at 221.
266. *Id.* at 222.
267. 653 S.W.2d 954 (Tex. App.—Dallas 1983, no writ).

cause, and probably did cause, an inappropriate division.[268] The court stated that "an appellate court is not authorized to reverse merely because the record discloses some error that is reasonably calculated to cause a miscarriage of justice" unless the appellant goes on to show that an unfair division was made.[269] Because the trial court, however, and not the appellate court should make the proper division,[270] it is unclear how the appellate court could conclude that the trial court would not have ruled otherwise without putting the issue back before the trial court on remand.

If the trial court mischaracterizes separate property of one spouse as the separate property of the other spouse or as community property and awards it to the other spouse, the award constitutes reversible error because it divests a spouse's separate property. A spouse has the burden of proving that property on hand at the termination of a marriage is his separate property, and if he discharges that burden, he obviously cannot later argue that the property was community. These mischaracterizations are not typical, however. Two forms of erroneous mischaracterizations are common: mischaracterization of community property as separate property and so awarding it, and mistakenly finding that separate property is community property but still awarding it to its owner. In both these instances the recipient will assert that, but for the error, he might have received a larger share of the community as well as all of his separate property. The mischaracterization in *Mundy* and that in *Reid v. Reid*[271] were both of the former type, findings that community property was the separate property of one of the spouses and awarding it accordingly. The appellants in both cases asserted that these mischaracterizations caused an improper division of the marital property as a whole, and a clear error occurred in both instances. In such a case, if the error could not be more than trifling in light of the sums and values involved, the appellate court would be justified in dispensing with the time and expense of remand. But if the error exceeded the bounds of the de minimis rule,[272] the appellate court should order a remand so that the trial court can exercise its proper function in making the division.[273]

Federal Retirement Benefits. In *McCarty v. McCarty*[274] the United States

268. *Id.* at 957.

269. *Id.* (construing TEX. R. CIV. P. 434). The record failed to reveal the value of the property divided, and so no comparison between the spouses' respective shares was possible.

270. McKnight v. McKnight, 543 S.W.2d 863, 866-67 (Tex. 1976).

271. 658 S.W.2d 863, 865 (Tex. App.—Corpus Christi 1983, no writ).

272. *See* King v. King, 661 S.W.2d 252, 255 (Tex. App.—Houston [1st Dist.] 1983, no writ). In Baker v. Baker, 624 S.W.2d 796, 799 (Tex. App.—Houston [14th Dist.] 1981, no writ), the issue was incorrect valuation rather than mischaracterization. The appellate court apparently followed the de minimis standard in its affirmance of a division that might have been only slightly affected by the revaluation of a single item of personalty, which the trial court valued on the basis of evidence improperly admitted.

273. 661 S.W.2d at 255-56.

274. 453 U.S. 210, 236 (1981), *discussed in* Note, McCarty v. McCarty: *The Battle Over Military Nondisability Retirement Benefits*, 34 BAYLOR L. REV. 335 (1982), Note, *Military Retirement Pay Not Subject to Division as a Community Property Upon Divorce*: McCarty v. McCarty, 19 HOUS. L. REV. 591 (1982), Note, *Federal Law Preempts State Treatment of*

Supreme Court held that military, nondisability, retirement benefits could not be divided on divorce pursuant to state community property law. Thus many former husbands saw the opportunity to suspend payment to their former wives of retirement benefits awarded as community property under divorce decrees entered prior to the *McCarty* decision.[275] A multitude of cases concerning the effect of *McCarty* on prior judgments followed. These cases took various forms. With the exception of *Ex parte Buckhanan*[276] and *Ex parte Acree*,[277] both of which allowed collateral attacks on pre-*McCarty* final decrees by way of habeas corpus proceedings, the intermediate Texas appellate courts have consistently applied the doctrine of res judicata in dealing with such cases.[278] The Texas Supreme Court laid the issue to rest in *Segrest v. Segrest*.[279] Following the Fifth Circuit holdings in *Erspan v. Badgett*[280] and *Wilson v. Wilson*,[281] in *Segrest* the court held that the *McCarty* decision had no retroactive effect on final unappealed divorce decrees that had treated military nondisability retirement benefits as community property.[282] The court stated that since such decrees were merely erroneous and not void, the rule of res judicata was applicable.

Cases in which no final judgment had been entered at the time *McCarty* was decided have given the courts greater difficulty. The difficulty arises not only from *McCarty* but also from the enactment in 1982 of the Uni-

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Military Retirement Benefits as Community Property: McCarty v. McCarty, 13 TEX. TECH L. REV. 212 (1982); *see* Raggio & Raggio, McCarty v. McCarty: *The Moving Target of Federal Pre-Emtion Threatening All Non-Employee Spouses*, 13 ST. MARY'S L.J. 505 (1982); *see also* Reppy, *Community Property in the U.S. Supreme Court—Why Such a Hostile Reception?*, 10 COMM. PROP. J. 93 (1983).

275. Kuhn, McCarty *revisited—its repercussions continue to echo*, 16 TRIAL L.F., Apr.-June 1982, at 11.

276. 626 S.W.2d 65, 66-67 (Tex. Civ. App.—San Antonio 1981, no writ).

277. 623 S.W.2d 810, 811-12 (Tex. Civ. App.—El Paso 1981, no writ).

278. *See Ex parte* Deckard, 656 S.W.2d 151, 152 (Tex. App.—El Paso 1983, no writ); Hall v. Hall, 650 S.W.2d 101, 102 (Tex. App.—Texarkana 1983, no writ); Thompson v. Thompson, 646 S.W.2d 546, 547 (Tex. App.—Houston [1st Dist.] 1982, no writ); Nelson v. Little, 644 S.W.2d 914, 914-15 (Tex. App.—Fort Worth 1983, no writ); Kocian v. Kocian, 643 S.W.2d 798, 799 (Tex. App.—Fort Worth 1982, no writ); *Ex parte* Rodriguez, 636 S.W.2d 844, 848-49 (Tex. App.—San Antonio 1981, no writ); *Ex parte* Hovermale, 636 S.W.2d 828, 835-37 (Tex. App.—San Antonio 1982, no writ); *Ex parte* Forderhase, 635 S.W.2d 198, 199-200 (Tex. App.—Tyler 1982, no writ); *Ex parte* Welch, 633 S.W.2d 691, 692-93 (Tex. App.—Eastland 1982, no writ).

279. 649 S.W.2d 610 (Tex.), *cert. denied*, 104 S. Ct. 242, 78 L. Ed. 2d 232 (1983); for a discussion of the *Segrest* decision, see *supra* notes 91-97 and accompanying text.

280. 647 F.2d 550 (5th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

281. 667 F.2d 497, 499 (5th Cir.), *cert. denied*, 458 U.S. 1107 (1982). In *In re* Smith, 549 F. Supp. 761 (W.D. Tex. 1982), a federal district court denied jurisdiction of a dispute in which the ex-husband sought removal of contempt proceedings to the federal court on the ground that a question of federal law was involved. *Id.* at 764-65. The court added that federal courts have no original jurisdiction in divorce cases and it is not appropriate for a federal court to become involved in the enforcement of such decrees. *See also* Powers v. South Central United Food Workers Welfare Trust, 719 F.2d 760 (5th Cir. 1983) (the fact that a claim involves a federal statute does not necessarily mean that the cause of action arose under federal law for purposes of removal to federal court).

282. 649 S.W.2d at 612-13.

formed Services Former Spouse's Protection Act (USFSPA)[283] on September 9, 1982. Moreover, *Trahan v. Trahan*,[284] decided by the Texas Supreme Court in November 1981, contributed to the confusion. In *Trahan*, a suit to partition retirement benefits that a pre-*McCarty* decree had not dealt with, the court held that no final judgment precluded application of the *McCarty* rule because the original decree was on appeal at the time *McCarty* was decided.[285] The court ignored the effect of the divorce decree that had left the property undivided. In *Trahan* the former wife of the pensioner thus was denied partition of the military retirement benefits.

After the decision in *Trahan* and in direct response to *McCarty*, Congress passed the USFSPA, effective February 1, 1983. Under this act state courts are authorized to divide military, nondisability, retirement benefits on divorce in accordance with state law on the subject.[286] These provisions apply to funds payable at any time after June 25, 1981, the day before *McCarty* was decided.[287] Congress thus apparently intended that the *McCarty* decision have no effect in subsequent cases, although the language of the act is far from clear. The USFSPA therefore seems to allow Texas divorce courts to resume pre-*McCarty* treatment of military retirement benefits as community property. In cases that had not been fully adjudicated prior to *McCarty*, however, or were heard after *McCarty* but before enactment of the USFSPA, the courts apparently had no choice but to follow *McCarty*. *In re Grant*[288] was such a case. In *Grant* the trial court had awarded the wife a portion of her husband's military retirement benefits prior to the decision in *McCarty*, but the decree was on appeal at the time *McCarty* was decided. Since the judgment was not final, the Amarillo court of civil appeals reversed and remanded with instructions that *McCarty* be followed and the community be divided without regard to the husband's military retirement benefits.[289]

Cameron v. Cameron[290] was tried before *McCarty* but was not decided by the Texas Supreme Court until October 13, 1982, after the enactment but before the effective date of the USFSPA. The trial court in *Cameron* had awarded the nonpensioner-spouse a percentage of her husband's retirement pay beginning at the date of its decree in March 1979. Since the USFSPA was effective only after June 25, 1981, the Texas Supreme Court affirmed the judgment of the trial court but excluded the portion of the award covering the period from the date of the decree through June 25,

283. 10 U.S.C. §§ 1401, 1401a (1982).

284. 626 S.W.2d 485 (Tex. 1981), *discussed in* Note, Trahan v. Trahan: *Federal Preemption of Texas Community Property Law*, 23 S. TEX. L.J. 483 (1982); *see* McKnight, *supra* note 170, at 144-45.

285. 626 S.W.2d at 488.

286. 10 U.S.C. § 1408(c)(1) (1982); *see* Newton & Trail, *Uniformed Services Former Spouses' Protection Act—A Legislative Answer to the* McCarty *Problem*, 46 TEX. B.J. 291, 307 (1983); Reppy, *Reconsidering the Rules for Military Benefits*, 5 FAM. ADVOC., Spring 1983, at 30.

287. 10 U.S.C. § 1408 (1982).

288. 638 S.W.2d 254 (Tex. App.—Amarillo 1982, no writ).

289. *Id.* at 255.

290. 641 S.W.2d 210 (Tex. 1982); *see* McKnight, *supra* note 72, at 97-99.

1981.[291] The court thus treated the benefits in the same way as it had treated those in *Trahan* for periods prior to the effective date of the USFSPA but recognized that the Act supersedes *McCarty* for the period after June 25, 1981. If Congress meant that *McCarty* should have no effect whatever, the court in *Cameron* partially missed the mark because it gave *McCarty* effect through June 25, 1981.[292]

Several recent cases illustrate the proposition that the *Trahan* decision cannot stand after *Cameron*. *McGehee v. Epley*,[293] *Boniface v. Boniface*,[294] and *Heisterberg v. Standridge*[295] involved divorces granted before a 1978 change of federal law[296] that clarified the character of civil service retirement benefits.[297] In each of these cases the plaintiff sought a partition of undivided benefits after the 1978 act. The courts in all three cases interpreted the act broadly to define the undivided civil service benefits as community property at the time of divorce and hence as resulting tenancies in common.[298] A federal district court reached essentially the same result in *Sutherland v. Sutherland*,[299] where it was asserted that federal law preempted state community property law in its treatment of Fleet Reserve retainer pay as separate property. The couple in *Sutherland* had been divorced in 1971 and the court divided the husband's retainer pay at that time. Under the doctrine of res judicata the court held that the final decree was not subject to review.[300] Nevertheless, in a decision handed down after the enactment of the USFSPA, the San Antonio court of appeals misguidedly followed *Trahan* in holding that military retirement benefits, undivided in a pre-*McCarty* divorce, could not be partitioned in a post-Act proceeding.[301] In light of the decisions in *Cameron* and *Segrest*, however, it is clear that *Trahan* is no longer authoritative as to final decisions ren-

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291. 641 S.W.2d at 223.

292. *Cf.* Voronin v. Voronin, 662 S.W.2d 102 (Tex. App.—Austin 1983, writ dism'd) (community entitled to pre-June 26, 1981, nondisability retirement benefits).

293. 655 S.W.2d 305 (Tex. App.—San Antonio), *aff'd in part and rev'd in part*, 661 S.W.2d 924, 925 (Tex. 1983).

294. 656 S.W.2d 131 (Tex. App.—Austin 1983, no writ).

295. 656 S.W.2d 138 (Tex. App.—Austin 1983, no writ).

296. A 1980 amendment to 5 U.S.C. § 8346 (1976) allowed payments to be made directly to the spouse to whom they were awarded. 5 U.S.C. § 8346(j)(1) (1982).

297. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); *see* McKnight, *supra* note 86, at 115-18; *see also* Boniface v. Boniface, 656 S.W.2d 131 (Tex. App.—Austin 1983, no writ). On the mechanics of enforcement, see McDannell v. Office of Personnel Management, 716 F.2d 1063 (5th Cir. 1983).

298. 656 S.W.2d at 135.

299. 563 F. Supp. 442 (E.D. Tex. 1983).

300. *Id.* at 444-46. It is to be hoped that the matter is now put to rest. *See* Sutherland v. Sutherland, 560 S.W.2d 531 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) (declaratory judgment writ not available when husband failed to perfect appeal); *Ex parte* Sutherland, 526 S.W.2d 536 (Tex. 1975) (trial court determination not subject to collateral attack by writ of habeas corpus); *Ex parte* Sutherland, 515 S.W.2d 137 (Tex. Civ. App.—Texarkana 1974, writ dism'd) (habeas corpus attack refused); *see also* Richard v. Richard, 659 S.W.2d 746 (Tex. App.—Tyler 1983, no writ) (federal preemption governs Social Security disability payments).

301. Salmans v. Salmans, 643 S.W.2d 778, 780 (Tex. App.—San Antonio 1982, no writ). For another misplaced allusion to *Trahan*, see Moore v. Jones, 640 S.W.2d 391, 393-94 (Tex. App.—San Antonio 1982, no writ).

dered prior to *McCarty*. Nor can post-*McCarty* divorce decrees rendered after enactment of the USFSPA be affected by *Trahan*.

In *Gordon v. Gordon*[302] the Corpus Christi court of appeals recognized the confusion created in the period after *McCarty* but before enactment of the USFSPA in considering an appeal from an order granting a divorce during that period. Military retirement benefits were involved but were not expressly provided for in the final decree. Showing a degree of frustration, the court stated:

> Normally, where a divorce decree fails to provide for the division of community property, the husband and wife become tenants in common . . . thereof. However, we feel that the perplexing and unusual circumstances created by the retroactive effect of [the USFSPA] require that we reverse the judgment and remand the cause to the trial court for a new trial.[303]

The court observed that the trial judge's failure to consider retirement benefits was not error because the law in effect on the date of the divorce precluded doing so. Nevertheless, the court apparently concluded that the passage of the USFSPA had nullified any effect *McCarty* ever had.[304]

After the passage of the federal act the El Paso court of appeals considered *Madrid v. Madrid*,[305] in which the trial had also occurred after *McCarty* and before passage of the federal act. The husband appealed on the ground that the trial court had not properly applied *McCarty* in dividing the community estate. The appellate court observed that while it was error for the trial court to have considered the retirement benefits at the time of trial, upon remand the court should not only consider the benefits but also divide them as community property.[306]

Attorney's Fees. It has long been recognized that a Texas trial judge may award attorney's fees to one party or the other in making an equitable division of the property on divorce.[307] The San Antonio court of appeals in *Cluck v. Cluck*[308] reaffirmed the rule that in order to overturn the trial court's judgment in this regard it must appear that a clear abuse of discretion occurred.[309] A major point of contention in *Cluck* was a fee the trial court awarded the wife's prior attorney, who had withdrawn before trial and appeared at trial only to testify as to the reasonableness of his fee. The court found that the attorney had done work in preparation of the case and was entitled to recover his fee in the divorce proceeding rather than having

302. 659 S.W.2d 475 (Tex. App.—Corpus Christi 1983, no writ).
303. *Id.* at 478.
304. *Id.*
305. 643 S.W.2d 186 (Tex. App.—El Paso 1982, no writ).
306. *Id.* at 187.
307. Carle v. Carle, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950); Baker v. Baker, 624 S.W.2d 796, 799 (Tex. App.—Houston [14th Dist.] 1981, no writ); Lipshy v. Lipshy, 525 S.W.2d 222, 227 (Tex. Civ. App.—Dallas 1975, writ dism'd).
308. 647 S.W.2d 338 (Tex. App.—San Antonio 1982, writ dism'd).
309. *Id.* at 340.

to file a separate suit.[310]

In *Beavers v. Beavers*[311] the Dallas court of appeals affirmed a trial court's order granting a former wife's motion for an increase of a supersedeas bond to secure annual payments due her as part of a property division on divorce.[312] The trial court had also declared that the movant would be entitled to recover attorney's fees should subsequent litigation become necessary to enforce the payments. The appellate court observed that this declaration did not make the trial court's judgment interlocutory, because it did not relate to the issues the trial court decided and was therefore only incidental to the judgment.[313] Although the court of appeals thus did not rule on the propriety of the trial court's statement concerning attorney's fees, such an award was then questionable. Article 2226 permits recovery of attorney's fees in suits founded on oral or written contracts.[314] There is authority for the proposition that when a written property settlement agreement is incorporated into a divorce decree and a subsequent suit to enforce the contract is filed, attorney's fees are available.[315] The divorce decree in *Beavers*, however, involved no underying contract, and the filing of a separate suit would have been necessary to enforce the award. Without statutory authority for an award of attorney's fees in subsequent litigation, the trial court in *Beavers* may have overstepped its jurisdictional bounds in then making such a prospective award.

Post-Divorce Disputes. Some post-divorce disputes stem from poorly drafted orders, others result from unwillingness to comply with orders, and still others arise beyond the terms of the divorce courts' decrees. To foresee all possible disputes would strain the prescience of a Hebrew prophet, and to ensure enforceability by contempt would thus tax the talents of the very best draftsman.[316] In 1983 the legislature established new provisions governing clarification and enforcement of orders.[317] The recent legislation will be helpful to some extent, but it does not purport to deal with

310. *Id.; see also* Bass v. Bryan, 609 S.W.2d 652, 654 (Tex. Civ. App.—San Antonio 1980, no writ) (award of fees to discharged attorneys). In a separate, post-divorce suit by an attorney whose services were terminated prior to divorce, liability rests on principles of contract law. Werlein v. Bishop, No. 1173 (Tex. Civ. App.—Houston [14th Dist.] Oct. 29, 1975, no writ) (unreported); *see also* Van Dyke v. Van Dyke, 624 S.W.2d 800, 801-02 (Tex. App.—Houston [14th Dist.] 1981, no writ) (severance of claim of dismissed attorney under TEX. R. CIV. P. 174(b)).

311. 651 S.W.2d 52 (Tex. App.—Dallas 1983, no writ).

312. *Id.* at 54-55.

313. *Id.* at 54.

314. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1984). *But see* TEX. FAM. CODE ANN. § 3.77 (Vernon Supp. 1984), discussed in text accompanying note 343 *infra*.

315. Brophy v. Brophy, 599 S.W.2d 345, 347 (Tex. Civ. App.—Texarkana 1980, no writ). This case was decided before the supreme court held in *Ex parte* Gorena, 595 S.W.2d 841, 844 (Tex. 1979), that such incorporation caused the contract to merge into the decree. *Cf.* Robertson v. Robertson, 608 S.W.2d 245, 247 (Tex. Civ. App.—Eastland 1980, no writ) (attorney's fees denied in suit by nonparty beneficiaries under terms of a judgment).

316. For some very useful suggestions, see Matheny, *Enforceability of Judgments and Proposed Specific Clauses for Use in Family Law Cases*, 45 TEX. B.J. 435 (1982).

317. Act of Sept. 1, 1983, ch. 424, § 2, 1983 Tex. Gen. Laws 2346, 2350-53 (codified at TEX. FAM. CODE ANN. §§ 3.70-.77 (Vernon Supp. 1984)); *see* Sampson & Hazelwood, *1983*

problems that the decree does not anticipate or that may not be enforced by use of the court's contempt powers. Thus the courts may still resort to established means of construing or enforcing ineptly worded decrees as to which the new statute is silent.

Clerical errors in a judgment may be corrected in a judgment nunc pro tunc, but judicial errors cannot be so corrected.[318] The distinction between the two types of error is not always easy to define, however. In *Davis v. Davis*[319] the appellate court determined from the record that the divorce court meant to award the wife all of the lots on which the family home was located; hence an omission to list one of the lots was properly cured by a corrected judgment.[320] In *In re Beavers*[321] the husband resorted to the normal route of appeal, asserting that the trial court, which had approved the parties' agreement, had failed to conform its judgment to the agreement. The appellate court ordered that the judgment be reformed.[322] Similar clarification was achieved by way of appeal in *Baker v. Baker*.[323]

In *Belz v. Belz*[324] the Dallas court of appeals noted an exception to the general rule that the trial court loses jurisdiction over a case thirty days after the judgment becomes final and may not thereafter change the judgment.[325] If the exception applies to divorce cases in which the trial court has the power to render a spousal support order even after an appeal from the divorce judgment has been fully perfected to the court of appeals,[326] the enforcement of such an order seems to come within the Texas Supreme Court's recent holding in *Ex parte Boniface*[327] announced three weeks later. The supreme court held in *Boniface* that the trial court in a divorce proceeding lacks jurisdiction to conduct a contempt proceeding during the pendency of an appeal.[328] The tenor of the supreme court's opinion in *Boniface* also casts doubt on the efficacy of the trial court's ordering tem-

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Legislation Affecting Family Law Practice—the 68th Session, ST. B. SEC. REP., FAM. L., Summer 1983, at 8-10; *see also infra* notes 334-43 and accompanying text.

318. TEX. R. CIV. P. 316.

319. Davis v. Davis, 647 S.W.2d 781 (Tex. App.—Austin 1983, no writ).

320. *Id.* at 783-85.

321. 648 S.W.2d 729 (Tex. App.—Amarillo 1983, no writ).

322. *Id.* at 733-34.

323. 624 S.W.2d 796, 799-800 (Tex. App.—Houston [14th Dist.] 1981, no writ). In accordance with TEX. FAM. CODE ANN. §§ 12.04(9), 14.02(a) (Vernon 1975), but apparently not in accordance with the record, the judgment in *Baker* provided that the mother, as managing conservator, should have "the rights to inherit from and through the child." 624 S.W.2d at 800. The father asserted that this term of the decree amounted to deprivation of some of his rights of paternity. The appellate court struck out the offending language in order to avoid further friction between the parents. *Id.* The court's decision should not be understood as a construction of the referenced Family Code provisions. Those provisions permit one parent to be deprived of rights of inheritance from his minor child, along with any other rights stemming from the inheritance rights. The deprivation is not intended to extend beyond the child's minority and does not affect the child's right to make a will. TEX. FAM. CODE ANN. §§ 12.04(9), 14.02(a) (Vernon 1975).

324. 638 S.W.2d 158 (Tex. App.—Dallas 1982, no writ).

325. TEX. R. CIV. P. 329b(d).

326. 638 S.W.2d at 159.

327. 650 S.W.2d 776 (Tex. 1983).

328. *Id.* at 778.

porary alimony after perfection of an appeal without an instruction from the appellate court to do so.

The Texas Supreme Court's decision in *McGehee v. Epley*[329] did not cause the enactment of the clarification and enforcement amendment to the Family Code,[330] but it dramatized the need to which those amendments responded. A divorce decree awarded the wife in *McGehee* one half of the husband's military retirement benefits, but it contained no order directing the husband to pay the benefits to the wife and was thus unenforceable by contempt.[331] Ten years after the divorce the wife went to another court seeking clarification of the decree. That court granted an order clarifying amount, time, and manner of making payments. The San Antonio court of appeals held that this order was merely a clarification and not a change of the judgment.[332] In a per curiam opinion the supreme court held that the order constituted a change that the original trial court could not have made in its judgment and, hence, a different trial court was also powerless to do so.[333]

The clarification-of-judgment amendments to the Family Code went into effect September 1, 1983.[334] Among other things these amendments define the procedure for enforcement of property divisions pursuant to divorce decrees and delineate the trial court's power to enforce its judgments. Under section 3.70 the court retains jurisdiction for a period of two years to enforce a property division upon filing of a motion to enforce.[335] In unequivocal language, however, section 3.71 states that under the new provisions the court *may not* amend, modify, alter, or change the division of the property as set forth in the divorce decree.[336] Previously, a court could not use its contempt powers to enforce an order to divide property unless the order set out with precision the actions necessary for compliance with the order. Now, in cases in which the order is not specific enough to be enforceable by contempt, the court may, on its own motion or that of either party, issue a clarifying order under section 3.72, setting forth specific terms to enforce compliance with the original division of property.[337]

Section 3.73 of the new statute empowers the court to order delivery of property that is held by one spouse at the time of the divorce but awarded

329. 661 S.W.2d 924 (Tex. 1983).

330. Act of Sept. 1, 1983, ch. 424, § 2, 1983 Tex. Gen. Laws 2350-53; *see supra* notes 316-17.

331. *See, e.g., Ex parte* Harris, 649 S.W.2d 389, 391 (Tex. App.—Corpus Christi 1982, no writ) (decree failing to order parties' compliance not enforceable by contempt); *Ex parte* Smiley, 626 S.W.2d 817, 819 (Tex. App.—San Antonio 1981, no writ) (details in decree must be in clear, specific, unambiguous terms to be enforceable by contempt).

332. McGehee v. Epley, 655 S.W.2d 305, 308 (Tex. App.—San Antonio 1983), *aff'd in part, rev'd in part*, 661 S.W.2d 924 (Tex. 1983).

333. 661 S.W.2d at 926.

334. Act of Sept. 1, 1983, ch. 424, § 2, 1983 Tex. Gen. Laws 2346, 2350-53 (codified at TEX. FAM. CODE ANN. §§ 3.70-.77 (Vernon Supp. 1984)).

335. TEX. FAM. CODE ANN. § 3.70 (Vernon Supp. 1984).

336. *Id.* § 3.71.

337. *Id.* § 3.72.

to the other spouse in the decree.[338] If the party in possession of such property loses or destroys it, the court can substitute a money judgment for the undelivered property under section 3.74.[339] Similarly, when one party fails to pay money owed to the other party, the balance due can be reduced to judgment.[340]

Section 3.75 addresses situations involving installment payments or other payments to become due in the future.[341] The time limits for jurisdiction imposed by section 3.70 therefore do not apply to these situations, and such payments can be enforced by contempt when they become due. Section 3.76 sets forth circumstances under which contempt is an appropriate enforcement procedure and specifically identifies situations in which contempt proceedings are not available.[342] For example, contempt is unavailable to enforce a money judgment rendered in lieu of an award of specific property. Finally, section 3.77 allows an award of costs and reasonable attorney's fees in suits to enforce a property division.[343]

The new clarification of judgments act should eliminate problems such as those presented by *Ex parte Powell*.[344] In *Powell* the Texas Court of Criminal Appeals granted a writ of habeas corpus to an ex-husband who was jailed under an order of contempt until he paid $28,000 into the register of the divorce court. The trial court had called upon the ex-husband to account for proceeds from property he had sold pursuant to a divorce decree. He first stated he did not know what had happened to the money but later admitted giving it to another. The trial court therefore, found him in contempt. The appeals court found that holding the ex-husband in contempt and confining him to jail until the money was paid was an attempt to secure payment of a debt arising from the divorce decree. Hence the court held that the order was void as imprisonment for debt under the Texas Constitution.[345] The court also stated that although punishing the contemnor for lying to the court was proper, punishing him for nondelivery of funds was inappropriate.[346] The court apparently was confused concerning the difference between criminal and civil contempt. Such confusion is perhaps understandable in the light of the fact that the court is almost always concerned with punishment rather than compulsion. But the court overlooked a distinction that the Texas Supreme Court has implicitly drawn between an order to pay a debt[347] and an order to perform an act, for example, to sell property and deliver the proceeds to the court

338. *Id.* § 3.73.
339. *Id.* § 3.74.
340. *Id.*
341. *Id.* § 3.75.
342. *Id.* § 3.76.
343. *Id.* § 3.77.
344. *Ex parte* Powell, 641 S.W.2d 540 (Tex. Crim. App. 1982).
345. *Id.* at 542 (citing TEX. CONST. art. I, § 18); *see also Ex parte* Thomas, 610 S.W.2d 213, 214-15 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).
346. 641 S.W.2d at 542.
347. *Ex parte* Yates, 387 S.W.2d 377, 378-80 (Tex. 1965).

or to a party.[348]

The post-divorce dispute at issue in *Employers Casualty Co. v. LaFave*[349] originated in a 1980 divorce decree that awarded a community automobile, which was registered in the husband's name, to the wife. In 1981 the ex-husband renewed the insurance policy on the car, and he was named in the policy as the insured owner. The wife subsequently reimbursed her former husband for the premiums he had paid, and she assumed that she had insurance coverage. In the ex-wife's subsequent suit against the insurer for benefits under the policy, the insurer pled the terms of the policy, which required that any driver have the permission of user from the named insured. Since the car was the plaintiff's property, the ex-husband had no control over its use and had no authority to grant or deny permission for its use. The court therefore concluded that at the time of the accident from which the suit arose the car was being driven without permission of the named insured and insurance coverage was not available under the husband's policy.[350]

As part of a settlement agreement incorporated into the divorce decree in *Hudspeth v. Stoker*,[351] the husband agreed to continue making payments on his employer's group life insurance policy. The policy had a face value of $15,000 and was payable to the wife as trustee for the couple's children. The ex-husband's employer subsequently changed insurers, so that the policy existing at the time of the divorce was cancelled. The ex-husband named his second wife as beneficiary under the new policy, which had a face value of $20,000. When the ex-husband died, a dispute arose between his first and second wives. The San Antonio court of appeals stated that the change of insurance carriers was not significant[352] and that by the terms of the divorce decree the husband had in effect surrendered his right to change beneficiaries under the policy up to the face amount of the original policy.[353] The court therefore affirmed the trial court's imposition of a constructive trust upon $15,000 in favor of the children and awarded the remaining proceeds to the second wife.

Effects of Bankruptcy on Property Division. Without any significant discussion of the point, a federal district court in *Moses v. Moses*[354] sustained a bankruptcy court's conclusion that a contractual undertaking, incorporated in a divorce decree, to make support payments to an ex-wife is not

348. *Ex parte* Gorena, 595 S.W.2d 841, 845 (Tex. 1979); *Ex parte* Sutherland, 526 S.W.2d 536, 639 (Tex. 1975); *Ex parte* Preston, 162 Tex. 379, 383-84, 347 S.W.2d 938, 940 (1961).

349. 651 S.W.2d 859 (Tex. App.—Eastland 1983, no writ).

350. *Id.* at 862. For a similar case involving a fire insurance policy, see Duren v. U.S. Fire Ins. Co., 579 S.W.2d 32, 36-37 (Tex. Civ. App.—Tyler 1979, no writ), *commented on in* McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 34 Sw. L.J. 115, 153 (1980).

351. 644 S.W.2d 92 (Tex. App.—San Antonio 1982, no writ).

352. *Id.* at 95.

353. *Id.* at 96.

354. 34 Bankr. 378 (S.D. Tex. 1983).

dischargeable in the ex-husband's bankruptcy.[355] In light of the statement in Family Code section 3.631(c)[356] that a divorce court can incorporate such agreements in the decree and thereby cause them to be merged in the judgment,[357] the court's conclusion seems proper. But money judgments or orders to make installment payments that do not arise from agreed settlements still raise the question of dischargeability in bankruptcy.[358] Although the Fifth Circuit court seems to view all such orders as in the nature of "alimony substitutes"[359] and thus nondischargeable in bankruptcy,[360] other federal circuits are not in full agreement with this conclusion.[361] Thus the matter is ripe for consideration by the United States Supreme Court.

355. *Id.* at 378-79.

356. TEX. FAM. CODE ANN. § 3.631(c) (Vernon Supp. 1984).

357. *See Ex parte* Gorena, 595 S.W.2d 841, 844 (Tex. 1979) (agreement merged into judgment).

358. *See* 11 U.S.C. § 523 (1982). The section discussed exceptions to the discharging of debts under 11 U.S.C. §§ 727, 1141, 1328(b) (1982).

359. *In re* Nunnally, 506 F.2d 1024, 1026-27 (5th Cir. 1975).

360. *Id.* at 1027.

361. *See, e.g., In re* Calhoun, 715 F.2d 1103, 1107-11 (6th Cir. 1983) (assumption of joint debts); Stout v. Prussel, 691 F.2d 859, 861 (9th Cir. 1982) (Small Business Administration loan); *cf. In re* Williams, 703 F.2d 1055, 1057 (8th Cir. 1983); *In re* Comer, 27 Bankr. 1018, 1019-22 (9th Cir. 1983); *see also* Tucker, *The Treatment of Spousal and Support Obligations Under Chapter 13 of the Bankruptcy Reform Act*, 45 TEX. B.J. 1359 (1982). Further, the entire issue of 5 FAM. ADVOC., Winter 1983, is devoted to the subject of bankruptcy and divorce. Concerning the possibility of invoking TEX. REV. CIV. STAT. ANN. art. 3827a (Vernon Supp. 1984) (providing post-judgment relief for creditors), see generally Hittner, *Texas Post-Judgment and Receivership Statutes*, 45 TEX. B.J. 417 (1982); Comment, *New Tools for the Creditor*, 35 BAYLOR L. REV. 341 (1983).