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FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight*

I. STATUS

INFORMAL Marriage. To prove an informal marriage the parties must not only demonstrate an agreement to be married and subsequent cohabitation as husband and wife, but also a holding out to others that they are husband and wife.¹ The evidence necessary to satisfy the third element was considered in *Persons v. Persons*.² The surviving wife asserted that she and her divorced husband had contracted an informal remarriage by which she was entitled to the intestate husband's property to the exclusion of his next of kin. Two weeks prior to his death the man had prepared a credit application to purchase a vehicle in which application he had referred to the woman as his spouse. The appeals court held that this was a sufficient holding out to the public and, therefore, satisfied the representation element for proof of the informal marriage.³

The Beaumont court of appeals addressed a similar situation in *Daniel v. Daniel*.⁴ A jury found that the couple had not formed an informal marriage subsequent to their divorce, and the wife appealed on grounds of improper submission of a special issue.⁵ The appellate court sustained the wife's assertion.⁶ The wife had objected to the use of the words "new marriage" within the jury charge, arguing that inclusion of that term imposed a greater burden of proof than the statute defining informal marriage required.⁷ The court in effect held that the elements of an informal marriage as defined by the Fam-

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

2. 666 S.W.2d 560 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

3. *Id.* at 563. The latter two elements of the Texas test for an informal marriage have been neatly dovetailed in a different context in recent Louisiana legislation terminating alimony when the former spouse has taken up post-divorce relations with another in open concubinage. LA. CIV. CODE ANN. art. 160 (West Supp. 1984). Under an appellate court's interpretation, "openness" (the analogue to the Texas holding-out standard) takes on a decidedly moralistic character; *i.e.*, it is "the absence of any pretense or disguise which would provide a morally acceptable cloak for their relationship." *Thomas v. Thomas*, 440 So. 2d 879, 882 (La. Ct. App. 1983).

4. 676 S.W.2d 666 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.).

5. *Id.* at 669.

6. *Id.* at 670.

7. *Id.* at 669. The wife properly preserved error by submitting her own correctly worded special issue, which the judge refused. *See* TEX. R. CIV. P. 279.

ily Code do not support a requirement that the wife show public awareness that the couple had entered into a new marriage.⁸

As in *Daniel*, the appellant in *Zephyr v. Zephyr*⁹ filed for divorce on the assumption that an informal marriage existed. The trial court found that no informal marriage existed and awarded the disputed property to the appellee. On appeal the appellant asserted that the trial court had no jurisdiction to award the property to the appellee in the absence of a decree of divorce. The appellate court held, however, that the trial court had jurisdiction to grant a division of property because the appellee's cross action had sought an adjudication that the parties were never married and prayed a settlement of their property rights.¹⁰ The appellate court nevertheless reversed the award of the property to the appellee.¹¹ The parties were cograntees of the property. When that occurs, a presumption arises that each of the grantees is vested with title to an equal undivided interest.¹² The court held the appellee had not rebutted this presumption.¹³

In *Roach v. Roach*¹⁴ the husband sought to establish the existence of an informal marriage before the couple's ceremonial marriage. The trial court held he had not sustained his burden of proof. Holding that the jury was in the best position to reconcile the conflict in testimony, the appellate court affirmed.¹⁵

Abatement. In *McKenzie v. McKenzie*¹⁶ the wife brought suit for divorce, but the husband asserted that there was no marriage to dissolve. The wife's preliminary issue of an informal marriage was submitted to a jury, which found that a marriage existed. Before a subsequently scheduled hearing on divorce and property issues, the husband died, and the court dismissed the action. Seeking to avoid relitigation of the marriage issue in her probate proceedings, the widow appealed. The Dallas appeals court affirmed, holding that without the possibility of a divorce, the severed issue of the existence of the informal marriage did not meet the controversy requirement and,

8. 676 S.W.2d at 669-70.

9. 679 S.W.2d 553 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

10. *Id.* at 555. The appellant also claimed that the trial court erred in finding that no informal marriage existed. Because the husband denied two of the elements of an informal marriage, the court held that sufficient evidence supported the trial court's holding. *Id.* at 556.

11. *Id.* at 556-57.

12. *Woolley v. West*, 391 S.W.2d 157, 159 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.) (presumption that cotenants had equal interest was rebutted).

13. 679 S.W.2d at 556-57. Both appellant and appellee were liable on the loan and deed of trust that secured funds for purchase of the home. The appellee had also argued that he was entitled to complete ownership of the house under the doctrine of inception of title. The court held this doctrine applied only to married couples. 679 S.W.2d at 556.

14. 672 S.W.2d 524 (Tex. App.—Amarillo 1984, no writ); see *infra* notes 69-70 and accompanying text for discussion of the characterization issue in *Roach*.

15. 672 S.W.2d at 529. Evidence as to the parties' intentions conflicted. The husband presented the parties' joint income tax returns and a letter to an administrative agency as evidence that the couple had held themselves out to others as husband and wife. The wife stated that, in telling the agency that she was married, she lied and had used the husband's name because she was embarrassed by their merely living together.

16. 667 S.W.2d 568 (Tex. App.—Dallas 1984, no writ).

hence, was not justiciable.¹⁷ To be justiciable the issue of an informal marriage must have constituted a separate cause of action.¹⁸ The court correctly held that the husband's death mooted the dispute for dissolution of the marriage and rendered the issue of the existence of the marriage meaningless.¹⁹ The court distinguished this case from prior Texas decisions holding that a suit for divorce does not become moot when a party dies if the adjudication of divorce or the event of death would affect property rights differently.²⁰ In those cases the property had already been divided and judgment of divorce had been pronounced. In *McKenzie* those issues had not even been argued. Hence, although the issue of informal marriage was not moot for other purposes, the court properly dismissed the case because the issue had become moot in the context in which it arose.²¹

*Novotny v. Novotny*²² presented the question whether the death of one party to a divorce proceeding abates the suit; the death occurred during the period after the adoption of a master's report, but prior to entry of a formal decree. Three weeks after the trial judge adopted a master's report in an agreed divorce, the wife shot and killed the husband. Some months later she filed a motion to dismiss the suit for divorce.²³ The judge denied the motion and was affirmed by the appellate court. The memorandum adopting the master's report was equivalent to entry of final judgment in an agreed case.²⁴ The court further stated that if neither party objects to the master's findings in such an instance, the report is conclusive on the issues.²⁵ Although the trial judge had not signed the judgment prior to the husband's death, it became final once the court adopted the master's report.²⁶ The wife also ar-

17. *Id.* at 570.

18. *Id.*; accord TEX. R. CIV. P. 41; accord *Kansas Univ. Endowment Ass'n v. King*, 162 Tex. 599, 611-12, 350 S.W.2d 11, 19 (1961); *St. Paul Ins. Co. v. McPeak*, 641 S.W.2d 284, 289 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

19. 667 S.W.2d at 572; see also *Parr v. White*, 543 S.W.2d 445, 449 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (dispute over jurisdiction and venue mooted by wife's death). The wife also contended on appeal that the trial court erred in not entering a judgment on the jury's verdict under TEX. R. CIV. P. 156. The court held that rule 156 does not apply to the situation when the answers to a special issue do not grant relief upon which the court could render a judgment. 667 S.W.2d at 571.

20. *Dunn v. Dunn*, 439 S.W.2d 830, 834 (Tex. 1969); *Vernet v. Vernet*, 570 S.W.2d 138, 140 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

21. 667 S.W.2d at 572. In *Black v. Black*, 673 S.W.2d 269 (Tex. App.—Texarkana 1984, no writ), the court of appeals addressed the issue of an appeal's mootness when the appellant died before the argument. The wife had limited her appeal to the issue of child-custody. The court held that because no property rights were at stake, the appeal was moot. The wife's attempt to gain custody died with her since any determination of custody would have no effect. *Id.* at 270; see also *Greene v. Schuble*, 654 S.W.2d 436, 438 (Tex. 1983) (managing conservator's death ends conservatorship order); *Knollhoff v. Norris*, 152 Tex. 231, 234, 256 S.W.2d 79, 81 (1953) (custody automatically vests in father when mother dies).

22. 665 S.W.2d 171 (Tex. App.—Houston [1st Dist.] 1984, writ dismissed).

23. *Id.* at 173. The wife apparently stood to gain a significantly larger share of her husband's probate estate, as opposed to her share under the divorce decree. *Id.* at 174.

24. *Id.* at 173.

25. *Id.*; accord *Cameron v. Cameron*, 601 S.W.2d 814, 815 (Tex. Civ. App.—Dallas 1980, no writ).

26. 665 S.W.2d at 173. The court held that signing the judgment was not a prerequisite to finding a rendition of judgment. *Id.*; accord *Texas State Bd. of Examiners v. Cane*, 337 S.W.2d 801, 803 (Tex. Civ. App.—Fort Worth 1970, writ ref'd).

gued that the husband's death rendered the controversy moot. The court held, however, that when property rights are affected differently by a determination of whether the marriage ended because of death or as a result of divorce, the case was not moot.²⁷ The court also rejected the wife's argument that the parties had not settled the issue of their property rights.²⁸ The court found that the parties had fully agreed to the master's report and waived any disagreement with the report when they did not object at the master's hearing.²⁹

Interspousal Disputes. The question of whether an employer can claim immunity from an action based on the principle of respondeat superior brought by an employee's spouse was addressed for the first time by a Texas appellate court in *Langley v. National Lead Co.*³⁰ The wife was injured while riding as a passenger in a truck negligently operated by her husband acting within the scope of his employment. The employer argued that because the husband was immune from suit by his wife, the husband's employer should be similarly protected. Following the majority of decisions in other jurisdictions, the court rejected this argument.³¹ The tort is actionable although the husband is exempt from liability.³² The court found no justification for including the employer within the purely personal family immunity.³³ The result in *Langley* is consistent with the previous decision prohibiting an employer from insulating himself from suit by pleading an employee's *parental* immunity.³⁴

In *Belz v. Belz*³⁵ the wife joined a claim for fraudulently secreting community funds with her suit for divorce. To sustain the independent cause of action for fraud the wife relied on the established right of one spouse to sue the other for an intentional tort³⁶ and the line of authority that allows one spouse to reclaim community assets that have been disposed of by the other

27. 665 S.W.2d at 174; accord *Dunn v. Dunn*, 439 S.W.2d 830 (Tex. 1969), discussed in McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 36 (1971); see also *McKenzie v. McKenzie*, 667 S.W.2d 568 (Tex. App.—Dallas 1984, no writ), discussed *supra* at notes 16-21 and accompanying text. If the court has not rendered judgment before a spouse dies, the case will be dismissed. *Whatley v. Bacon*, 649 S.W.2d 297, 299 (Tex. 1983); *Garrison v. Texas Commerce Bank*, 560 S.W.2d 451, 453 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

28. 665 S.W.2d at 174.

29. *Id.*; see also *Cameron v. Cameron*, 601 S.W.2d 814 (Tex. Civ. App.—Dallas 1980, no writ) (appellant had orally objected, but offered no evidence).

30. 666 S.W.2d 343 (Tex. App.—El Paso 1984, no writ).

31. *Id.* at 345-46. "The tort is complete by itself by the husband acting in his business as distinguished from acts which arise from the discharge of normal spousal duties and responsibilities." *Id.* at 345.

32. *Id.*; *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E.42 (1928) (opinion of Cardozo, J.).

33. 666 S.W.2d at 345 (citing W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 116 (1964)). Prosser states that this argument confuses spousal immunity from suit with lack of the servant's responsibility.

34. See *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975) (parental immunity of foreman not extended to employer).

35. 667 S.W.2d 240 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

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

spouse with an actual³⁷ or constructive intent to defraud by squandering³⁸ or making inappropriate gifts.³⁹ Although the trial court had awarded both actual and exemplary damages for the alleged fraud, the appellate court rejected the wife's claim on the part of the community estate as being unfounded in law.⁴⁰ The court acknowledged that damages might be awarded for the wrongful disposition of community property⁴¹ and for the infliction of harm, for which recovery is the separate property of the victim.⁴² The court rejected the claim for fraud in attempting to secrete community assets that were not dissipated. Once uncovered, such assets are subject to division by the divorce judge, who may take the husband's conduct into account in awarding a larger share of the community to the wife along with the attorney's fees necessary to ferret out the assets.⁴³ In *York v. York*⁴⁴ an ex-wife asserted a similar cause of action against her ex-husband who had successfully concealed community assets at the time of their divorce. The value of the property could be determined and her share partitioned to the ex-wife. In this instance exemplary damages may be justified; the hiding of assets on divorce should not go unpunished. In *York* the trial court awarded exemplary damages for concealing the property at divorce. Because the appellate court affirmed this award,⁴⁵ it evidently concluded that the ex-wife's attorney's fees constituted the necessary actual damages on which to predicate her right to exemplary damages.⁴⁶

In another case⁴⁷ the court discussed the application of the confidential communication statute to a spouse whose voidable marriage had been annulled. The husband had falsely represented his identity and background to his wife's relatives and had persuaded them to invest in a nonexistent enterprise. In his prosecution for theft and over the objections of the accused, his former wife testified against him.⁴⁸ The court held that the wife was compe-

37. Relief sought inter vivos: *Mahoney v. Snyder*, 93 S.W.2d 1219, 1220 (Tex. Civ. App.—Amarillo 1936, no writ); *Coss v. Coss*, 207 S.W. 127, 127 (Tex. Civ. App.—San Antonio 1918, no writ); relief sought post mortem: *Martin v. McAllister*, 94 Tex. 567, 567-68, 63 S.W. 624, 624 (1901); *Stramler v. Coe*, 15 Tex. 211, 215-16 (1855) (dictum); *Krenz v. Strohmeir*, 177 S.W. 178, 178-79 (Tex. Civ. App.—Austin 1915, no writ).

38. *Reaney v. Reaney*, 505 S.W.2d 338, 339-40 (Tex. Civ. App.—Dallas 1974, no writ) (squandered assets sought at divorce).

39. Improper donations sought on divorce: *Horlock v. Horlock*, 533 S.W.2d 52, 54-55 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ *dism'd*); improper donations sought at death: *Carnes v. Meador*, 533 S.W.2d 365, 368 (Tex. Civ. App.—Dallas 1975, writ *ref'd n.r.e.*); *Murphy v. Metropolitan Life Ins. Co.*, 498 S.W.2d 278, 279-80 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ *ref'd n.r.e.*); *Givens v. Girard Life Ins. Co.*, 480 S.W.2d 421, 423 (Tex. Civ. App.—Dallas 1972, writ *ref'd n.r.e.*).

40. 667 S.W.2d at 247.

41. *Id.* at 246-47.

42. *Id.* at 246.

43. *Id.* at 247.

44. 678 S.W.2d 110 (Tex. App.—El Paso 1984), writ *ref'd n.r.e.*, 28 Tex. Sup. Ct. J. 316 (Mar. 27, 1985).

45. *Id.* at 113.

46. An award of a money judgment for the ex-wife's share would not seem to constitute actual damages in this context, because such an award is in lieu of a partitionable interest, *i.e.*, in its nature a quasi-contractual recovery.

47. *Bruni v. State*, 669 S.W.2d 829 (Tex. App.—Austin 1984, no writ).

48. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon 1979) disqualifies a spouse from

tent to testify.⁴⁹ The court found that the confidential communication statute, when applied to divorced spouses, only granted the protesting spouse an opportunity to object to any communications that occurred during the marriage.⁵⁰ Since this marriage had been annulled, the marriage never existed and no confidential marital communication had occurred.⁵¹ The court reasoned that an annulment destroys all privilege as to communications made between husband and wife while the spousal relationship existed.⁵² The flaw in this argument is that a voidable marriage, unlike one that is absolutely void, is not treated as a non-status for all purposes. Children born of the marriage are legitimate,⁵³ and the profits of the marriage are subject to division as community property.⁵⁴ A statute concerning privileged communications should be strictly construed. The court drew the wrong inference from the cases involving the application of the statute to divorced spouses. The more appropriate response to this reasoning would be to treat the voidable marriage like one dissolved by divorce.

Loss of Consortium and Wrongful Death. The Texas Supreme Court in *Gracia v. R.C. Cola-7-Up Bottling Co.*⁵⁵ addressed the issue of whether settlement of a claim for injuries sustained by a minor child barred the mother from bringing suit for loss of the child's companionship. The father and the child had been injured in an accident caused by the defendant's employee. The father sued for damages and both parents sued as the child's next friend to recover the child's damages. After a settlement was reached on these claims, the mother brought suit for loss of the child's companionship. The supreme court found that the mother had an independent cause of action for her own loss due to the child's injury, which was independent of her husband's cause of action.⁵⁶ If the wife had participated in her own right in the prior settlement, however, she could not pursue her claim for loss of consortium.⁵⁷ The court held that the evidence presented showed that the wife

adversely testifying against the other spouse about matters occurring while married and creates a privilege that must be asserted if the parties are divorced.

49. 669 S.W.2d at 834.

50. *Id.*

51. *Id.* at 835. The divorced wife can testify to nonconfidential matters, and the burden to object is placed on the spouse claiming confidential communications. *Bear v. State*, 612 S.W.2d 931, 932 (Tex. Crim. App. 1981); *Foster v. State*, 493 S.W.2d 812, 813 (Tex. Crim. App. 1973). The fact that the matter at issue occurred during the marriage does not, in itself, make such a matter privileged. *Curd v. State*, 217 S.W. 1043, 1044 (Tex. Crim. App. 1920). The court in *Bruni* also overruled the husband's contention on a procedural ground, stating that he only objected to his wife's competency to testify and not to the content of her testimony. 669 S.W.2d at 835. Therefore, even if the husband could have claimed a privilege, he waived this right because his objection was improper. *Id.*; *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1982); *Kipperman v. State*, 626 S.W.2d 507, 513 (Tex. Crim. App. 1981).

52. 669 S.W.2d at 834-35.

53. TEX. PROB. CODE ANN. § 42(d) (Vernon 1980).

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

55. 667 S.W.2d 517 (Tex. 1984).

56. *Id.* at 519 (citing *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978)).

57. 667 S.W.2d at 519; see *Westinghouse Credit Corp. v. Kownslar*, 496 S.W.2d 531, 532 (Tex. 1973); *Griffin v. Holiday Inns of Am.*, 496 S.W.2d 535, 537 (Tex. 1973).

participated in the prior settlement only as next friend of the child and not individually.⁵⁸ Thus her claim for loss of consortium was not barred.⁵⁹

The issue of whether an observer of an accident in which a close relative is killed may recover for mental anguish when the decedent's negligence exceeds that of the defendant was dealt with in *Dawson v. Garcia*.⁶⁰ When vehicles driven by the plaintiff's husband and the defendant collided at an intersection, the decedent's passengers were his wife and two children, who sought recovery for shock and mental suffering allegedly caused by observing the infliction of mortal injuries to the husband-father. The jury found that the decedent was seventy-five percent at fault, thereby relieving the defendant of any primary liability to the plaintiffs under the Texas Comparative Negligence Act.⁶¹ Relying heavily on California authority,⁶² the court concluded that absent preponderant, or primary, liability of the tortfeasor for the victim's death, an observer had no claim for mental anguish resulting from the accident.⁶³ Since the Texas statute relieves a defendant from primary liability if he is less negligent than the plaintiff, the defendant is relieved of fault as to third parties.⁶⁴ A claim for mental anguish resulting from observing a fatal accident is derivative, just as the cause of action for loss of consortium is derivative. If no principal right of recovery exists, no derivative right is available.

II. CHARACTERIZATION OF MARITAL PROPERTY

Tort Recovery. The parents in *Williams v. Steves Industries, Inc.*⁶⁵ sued for wrongful death when their children were killed in an automobile accident. The jury found the defendant seventy-five percent liable and the mother, who drove the car involved in the accident, twenty-five percent liable. On appeal the parents contended that the husband's portion of damages due to loss of the children's companionship should not be reduced because of his wife's negligence. The court agreed, characterizing the loss of the children's companionship as separate property.⁶⁶ The court compared the loss of the

58. 667 S.W.2d at 519-20. The court found that the original pleadings stated that the wife acted only as next friend of the child and that the parties did not intend that the wife be bound by the settlement. *Id.* at 519. Although the judgment purported to award damages to the husband and wife individually, each element of damages recovered satisfied a claim of the husband alone. The bulk of the judgment was separate property of the husband. *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972) (damages for pain and suffering are separate property of injured spouse). Only a small sum awarded for the wife's medical bills and expenses was community. 667 S.W.2d at 520.

59. 667 S.W.2d at 520. The court also dismissed the bottling company's second assertion that the settlement constituted an accord and satisfaction between the parties. The court held that the settlement did not state that it was in full and final settlement of all claims and hence did not constitute an accord and satisfaction. *Id.* at 520.

60. 666 S.W.2d 254 (Tex. App.—Dallas 1984, no writ).

61. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1985) bars recovery by any person whose negligence exceeds that of the defendant.

62. *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

63. 666 S.W.2d at 260.

64. *Id.*; see also TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1985).

65. 678 S.W.2d 205 (Tex. App.—Austin 1984, writ granted).

66. *Id.* at 210. Because the value of the loss of companionship was separate property,

children's companionship to loss of spousal consortium and found no distinction between the two.⁶⁷

Inception of Title. Marital property is characterized at inception of title. Such characterization occurs when a right or claim to property is fixed, though the actual receipt of title may occur at a later time when the acquiring person's marital status may have changed.⁶⁸ The Amarillo appeals court recently applied this basic principle to a situation in which the husband, prior to marriage, contracted to purchase realty under a lease-option agreement. The deed evidencing the transfer was placed in escrow, to be delivered upon the completion of payments of a predetermined amount.⁶⁹ Payment was made and the deed was delivered subsequent to the grantee's marriage. The court ruled that, despite the facts that payment was made from community funds and title had not fully vested prior to marriage, inception of title occurred upon execution of the agreement that gave the husband a claim to the property upon fulfillment of the escrow conditions.⁷⁰

In *Hardin v. Hardin*⁷¹ the husband had been made a participant of a retirement trust of a professional association by which he had been employed for over thirty years. Upon divorce the trial court characterized his interest as separate property and awarded it to him. The court of appeals affirmed, holding that the trust fund interest was received as a gift.⁷² The court stressed the fact that the ex-husband did not expect the trust benefit as compensation for his employment. The interest was thus distinguished from an interest in a retirement pension plan, which is an earned property right.⁷³ The employer received no benefit by providing the trust fund. Thus the husband's interest was much like a legacy for faithful service when no wages are due.

Reimbursement. The Texas Supreme Court has rendered two very significant decisions on the characterization of an increase in value of separately owned corporate stocks when the increase is attributable to the expenditure of time and effort by the owner-spouse. In *Vallone v. Vallone*⁷⁴ the court held that the community must be reimbursed when community time, talent, and labor, beyond that amount necessary for mere maintenance and preservation of the separate estate, is used to enhance the value of a spouse's separate property.⁷⁵ The court elaborated on the point in *Jensen v. Jensen*,⁷⁶

imputed negligence would not bar the non-negligent spouse's recovery. *Graham v. Franco*, 488 S.W.2d 390, 397 (Tex. 1972). The defendant should be entitled to a twenty-five percent contribution from the wife, if pleaded.

67. 678 S.W.2d at 210.

68. *Welder v. Lambert*, 91 Tex. 510, 526-27, 44 S.W. 281, 287 (1891).

69. *Roach v. Roach*, 672 S.W.2d 524 (Tex. App.—Amarillo 1984, no writ).

70. *Id.* at 531.

71. 681 S.W.2d 241 (Tex. App.—San Antonio 1984, no writ).

72. *Id.* at 242-43.

73. *Id.* at 243.

74. 644 S.W.2d 344 (Tex. 1982).

75. *Id.*

76. 665 S.W.2d 107 (Tex. 1984). For more extensive discussions of *Jensen*, see McKnight,

holding that 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 then subtract the amount of actual compensation received as well as the value of efforts reasonably necessary to maintain the separate estate.⁷⁷ *Holloway v. Holloway*⁷⁸ involved a similar issue. The husband had parlayed initial separate property investments of \$1,000 and \$3,000 into two closely held corporations valued at \$30,000,000 and \$60,000,000 respectively. Consistent with *Vallone* and *Jensen*, the court held that the stock was entirely separate property, subject only to a community claim for reimbursement for the uncompensated value of the husband's efforts.⁷⁹

The court's position in *Holloway* is ambiguous with respect to pleading a claim for reimbursement, however. In *Vallone*, *Jensen*, and *Holloway* the wife failed to plead specifically for reimbursement and relied instead on the position that the enhanced value of the stock was community property. In *Vallone* the court refused to remand for a new trial in the absence of reimbursement pleadings. Thirteen months later in *Jensen* the court remanded for a new trial.⁸⁰ Although in his concurring opinion Justice Robertson expressed the view that the court had thereby returned to a more liberal policy of construing pleadings in divorce cases involving reimbursement claims,⁸¹ the supreme court's handling of the case is better seen as an instance of trial by consent with respect to the reimbursement issue. That the court meant to depart from the strict pleading rule so recently and clearly announced in *Vallone* seems very unlikely. In *Holloway* the court initially seemed to follow *Vallone* but, on motion for rehearing after *Jensen*, remanded the case for a determination of the amount of reimbursement.⁸² The court thus seems to have retreated from its earlier conclusion that the parties had not tried the issue by implied consent.⁸³

In another case concerning pleading for reimbursement, *Hilton v. Hilton*,⁸⁴ the court held that in a pleading for reimbursement of separate property used to retire a community debt an allegation is not required that the separate expenditure exceeded the benefits received by the community.⁸⁵ Even if it is necessary in the converse context to allege the extent that the community estate is benefited when the community estate expends funds to

Family Law: Husband and Wife, Annual Survey of Texas Law, 38 Sw. L.J. 131, 137-39 (1984) [hereinafter cited as McKnight, 1984 Annual Survey]; McKnight, *Reimbursement for Uncompensated Labor Rendered for a Closely-Held Corporation*, State B. Litigation Sec. Rep., 3 THE ADVOCATE, Dec. 1984, at 8 (As indicated *infra* notes 102-13, the author's crystal ball, if not his logical ability, was very badly clouded when this prophecy was cast.); Note, *Community Entitled to Reimbursement for Enhanced Value of Separately Owned Corporate Stock*, 16 ST. MARY'S L.J. 177 (1984).

77. 665 S.W.2d at 110.

78. 671 S.W.2d 51 (Tex. App.—Dallas 1983, writ dismissed).

79. *Id.* at 58.

80. 665 S.W.2d at 110.

81. *Id.* at 110-11.

82. 671 S.W.2d at 63.

83. *Id.* at 58.

84. 678 S.W.2d 645 (Tex. App.—Houston [14th Dist.] 1984, no writ).

85. *Id.* at 648.

discharge a separate debt, because the separate estate is normally entitled to an offset for that amount,⁸⁶ in the dispute before the court in *Hilton* the situation was different. The court stated that the separate estate could not possibly benefit from the retirement of a community debt and, therefore, pleading of benefit would be irrelevant.⁸⁷ The more significant message in *Hilton*, however, was that the separate estate was entitled to reimbursement for payment of a community obligation regardless of the reason for which the community debt was incurred. The community indebtedness was allegedly incurred to provide family living expenses. This argument against reimbursement was clearly predicated on the holding in *Norris v. Vaughan*⁸⁸ that separate payment for family living expenses are not reimbursable.⁸⁹ The court's conclusion in *Hilton*, therefore, allows the rule in *Norris* to be circumvented by separate payment of a community debt incurred for living expenses rather than outright separate payments for living expenses.

The supreme court in *Jensen* enumerated particular factors to be considered in determining the amount of reimbursement due the community in a corporate compensation case.⁹⁰ In that instance, the court said that the reimbursable amount is the value of all labor performed, less salary and bonuses paid, fringe benefits enjoyed, and dividends received.⁹¹ A comparison of the court's opinion in *Jensen* with its conclusions in a superseded opinion⁹² seems to indicate that the fact finder should not consider the enhanced value of the stock in computing the value of the community time and effort expended. The contrary assertion by the El Paso court in *Trawick v. Trawick*⁹³ is apparently attributable to a printer's error.⁹⁴ In *Trawick* the court also discussed whether the enhanced value of the separate estate imposed an upper limit on recovery, but because the court was not confronted with that issue, it did not decide it.⁹⁵ The present worth of the shares held should be irrelevant to the computation of the debt owed for inadequate compensation paid. In *Jacobs v. Jacobs*,⁹⁶ on the other hand, the court concluded that a claimant for reimbursement must plead and prove not only that the other spouse's efforts enhanced the value of his separate corporate stock but also that this effort extended beyond what was necessary for maintenance of the separate corporate interest and that the community did not receive adequate compensation for his efforts.⁹⁷ The court found no evi-

86. *Colden v. Alexander*, 141 Tex. 134, 147-48, 171 S.W.2d 328, 334 (1943).

87. 678 S.W.2d at 648.

88. 152 Tex. 491, 260 S.W.2d 676 (1953).

89. *Id.* at 502-03, 260 S.W.2d at 683.

90. 665 S.W.2d at 110.

91. *Id.*

92. 27 Tex. Sup. Ct. J. 68, 69-70 (Nov. 9, 1983) (opinion withdrawn). This statement from that opinion was pointedly omitted.

93. 671 S.W.2d 105, 108 (Tex. App.—El Paso 1984, no writ).

94. *Id.* Without the word "not" in line 31, page 108, the sentence makes no sense in context.

95. *Id.* at 109.

96. 668 S.W.2d 759 (Tex. App.—Houston [14th Dist.] 1984), *rev'd on another ground*, 28 Tex. Sup. Ct. J. 337 (Apr. 3, 1985).

97. *Id.* at 762.

dence of the latter two requirements and, therefore, reversed the trial court's award of reimbursement.⁹⁸

In its *Jensen* opinion the court made no mention of the countervailing equities considered in cases involving reimbursement in other contexts. In its *Dakan*⁹⁹ decision of 1935 the court indicated that the widow's reimbursement for her share of community property used to improve the separate homestead should be equitably reduced because the widow would have a lifetime enjoyment of the premises.¹⁰⁰ In a succession case, as opposed to a divorce case, one might argue that if the widow is a recipient of a legacy of the husband's separate shares, similar equities might be taken into consideration to reduce the amount of community reimbursement for uncompensated labor expended to enhance the value of the separate shares. Such considerations may be immaterial, however, if the *Jensen* and *Trawick* approach to reimbursement cause the courts to move away from a loosely defined right of reimbursement to a strict, mathematical calculation in which such equities may no longer be relevant. In making a careful enumeration of factors to be considered in a corporate compensation case, the supreme court seems to have defined the computation of reimbursement by the application of precise rules that give little, if any, leeway for the operation of discretion.

Some of these conclusions and arguments derived from *Jensen*¹⁰¹ are put in some doubt by the Texas Supreme Court's recent decision in *Anderson v. Gilliland*.¹⁰² There the deceased husband's heir claimed his share of community reimbursement for community improvements made to the wife's separate property during marriage. Saying that the issue had not been previously resolved or that the authorities were so garbled that one could not tell whether the issue had been previously dealt with by the court or not,¹⁰³ the court concluded that the proper measure of reimbursement is the enhancement contributed to the benefited estate and not the amount expended.¹⁰⁴ In so holding the court recognized that a simple, uniform *cost* test would be easier to plead and to apply, but that the application of such a rule would, in the court's view, produce inequitable results:¹⁰⁵

98. *Id.*

99. *Dakan v. Dakan*, 125 Tex. 305, 319, 83 S.W.2d 620, 628 (1935).

100. *Id.* at 319, 83 S.W.2d at 628.

101. *See supra* note 76.

102. 684 S.W.2d 673 (Tex. 1965). Decisions of courts of appeals immediately following *Jensen* illustrate three different approaches to the measure of reimbursement for improvements: (1) *cost*, *Fyffe v. Fyffe*, 670 S.W.2d 360, 361-62 (Tex. App.—Texarkana 1984, writ *dism'd*); (2) *enhancement*, *Cook v. Cook*, 665 S.W.2d 161, 166 (Tex. App.—Fort Worth 1983, writ *ref'd n.r.e.*); *Padon v. Padon*, 670 S.W.2d 354, 358 (Tex. App.—San Antonio 1984, no writ); and (3) *cost* or *enhancement*, whichever is less, *Anderson v. Gilliland*, 677 S.W.2d 105, 108-09 (Tex. App.—Dallas 1984) (in this instance *cost* was less than *enhancement*), *rev'd*, 684 S.W.2d 673 (Tex. 1985).

103. 684 S.W.2d at 674.

104. *Id.* at 674-75.

105. *Id.* at 675. "This is true because the estate which contributes the capital necessary to construct the improvements would not share in the increase in value resulting from the investment." *Id.* But in explaining its choice of the "reimbursement" over the "ownership" theory of recovery for increased value of enhanced separate property in *Jensen*, the court said that the contributing community estate did not maintain an interest in the property benefited. *Jensen*,

[I]t is incumbent upon the courts to insure that the benefited estate is not required to pay more in reimbursement than the amount in which it was benefited by the other estate.¹⁰⁶ Likewise, it is necessary to ascertain that the benefited estate pays no less than it has been benefited.¹⁰⁷

The court's assertion that to apply a measure of reimbursement other than enhancement would be unfair to the spouse whose estate supplies the benefit¹⁰⁸ seems inconsistent with common marital experience. The expectation of the marital relationship is one of return of that which is lent or advanced unless otherwise agreed by the spouses. "When are you going to pay back the \$1,000 I let you have?" or "When can I have the \$6,500 I spent on the roof for your rent house?" are the typical marital responses to requested advancements that give rise to rights of reimbursement. As between the spouses the subsequent deterioration of the shingles or hail damage to the roof should be as irrelevant as their replacement cost. When a spouse voluntarily expends marital funds or efforts on behalf of another marital estate, there is even less expectation of receiving more or less than was expended.

In addition to the decisions of lower appellate courts, the court specifically relied on *Sharp v. Stacy*,¹⁰⁹ a case in which a good faith adverse possessor was awarded reimbursement in the amount of enhancement for betterments provided to the land possessed. The same measure of recovery applies to the reimbursement of a tenant in common who contributes improvements to a common estate.¹¹⁰ But the situations of the cotenant and the adverse possessor are different from that of the marital claimant. Each of the former must justify his right to reimbursement for improvements made without the cotenant's or the owner's consent.¹¹¹ He puts his capital at risk. Marriage is not and should not be a relationship requiring that sort of proof. Nor is there an anticipation between spouses that the advancement will either grow or diminish during the marriage. In an apparent attempt to lay down a uniform rule for the measure of reimbursement in cases of cotenancies, betterments and marital property improvements, the court missed a golden opportunity to lay down a more pressingly needed uniform rule for all marital reimbursement cases: that cost or value contributed at the date of contribution is the measure of reimbursement.¹¹² The law would have been greatly simplified if cases of improvements and other increases in value due to contributions of one marital estate by another marital estate were the same as that for pay-

665 S.W.2d at 109. "The 'reimbursement' theory provides that the stock, as it appreciates, remains the separate property of the owner spouse." *Id.*

106. That a benefited separate estate should ever pay less than the amount expended for its benefits seems strikingly inequitable, when one considers that it is under the constant control of its owner.

107. 684 S.W.2d at 675.

108. *Id.*

109. 535 S.W.2d 345, 351 (Tex. 1976).

110. *Whitmore v. Powell*, 103 Tex. 232, 236, 125 S.W. 889, 890 (1910).

111. *See Shaw & Estes v. Texas Consol. Oils*, 299 S.W.2d 307, 317 (Tex. Civ. App.—Galveston 1957, writ ref'd n.r.e.) (cotenancy).

112. *Colden v. Alexander*, 141 Tex. 134, 147-48, 171 S.W.2d 328, 334 (1943); *Schmidt v. Huppmann*, 73 Tex. 112, 116, 11 S.W. 175, 176-77 (1889).

ment of debts and improper disposition of assets.¹¹³

Tracing and Commingling. The opinion in *Holloway* also addressed the characterization of property purchased during marriage with borrowed funds. In *Gleich v. Bongio*¹¹⁴ the Texas Supreme Court concluded that the mere intent of the spouses cannot control the character of property borrowed or purchased on credit; rather, an agreement on the part of the lender or seller to look solely to the separate estate of one of the spouses for repayment is determinative.¹¹⁵ In *Holloway* the husband borrowed \$3,000 to start a corporation. Although there was no express agreement on the lender's part to look solely to his separate estate for satisfaction of the indebtedness, the Dallas court found ample evidence of such an implied agreement.¹¹⁶ The loan proceeds were deposited by agreement to an account designated as the husband's separate property; the note, security agreement, and statement of purpose for the loan were signed by the husband as a separate borrower; and only separate property was given as collateral. The court held such evidence capable of sustaining the inference that the bank agreed to look only to the husband's separate property for payment.¹¹⁷

Alimony. The Texas Legislature has long resisted suggestions that the courts be authorized to award alimony in a divorce decree. In *Francis v. Francis*¹¹⁸ the Texas Supreme Court held in 1967 that spouses might contract for the payment of such maintenance and the courts might incorporate this purely contractual agreement into the decree.¹¹⁹ In 1981 the legislature went a step further to provide that a divorce court may order the agreed payments.¹²⁰ A divorced spouse thus often deducts such payments from gross income for federal income tax purposes.¹²¹ At the core of the dispute in *Benedict v. Commissioner*¹²² was the question of whether the ex-husband could deduct as alimony a periodic payment pursuant to the property division in a 1975 divorce.¹²³ The Revenue Service argued that the payments that the ex-hus-

113. The conclusion in *Anderson* may have more serious results than failure to state a consistent rule for all marital reimbursement cases. It also unsettles the application of the *Jensen* principle in stock value cases. Is the measure of reimbursement in such a case the value of services rendered at the date the services were performed or as reflected in the enhanced value of the stock that the services produced? If the latter, the reimbursement claimant in a *Jensen*-type case will really get all the benefits of the proportional ownership, after all.

114. 128 Tex. 606, 99 S.W.2d 881 (1937).

115. *Id.* at 612, 99 S.W.2d at 884.

116. 671 S.W.2d at 57.

117. *Id.*

118. 412 S.W.2d 29 (Tex. 1967).

119. *Id.* at 32.

120. TEX. FAM. CODE ANN. § 3.631(c) (Vernon Supp. 1985). *But see* Klise v. Klise, 678 S.W.2d 545, 547-48 (Tex. App.—Houston [14th Dist.] 1984, no writ) (trial judge not obligated to adopt agreed child support, but has discretion to make his own orders regarding child support).

121. I.R.C. § 215 (1982) provides for deduction of one spouse's alimony payments if the alimony is included in the other spouse's gross income.

122. 82 T.C. 573 (1984).

123. For a comment on the division on divorce, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 31 Sw. L.J. 105, 122-23 (1977).

band called alimony were actually part of the property division and thus nondeductible. But the Tax Court held he could deduct these payments as alimony because they fitted the criteria under the Internal Revenue Code in order to be classified as alimony.¹²⁴

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

Disposition of Jointly Managed Community Property. In 1974 in *Williams v. Portland State Bank*¹²⁵ the Beaumont court of appeals held that one spouse might unilaterally mortgage his half interest in nonhomestead, jointly managed community realty.¹²⁶ After a motion for a writ of error was granted by the Texas Supreme Court, the parties settled their dispute and the motion was dismissed as moot. The decision is nonetheless erroneous in that it somehow interpreted joint management of community property under section 5.22(b)¹²⁷ as meaning *several* management.¹²⁸ This interpretation was particularly startling because it was reached soon after the supreme court had concluded that the statute defining joint management means exactly what it says.¹²⁹ Citing *Williams*, the court in *Vallone v. Miller*¹³⁰ pronounced a misleading dictum to the effect that one spouse may unilaterally convey his half interest in jointly managed, community realty, though the court purported to be guided in this instance by section 5.22(c).¹³¹ Subsection (c), however, also deals with joint management, which cannot mean anything but concerted action.¹³² The actual holding of the case is correct: the husband, acting alone, could not dispose of a tract of jointly owned, community property without his wife's joinder.¹³³ The grantee sought specific performance of the contract and wholly failed. The court merely added the inaccurate observation that the husband might have sold his half interest in the prop-

124. 82 T.C. at 578-79. The court listed seven factors that, if found to exist, showed the payments were alimony: (1) the parties did not intend the payments to be a division of assets; (2) the recipient did not surrender valuable property rights in exchange for the payments; (3) the payments are subject to contingencies; (4) the payments are not secured; (5) the amount of payments plus other property exceeds one-half of the property the parties accumulated during the marriage; (6) the need of the recipient is taken into account; (7) the provision does not provide for support elsewhere in the decree. *Id.* at 578. In *Benedict* the court found that the payments were subject to contingencies, were unsecured, constituted more than one-half the property, were for the wife's need, and that the decree contained no other provision concerning support. *Id.* The court took these factors from *Beard v. Commissioner*, 77 T.C. 1275, 1284-85 (1981).

125. 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ dism'd as moot after settlement).

126. *Id.* at 126-27.

127. TEX. FAM. CODE ANN. § 5.22(b) (Vernon 1975).

128. See McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 88-89 (1975).

129. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200 (Tex. 1972). Husband's unilateral action to rescind community purchase of real estate was dismissed with prejudice. Husband and wife then refiled the suit together, and the court held that the previous dismissal was not res judicata as to wife, because she had joint control of the community property. *Id.* at 205.

130. 663 S.W.2d 97 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

131. *Id.* at 98.

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

133. 663 S.W.2d at 98.

erty had he purported to deal only with his share.¹³⁴

Liability of Spouses to Third Persons. Although a divorce court may order either spouse to pay a particular joint liability, the other spouse is not thereby freed of liability. If the creditor intervenes in the proceeding, the court cannot reorder liability as between the creditor and the spousal debtors unless all parties consent to the novation. This proposition was recently reiterated in *Wileman v. Wade*.¹³⁵ The divorce court may do no more than adjust the mode of payment as between the debtors;¹³⁶ the creditor's rights are not disturbed.¹³⁷ In *Wileman* the trial court found that liability for an attorney's fee contracted by the wife in connection with obtaining the divorce was a community debt and ordered each spouse to discharge half of it. It does not appear from the opinion that the trial court made a finding that the debt was a necessary.¹³⁸ In reforming the judgment to hold that both spouses were jointly liable for payment of the fee, the Dallas appellate court did not rely on the law of necessities but on the conclusion that the liability was a community debt.¹³⁹ In his dissent Justice Sparling implicitly rejected both approaches. Characterizing the debt as a community obligation, he argued, does not necessarily subject the husband to liability.¹⁴⁰ In determining whether the noncontracting spouse is liable in such instances, the court should look to the husband's express or implied assent, acknowledgment of liability, and all other surrounding circumstances.¹⁴¹ Under these requirements, the dissenting judge would have absolved the husband of liability.¹⁴² Evidently the judge's view is that the old law, by which the wife was the husband's agent of necessity in such cases, has been superseded by the equal rights amendment to the Texas Constitution and a series of legislative acts and judicial decisions of the past two decades.¹⁴³ He would replace the time-worn and outmoded notion of agency of necessity with one of factual agency, implemented by the statutory injunction that each spouse has the duty to support the other. The dissenting judge's points are well taken.

All debts contracted by either spouse during marriage are presumed to be

134. *Id.* at 99.

135. 665 S.W.2d 519 (Tex. App.—Dallas 1983, no writ).

136. McKnight, *Liability of Separate and Community Property for Obligations of Spouses to Strangers*, in CREDITOR'S RIGHTS IN TEXAS 331, 340-42 (J. McKnight ed. 1963). With particular reference to attorney's fees, see McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 456 n.252 (1976).

137. 665 S.W.2d at 520.

138. *Id.* at 521; see *Black v. Bryan*, 18 Tex. 453, 464-65 (1857).

139. 665 S.W.2d at 520.

140. *Id.* at 522.

141. 665 S.W.2d at 522 (citing *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975); *Leblanc v. Waller*, 603 S.W.2d 265, 268 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *Miller v. City Nat'l Bank*, 594 S.W.2d 823, 826 (Tex. Civ. App.—Waco 1980, no writ)).

142. 665 S.W.2d at 523.

143. See McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 455-59 (1976); McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 68, 84-85 (1976) [hereinafter cited as McKnight, *1976 Annual Survey*]; see also *Donovan v. Mercer*, 747 F.2d 304, 308-09 (5th Cir. 1984) (wife did not act as husband's agent, but was personally liable for her own breach of fiduciary duty).

community obligations for the purpose of characterizing property bought on credit or with money borrowed by either spouse. The character of the debt is rebuttable by a showing that the creditor agreed to look solely to separate property for its satisfaction. The Bankruptcy Court of the Northern District of Texas discussed this proposition in *In re Karber*.¹⁴⁴ The issue in *Karber* was whether the wife was jointly liable for a business debt contracted by the husband. The creditor asserted that because the liability had community character, the wife was jointly liable, thereby causing her separate property to be answerable in satisfaction. In *Karber* the court followed the Texas Supreme Court's analysis in *Cockerham v. Cockerham*,¹⁴⁵ in which the court found that the obligation was indeed a community obligation because the creditor had not agreed to look solely to the husband's separate estate,¹⁴⁶ but the creditor must also prove that these community debts were joint obligations of the wife before her separate property might be made liable for their discharge.¹⁴⁷ In such a circumstance, the court in *Cockerham* held, the creditor must prove that the wife implicitly assented to the husband's debt.¹⁴⁸ In *Karber* the court found that the wife had not assented because her affirmative act reflected her refusal in this regard to encumber her separate estate.¹⁴⁹

The Tyler court of appeals expressed the view in *Humphrey v. Taylor*¹⁵⁰ that the source of repayment particularly contemplated by the creditor and the attitude of the other spouse indicate whether a community liability is jointly incurred.¹⁵¹ The husband executed a promissory note for a loan without his wife's knowledge. When the couple sought a divorce, the lender intervened, seeking a judgment on the note against both spouses. Based upon the lender's testimony that in extending the loan he had no "intent as far as the estate was concerned except if it came time for collection I would try to collect however I could,"¹⁵² the court ruled that neither the wife's separate property nor the community property interest subject to the sole management of the wife was liable for the debt.¹⁵³ The court also relied upon evidence showing that the wife had no knowledge of the transaction until the creditor notified her that the note was in default, and that she had

144. 25 Bankr. 9 (Bankr. N.D. Tex. 1982).

145. 527 S.W.2d 162 (Tex. 1975). In *Cockerham* the court found that the husband was jointly liable for the debts of the wife's dress shop, because of the husband's involvement in the business as a principal. In its opinion in *Cockerham* the court (somewhat ambiguously) laid out the rules concerning imposition of joint liability in such circumstances. See McKnight, *1976 Annual Survey*, *supra* note 143, at 91-92.

146. 527 S.W.2d at 171-72.

147. *Id.*

148. *Id.* at 172.

149. 25 Bankr. at 13. The wife testified that she had been opposed to the acquisition of the business. Though she had signed some of the notes under apparent duress, she then had countermanded her husband's instructions to her attorney to prepare documents to place a lien on her property. She also had refused to sign a personal guaranty that her husband had urged upon her.

150. 673 S.W.2d 954 (Tex. App.—Tyler 1984, no writ).

151. *Id.* at 956.

152. *Id.*

153. *Id.*

neither received any proceeds of the loan nor had she participated in any part of the transaction.¹⁵⁴ Following the supreme court's analysis in *Cock-erham*, the court concluded that both spouses were not jointly liable on the note.¹⁵⁵ A far easier and better way to arrive at the same conclusion is merely to follow the rules of liability prescribed by section 5.61 of the Family Code. Under those provisions contractual liability falls on the maker of the contractual obligation and on all community property of which he or she is the sole or joint manager. The separate property and the community property subject to the sole management of the nonmaker is not liable for such obligations.¹⁵⁶ Tortious liability is somewhat different: all community property may be reached in satisfaction of either spouse's liability.¹⁵⁷ This rule is ameliorated somewhat by the marshalling statute, section 5.62, whereby a court may direct the order in which various types of community, or separate, property may be made subject to satisfaction.¹⁵⁸

In *Estate of Fulmer v. Commissioner*¹⁵⁹ the United States Tax Court addressed the issue of whether a deceased spouse's estate could deduct the entire amount of a tort judgment against the estate in computing estate tax liability. A judgment had been rendered against the deceased husband's estate for a personal tort committed by the decedent. The court ordered the judgment paid first from the separate estate of the decedent and then from his share of the community before payment from the widow's share. The probate court confirmed this order of full payment from the husband's estate. The Revenue Service argued that because the Family Code provides that the community is subject to all tortious liability,¹⁶⁰ the estate could deduct only half of the liability, and the decedent's wife's share of the community would be liable for the other half.¹⁶¹ In ruling in favor of the estate,¹⁶² the Tax Court effectively extended the scope of section 5.62¹⁶³ to allow marshalling of payment against a decedent's share of community property partitioned at death.

The Corpus Christi appeals court ruled that the husband of a purchaser of

154. *Id.*

155. *Id.*

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

157. *Id.* § 5.61(d).

158. *Id.* § 5.62.

159. 83 T.C. 302 (1984).

160. TEX. FAM. CODE ANN. § 5.61(d) (Vernon 1975).

161. The separate property of the decedent would also have been liable, but the estate had no separate assets.

162. 83 T.C. at 308-09. Section 5.61 of the Family Code pertains to the spouse's marital liability, while § 5.62, the marshalling statute, determines the order in which property subject to liability under § 5.61 may be reached by the creditor. See TEX. FAM. CODE ANN. §§ 5.61, 5.62 (Vernon 1975).

163. TEX. FAM. CODE ANN. § 5.62 (Vernon 1975). The court concluded that the marshalling statute applied to tort judgments because if the tort claim had been partly satisfied out of the wife's share of the community, the wife would have had a claim of reimbursement against the husband's estate. 83 T.C. at 308. The court inferred that a Texas court would reach the same result as that reached by a Washington court in that situation. See *deElche v. Jacobson*, 95 Wash. 2d 236, 622 P.2d 835, 840-41 (1980). For a discussion of community liability for a tax lien under California law, see *Noonis v. United States*, 576 F. Supp. 853, 856-57 (W.D. Tex. 1983).

realty was not an indispensable party to his spouse's action seeking return of the earnest money paid by her when the husband was in no sense a party to the transaction.¹⁶⁴ The court noted, however, that if the husband had been a third-party beneficiary to the contract, he might have been a proper party to the suit.¹⁶⁵ Because the husband had not assented to this status, the court concluded that he was not a necessary party to the resolution of the dispute.¹⁶⁶

Homestead: Nature of the Interest. A twice divorced homeowner resided during his two marriages and afterwards in the same urban home. Because he was finally divorced before the 1973 amendment to the Texas Constitution,¹⁶⁷ which allowed a single adult to claim a homestead, the trial court concluded that a judgment creditor was entitled to levy upon the asserted homestead. The appellate court reversed:¹⁶⁸ divorce does not cause a family home to lose its homestead character as long as the owner with parental obligations remains in possession and uses the property as his homestead.¹⁶⁹ This decision is merely a new example of a well-established principle,¹⁷⁰ since the claimant had reared two sons in the designated property. The Texas Supreme Court had gone a step further in *Renaldo v. Bank of San Antonio*¹⁷¹ in allowing a single father to acquire a new homestead after divorce so that his minor child could visit him there.¹⁷²

Apart from federal liability a homestead may not be encumbered by liens other than for purchase money, property taxes, and improvements.¹⁷³ The transfer of one spouse's community interest to the other on divorce raises a question as to whether the deprived spouse's right to a money judgment in lieu of her interest can be secured by a lien on the premises. That question is resolved by awarding a species of purchase-money lien on the homestead to secure the monetary award granted to the spouse whose interest is transferred to the other spouse.¹⁷⁴ In a related context the Texas Supreme Court

164. *Major Inv., Inc. v. De Castillo*, 673 S.W.2d 276, 279-80 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

165. *Id.*

166. *Id.* In *De Castillo* the purchaser-wife also asserted that the sales contract was void under TEX. REV. CIV. STAT. ANN. arts. 130 & 6626c (Vernon 1980 & Supp. 1985) and TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon Supp. 1985).

167. TEX. CONST. art. XVI, § 50. The homestead right of a single person is also reflected in TEX. PROP. CODE ANN. § 41.001 (Vernon 1984).

168. *McFarland v. Rousseau*, 667 S.W.2d 929 (Tex. App.—Corpus Christi 1984, no writ).

169. *Id.* at 931-32.

170. The court followed *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929), which held that the dissolution of the family does not destroy homestead rights of the surviving head as long as he uses it as a homestead. *Id.* at 589, 19 S.W.2d at 35.

171. 630 S.W.2d 638 (Tex. 1982). The divorce and acquisition of the new property occurred prior to the 1973 constitutional amendment.

172. *Id.* at 638-40.

173. TEX. CONST. art. XVI, § 50; see *Commonwealth Nat'l Bank v. United States*, 573 F. Supp. 881, 883 (N.D. Tex. 1983). In *Kostelnik v. Roberts*, 680 S.W.2d 532, 536 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.), the court held that a homestead cannot be a haven for ill-gotten gains.

174. *Lettieri v. Lettieri*, 654 S.W.2d 554 (Tex. App.—Fort Worth 1983, writ dism'd), discussed in *McKnight*, 1984 *Annual Survey*, *supra* note 76, at 154-55. A similar analysis is used

recently held in *McGoodwin v. McGoodwin*¹⁷⁵ that a divorce court's decree that the wife transfer her interest in the home to the husband with a money judgment in her favor implies a vendor's lien on her behalf.¹⁷⁶ The court reached this conclusion by likening the couple's settlement agreement, which was incorporated in the decree, to a contract for the purchase of land. The court then invoked the further analogy that when no express lien is reserved in a deed and the purchase money is not paid, an implied lien arises as a matter of law.¹⁷⁷ The court, however, modified the court of appeals' judgment in a manner that clarifies the law in this and related cases: the lien imposed was only against the wife's interest in the property acquired.¹⁷⁸

Following older, but unconvincing, authorities, a spouse's right to recover on a fire insurance policy was rejected in *Western Fire Insurance Co. v. Sanchez*¹⁷⁹ when the husband willfully destroyed his wife's separate-property homestead. Texas courts have often held that the nonowner's possessory right is much like an estate in land, but this court stretched the simile too far. The homestead right is similar to a life estate,¹⁸⁰ but differs markedly from a life estate in that no right of lifetime disposition attaches. Following an insurance law principle that a co-owner cannot recover on an insurance policy when the other co-owner destroys the property, the court denied the wife recovery on the policy.¹⁸¹ By analogy the court overmagnified the husband's interest, which is not truly analogous to that of a co-owner in this context. The husband's right is merely that of occupancy. His intentional damage to the house of course may hinder the enjoyment of that right, but it should not affect the right of ownership, because the law does not recognize the husband's right of disposition as it does in the case of a co-owner. The husband's homestead right, therefore, should not preclude the wife's recovery under the insurance policy. The contrary argument rests on the principle that the benefits of the insurance policy inure to the mutual benefit of all the owners;¹⁸² hence, all co-owners must use all reasonable

to support a purchase money lien when a resident family member sells a homestead interest on the death of an ancestor.

175. 671 S.W.2d 880 (Tex. 1984).

176. *Id.* at 882.

177. *Id.*

178. *Id.* at 883. The court also held that the principle of res judicata did not bar the wife from litigating the issue of the vendor's lien's existence. *Id.* at 881-82. The court held that the wife had in effect sought to foreclose a lien created on divorce and, hence, did not seek to create a lien by her subsequent suit. *Id.* (citing *Debord v. Muller*, 446 S.W.2d 299 (Tex. 1969); *Goldberg v. Goldberg*, 425 S.W.2d 830 (Tex. Civ. App.—Fort Worth 1968, no writ)).

179. 671 S.W.2d 666 (Tex. App.—Tyler 1984, writ *ref'd n.r.e.*). If the point of error with respect to recovery was properly presented, the writ of error seems to have been improvidently denied.

180. *Id.* at 668; see *Sargeant v. Sargeant*, 118 Tex. 343, 351-52, 15 S.W.2d 589, 593 (1929). For the United States Supreme Court's interpretation of the Texas law of homestead, see *United States v. Rodgers*, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983), discussed in *McKnight, 1984 Annual Survey*, *supra* note 76, at 152-53.

181. 671 S.W.2d at 670. Many jurisdictions, however, allow recovery by an innocent co-owner when the other co-owner intentionally destroys the property. *Hosey v. Seibels Bruce Group*, 363 So. 2d 751, 753-54 (Ala. 1978); *Steigler v. Insurance Co. of N. Am.*, 384 A.2d 398, 401 (Del. 1978).

182. *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511, 512 (Tex. Civ. App.—

means to preserve the property.¹⁸³ Thus, a co-owner's destruction of the property renders the whole policy void.¹⁸⁴ In *Sanchez*, however, the policy was issued to the wife only.¹⁸⁵ The husband had no contractual relations with the insurance company. He was merely involved by operation of the homestead law. A wrongful act on the part of a lessee would not preclude recovery of the owner's fire insurance policy, and for that reason the rights of a tenant at law should have no greater force.

With few exceptions, such as the long-term lease of a home and rental of mobile home facilities, rented property is not treated as a homestead.¹⁸⁶ In most instances the protection would be meaningless because the lessee's interest is normally not assignable¹⁸⁷ and is, therefore, immune from seizure by his creditor. But even if a homestead may be maintained on rented premises for some purposes, the lessor's interest is not precluded from seizure by his creditors. In *Texas Commerce Bank v. McCreary*¹⁸⁸ after divorce the ex-husband moved to a house on property he leased to his solely owned corporation. He thus owned the property, but his occupancy was as a tenant at will of the lessee. A year after he moved to the property the corporation executed a promissory note to the bank with the residential realty as security. The owner personally guaranteed payment. On default of the note the bank sought foreclosure of its lien on the property that the occupant claimed as his homestead. The court held that the property's uninterrupted use as a rental property to the corporation precluded its qualification as a homestead, regardless of whether the corporate-owner used it as his residence.¹⁸⁹ The corporation's permission to use its buildings for living quarters did not establish an independent right to use the premises as a homestead.¹⁹⁰ The analysis is somewhat analogous to that of the Texas Commission of Appeals in *Rettig v. Houston West End Realty Co.*¹⁹¹ There a husband and wife had a rural community homestead of twenty-five acres. After the wife died interes-

Eastland 1952, no writ) (former wife burned homestead); *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281, 282 (Tex. Civ. App.—Waco 1952, writ ref'd) (former husband burned homestead).

183. *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281, 282 (Tex. Civ. App.—Waco 1952, writ ref'd).

184. *Id.* at 283; see also *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423, 425 (1938) (husband's arson was act of insured); *Bowers Co. v. London Assur. Corp.*, 90 Pa. Super. 121 (1926) (seller of automobile burned by purchaser precluded recovery by seller on joint policy); *Bellman v. Home Ins. Co.*, 178 Wis. 349, 189 N.W. 1028, 1028 (1922) (partners had agreed to use reasonable means to protect property).

185. In *Jones* the policy was issued to the husband and wife before they were divorced and the property was awarded to the wife. See *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281, 282 (Tex. Civ. App.—Waco 1952, writ ref'd).

186. *Yates v. Home Bldg. & Loan Co.*, 103 S.W.2d 1081 (Tex. Civ. App.—Beaumont 1937, no writ) (mere intention to stop renting a house and to resume using it as homestead does not create the right); *Blackwell v. Lasseter*, 203 S.W. 619 (Tex. Civ. App.—El Paso 1918), *aff'd*, 227 S.W. 944 (Tex. Comm'n App. 1921, judgment adopted) (intention not enough when property not used as homestead).

187. TEX. PROP. CODE ANN. § 91.005 (Vernon 1984).

188. 677 S.W.2d 643 (Tex. App.—Dallas 1984, no writ).

189. *Id.* at 646.

190. *Id.*

191. 254 S.W. 765 (Tex. Comm'n App. 1923, judgment adopted).

tate, the husband and son continued to occupy the land. The father allowed the son to build a house on the land that the son occupied. The son then purported to sell his interest in the land without his wife's joinder. If the sale was the son's homestead, the sale was invalid. But because the father had an exclusive right of homestead occupancy and the son was an occupant as a tenant at will of the father (though his tenant in common), the son had no homestead right in the land.¹⁹²

Homestead: Designation and Extent. The fact that an owner of land has never designated it as a homestead for property tax purposes does not preclude a finding that the property is, nevertheless, his homestead.¹⁹³ This proposition was recently restated. The property is a homestead because the claimant used it as such. Assertion of an ad valorem tax exemption is evidence of such use, but failure to designate for that purpose does not preclude the homestead claim by the owner in another context.¹⁹⁴

In *Dallas Power & Light Co. v. Loomis*¹⁹⁵ the issue was whether homestead property acquired in 1954 for more than \$5,000 (but less than \$10,000) was entirely exempt based upon the 1970 Texas constitutional amendment raising the homestead exemption of an urban lot from \$5,000 to \$10,000 "at the time of [its] designation."¹⁹⁶ The creditor, whose post-amendment debt had been reduced to judgment, asserted the right to levy upon the excess over the initial exemption. In holding for the homestead claimant, the appellate court admitted that its decision effectively established the retroactivity of the amendment and concluded that such was the intention of its framers.¹⁹⁷ The court distinguished the situation before it from that in *Linch v. Broad*¹⁹⁸ and cases decided in reliance thereon, in that *Linch* involved a claimant who had tried to enlarge the area of his homestead following an amendment of the Texas Constitution that enlarged the dollar amount exempted.¹⁹⁹ Instead, the court followed *Wilder v. McConnell*,²⁰⁰ a case that dealt with the issue of whether land that was rural at the time of

192. *Id.* at 767-68.

193. *Dodd v. Harper*, 670 S.W.2d 646 (Tex. App.—Houston [1st Dist.] 1983, no writ). To establish homestead rights the claimant must show a combination of both overt acts of homestead usage and intention on the part of the owner to claim the land as homestead. *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 314 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); *Sims v. Beeson*, 545 S.W.2d 262, 263-64 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); *Prince v. North State Bank*, 484 S.W.2d 405, 409 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

194. *Dodd v. Harper*, 670 S.W.2d 646, 649 (Tex. App.—Houston [1st Dist.] 1983, no writ).

195. 672 S.W.2d 309 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

196. TEX. CONST. art. XVI, § 51.

197. 672 S.W.2d at 310-11.

198. 70 Tex. 92, 6 S.W. 751 (1888).

199. 672 S.W.2d at 311. TEX. CONST. art. XVI, § 51 was amended in 1970 to increase the dollar amount from \$5,000 to \$10,000. The court concluded that cases that would not allow the homestead claimant to take advantage of an increase in the dollar amount of the homestead exemption when applied to the original property were a result of a misreading of *Linch*. See *Valley Bank v. Skeen*, 401 F. Supp. 139, 140 (N.D. Tex. 1975) (statutory homestead designation not retroactive); *In re Bobbitt*, 3 Bankr. 372, 373 (Bankr. N.D. Tex.), *aff'd*, 532 F.2d 185 (5th Cir.), *cert. denied*, 429 U.S. 834 (1976) (increase not retroactive).

200. 91 Tex. 600, 45 S.W. 145 (1898).

designation had become urban at the time of trial. In *Wilder* the supreme court had stated that the exemption must be determined by the terms of the Constitution applicable to it when the question of exemption arose.²⁰¹ Reliance on *Wilder* is misplaced, as is demonstrated by the supreme court's brief opinion in *Love v. Hoffman*.²⁰²

In 1983 the United States Supreme Court held in *United States v. Rodgers*²⁰³ that a federal district court may order the sale of a deceased, delinquent, federal taxpayer's homestead even if the nondelinquent surviving spouse also has a homestead interest in the property.²⁰⁴ In *United States v. Molina*²⁰⁵ the Federal District Court for the Southern District of Texas determined the allocation of the proceeds among the United States, the delinquent spouse, and the nondelinquent spouse, both of whom were still living. In *Molina*, two couples owned undivided one-half interests in the property seized by the Revenue Service, but one of the couples did not live on the property and asserted no homestead claim therein. The other couple asserted that the property was their homestead. Both husbands were liable for unpaid employment taxes. The evidence indicated that the first couple's interest was community property; hence, the whole of their interest could be applied to satisfy the deficiency on their joint income tax return.²⁰⁶ The proceeds of the second couple's half interest was apportioned differently because of its homestead character. Since the wife was not liable for the unpaid taxes, the court held that her interest in the homestead was distinct from her community property interest and, hence, would not be liable.²⁰⁷ The court found that her interest approximated a life estate and so evaluated it by calculating the present discounted value of a life estate, using actuarial tables.²⁰⁸ The Revenue Service argued that the classification of the property as community made it liable for unpaid taxes and overrode the innocent wife's homestead rights, but the court disagreed. Since the homestead right was an independent interest, the court concluded that, although the wife's community ownership interest was liable, her homestead right was protected.²⁰⁹ On motion to alter or amend the court's findings the court repeated its analysis, concluding that the second wife should be compensated for her one-half homestead interest in the property.²¹⁰

201. *Id.* at 604-05, 45 S.W. at 147.

202. 499 S.W.2d 295, 295 (Tex. 1973).

203. 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983). For a discussion of *Rodgers*, see McKnight, *1984 Annual Survey*, *supra* note 76, at 152-54.

204. 103 S. Ct. at 2136, 76 L. Ed. 2d at 244.

205. 584 F. Supp. 1011 (S.D. Tex. 1984).

206. *Id.* at 1013. Although the first wife was not liable for unpaid taxes, the full liability for the first husband's unpaid taxes could be satisfied from the property because it was jointly managed community property. TEX. FAM. CODE ANN. § 5.61(c) (Vernon 1975); see *Short v. United States*, 395 F. Supp. 1151, 1153-54 (E.D. Tex. 1975).

207. 584 F. Supp. at 1014.

208. *Id.*

209. *Id.*

210. *Id.* at 1014-15. The court drew its conclusion from *Rodgers*, finding that the language of the Supreme Court opinion indicated that regardless of whether ownership rights are separate or community property, the nondelinquent spouse has a vested property right in the

Homestead: Imposing and Enforcing Liens. A forced sale of homestead property may occur in only three situations: (1) for payment of a purchase money lien; (2) for payment of taxes due on the property; and (3) for payment of improvements on the property.²¹¹ The contract for improvements, however, must be in writing and executed by both spouses in the case of a family homestead.²¹² These are long-standing rules with respect to family homesteads,²¹³ but only recently was the rule with respect to improvements applied in an appellate case to the homestead of a single person.

In *Stewart v. Clark*²¹⁴ a general contractor sued the single co-owners of a home to fix a lien for improvements made thereon. The contract, however, was not in writing. The contractor argued that the contract did not have to be in writing because the owners were unmarried. He stated that the constitutional provision requiring a written agreement for improvements applies only to a family homestead. Though article XVI, section 50 of the Texas Constitution²¹⁵ might be given such a narrow construction with a strong reliance on punctuation, the court rejected this argument.²¹⁶ As amended in 1973 the constitution extends homestead protection to single adults, and the court concluded that the homestead of a single person must be on the same terms as that afforded to a family homestead.²¹⁷ The court's conclusion is, of course, supported by the plain provision of article 3839²¹⁸ and section 41.002 of the Property Code,²¹⁹ which replaced it on January 1, 1984.

In *In re Daves*²²⁰ the creditor had lent the debtor a substantial sum of money to make improvements on both sites of his urban residential and business homestead, relying on the husband's assertion of a prior filing of a mechanic's lien upon which the owner could rely to obtain a permanent loan if he could not repay the improvement loans. The debtor, however, had obtained a release of the mechanic's lien, but did not record it until long after he had defaulted on the improvement loans. The recordation of the release, therefore, destroyed any basis for a valid contractual lien because the lien must have been perfected prior to the beginning of construction to be

homestead that the court must protect. *Id.* at 1015; see *United States v. Rodgers*, 103 S. Ct. at 2138-39, 76 L. Ed. 2d at 248.

211. TEX. CONST. art. XVI, § 50; e.g., *Franklin v. Woods*, 598 S.W.2d 946, 949 (Tex. Civ. App.—Corpus Christi 1980, no writ) (decendent's homestead could not be sold to pay debts of estate).

212. TEX. CONST. art. XVI, § 50 states: "[A]nd in this last case [in which the homestead may be subjected for forced sale for the payment of improvements] only when the work and material are contracted for in writing with the consent of both spouses, in the case of a family homestead"

213. *Minnehoma Fin. Co. v. Ditto*, 566 S.W.2d 354, 357 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.) (both spouses required to sign instrument creating lien on homestead).

214. 677 S.W.2d 246 (Tex. App.—Corpus Christi 1984, no writ).

215. TEX. CONST. art. XVI, § 50.

216. 677 S.W.2d at 249.

217. *Id.* The contractor had also asserted that the owner had not proved the homestead character of the property. The court found that at least one of the co-owners had shown that the property was her residence. *Id.* at 250.

218. TEX. REV. CIV. STAT. ANN. art. 3839 (Vernon 1966) (repealed 1984).

219. TEX. PROP. CODE ANN. § 41.002 (Vernon 1984).

220. No. 583-00087 (Bankr. N.D. Tex. Jan. 10, 1984).

effective.²²¹ The bankruptcy court put an equitable lien on both properties because the parties had intended that a lien be created in favor of the lender and because both properties together constituted the urban homestead.²²² Because the owner had an insufficient equity in the business premises to sustain a lien for all of the indebtedness incurred for its improvements, the equitable lien for the bulk of the improvements of the business premises fell on the residential part of the property. The court's decision embellishing Texas homestead law in favor of a creditor by allowing the imposition of a lien against homestead property when the constitutional formalities have not been followed seems wrong in principle, but some authority supports the court's treatment of the homestead as a unit for the purpose of encumbrances.²²³

The court in *Villarreal v. Laredo National Bank*²²⁴ reiterated the rule that one spouse could not alone renew a joint lien note when the other spouse still had homestead rights in the property. By a deed of trust the husband and wife had put a lien for improvements on their homestead. On divorce the court granted the property to the husband, but awarded the wife a homestead interest in the property until their youngest child reached eighteen. The ex-husband later executed a lien renewal note upon the bank's assertion of its right to accelerate the old note for payment under its terms. The old note, however, remained in effect. When the bank proceeded to foreclose under the renewal agreement, the wife, asserting her homestead rights, instituted a suit for a permanent injunction. The trial court denied her claim and granted the bank summary judgment. On appeal, the San Antonio court of appeals held that the ex-husband alone had no power to renew or alter the continuing joint obligation against the homestead.²²⁵ Placing fee title in the ex-husband alone on divorce did not affect the operation of this fundamental rule of law.²²⁶ Although the bank could foreclose upon the ex-husband's interest if the property were no longer his homestead, the new title holder would take subject to the wife's homestead interest as defined by the divorce decree. The bank could perhaps have forced a sale on the original note rather than the renewal note, but the court made no disposition on that point

221. *Id.*, slip op. at 12; TEX. CONST. art. XVI, § 50.

222. No. 583-00087, slip op. at 15-16. An equitable lien is created when a party indicates an intention to provide certain property as security for repayment of a debt. William Clay, Jr. Found. v. United States, 233 F. Supp. 628, 631 (N.D. Tex. 1964). Such an equitable lien will not arise except out of an express or implied contract between the parties. *Bray v. Curtis*, 544 S.W.2d 816, 819 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

223. See, e.g., *Hollifield v. Hilton*, 515 S.W.2d 717, 721 (Tex. Civ. App.—Forth Worth 1974, writ ref'd n.r.e.) (improvement of a rural area around the family home as a mobile home park constituted an improvement on the homestead property for which the land occupied as the home was subject to foreclosure). In *Day v. Day*, 610 S.W.2d 195, 198-99 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.), relied on by the court, it was not shown that the property was a homestead.

224. 677 S.W.2d 600 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

225. *Id.* at 608 (citing *Uvalde Rock Asphalt v. Hightower*, 140 Tex. 200, 166 S.W.2d 681 (1942); *Sudduth v. DuBose*, 93 S.W. 235 (Tex. Civ. App. 1906, no writ); *San Antonio Real Estate Bldg. & Loan Ass'n v. Stewart*, 65 S.W. 665 (Tex. Civ. App. 1901, writ ref'd)).

226. 677 S.W.2d at 608. Although the bank could foreclose against the husband's interest, this right could not affect the wife's homestead interest as long as it existed. *Id.*

because the bank argued that the wife was no longer responsible under the original note because of the renewal.²²⁷ The appellate court affirmed the trial court's award of summary judgment for the bank, but modified the order to protect the wife's homestead interest.²²⁸ The bank thus could foreclose and sell the husband's nonhomestead interest, but could not impair the wife's possessory homestead rights.

Exempt Personalty. In *In re Johnson*²²⁹ the debtor claimed that her tax-deferred annuity was exempt property in a bankruptcy proceeding.²³⁰ The debtor was a participant in an annuity funded solely from her earnings as an employee. The Fifth Circuit Court of Appeals held that the annuity was not exempt because Texas law exempts only employer-funded benefits.²³¹ A somewhat similar dispute was before a bankruptcy court in *In re Roper*.²³² The debtor asserted that he could exempt funds held in his Teacher Retirement Account. The trustee responded that the debtor can exempt only that portion contributed by the state in an amount not to exceed allowed personal property exemptions.²³³ But the court held that the entire retirement fund was exempt independent of the \$30,000 limit, because that exemption is separately provided for in a context that imposes no limitation as to amount.²³⁴ The court distinguished the case from *Johnson* in that the retirement fund in *Roper* was partly employer-funded.²³⁵

227. *Id.* at 608. By taking that position the bank apparently did not assert its right to foreclose on the original note. In a concurring opinion Justice Dial took the position that the bank did not waive its right to foreclose under the original note and, therefore, had to proceed with the notice requirements of that note to make a successful foreclosure. *Id.* at 609. The concurring opinion did not discuss the bank's apparent waiver of the wife's liability.

228. *Id.* at 609. A dissenting judge pointed out, however, that the court should merely have reversed and rendered in favor of the wife. *Id.* at 609-10 (Butts, J., dissenting). The dissent argued that since the bank only asserted a denial of the wife's homestead claim and lost this argument, judgment should be granted in favor of the wife. *Id.* at 610.

229. 724 F.2d 1138 (5th Cir. 1984).

230. Texas State College and University Employees Uniform Insurance Benefits Act, TEX. INS. CODE ANN. art. 3.50-3, § 9(a) (Vernon 1981) exempts "[a]ll insurance benefits and other payments and transactions made pursuant to the provision of this Act to any employee covered under the provisions of this Act"

231. 724 F.2d at 1141. The court held that the words "to any employee" were meant to exempt only employer-provided benefits. The court also determined that the annuity was not exempt under TEX. INS. CODE ANN. art. 21.22 (Vernon 1981), which exempts annuities paid on a periodic basis. Since the debtor could elect to receive a lump sum, the annuity was not exempt under that provision. 724 F.2d at 1142; see also *Union Sav., Bldg. & Loan Ass'n v. Smith*, 62 S.W.2d 175 (Tex. App.—Texarkana 1933, writ ref'd) (construing prior statute).

232. No. 584-50051 (Bankr. N.D. Tex. Nov. 1, 1984).

233. TEX. PROP. CODE ANN. § 42.001 (Vernon 1984) allows for a \$30,000 maximum for personalty exempted for a family.

234. No. 584-50051, slip op. at 8. The court held the property exempt under TEX. REV. CIV. STAT. ANN. tit. 110B, § 31.005 (Vernon Pam. 1985), which provides: "[a]ll retirement allowances, annuities, refunded contributions, optional benefits, money in the various retirement system accounts, and rights accrued or accruing under this subtitle to any person are exempt from garnishment, attachment, state and municipal taxation, sale, levy, and any other process, and are unassignable."

235. No. 584-50051, slip op. at 7.

IV. DIVISION ON DIVORCE

Property Settlements. The Texas Supreme Court concluded in *McGoodwin v. McGoodwin*²³⁶ that a divorce decree approving a property settlement agreement by which one spouse is allowed to purchase the other spouse's interest in particular realty establishes a vendor's lien in favor of the seller.²³⁷ The court drew its analysis from contract law, holding that a marital property agreement, though incorporated in a divorce decree, is governed by contract law.²³⁸ Unlike the lower court, the court did not rely on the fact that the divorce decree contained strong language concerning the instruments to be executed pursuant to the divorce decree.

The decision in *McGoodwin* may be interpreted as impliedly repudiating the rule announced in *Ex parte Gorena*²³⁹ that an agreement incorporated in a judgment is thereafter governed by the law of judgments, rather than that of contracts, because the agreement is incorporated into the judgment.²⁴⁰ In its initial opinion in *McGoodwin* by Justice McGee (later withdrawn) the court cited a line of authority, including *Gorena*, in holding the wife must have sued in the divorce proceeding to obtain a vendor's lien and since she did not, the issue was res judicata.²⁴¹ In its ultimate opinion in *McGoodwin* the court, speaking through Justice Barrow, relied on *Ex parte Jones*²⁴² and other cases²⁴³ for the proposition that the law of contracts governs the enforcement of an agreed judgment.²⁴⁴ In *Gorena* the court had expressly disapproved of the analysis in *Jones*.²⁴⁵ All the implications of the court's decision cannot yet be discerned, but it seems clear that the court has turned away from the law of judgments in order to define property settlement agreements under the law of contracts even after the agreement has been incorporated in the divorce decree. Hence, a respondent may plead contractual defenses and the successful petitioner cannot enforce his judgment by contempt.

Following *McGoodwin*, the Austin court of appeals concluded in *Colquette*

236. 671 S.W.2d 880 (Tex. 1984). In its prior opinion, the court held that no implied lien existed and the seller must have secured an appeal in the divorce proceeding. 27 Tex. Sup. Ct. J. 275, 276 (March 14, 1984) (opinion withdrawn).

237. 671 S.W.2d at 882.

238. *Id.*; Francis v. Francis, 412 S.W.2d 29, 33 (Tex. 1967); *Ex parte Jones*, 163 Tex. 513, 520, 358 S.W.2d 370, 375 (1962); Martinez v. Guajardo, 464 S.W.2d 944, 946-47 (Tex. Civ. App.—San Antonio 1971, no writ).

239. 595 S.W.2d 841 (Tex. 1979).

240. The court of appeals in *McGoodwin* had indicated that the vendor's lien was inferred from the language of the decree because it ordered both parties to execute all instruments necessary to effect its decree. *McGoodwin v. McGoodwin*, 656 S.W.2d 202, 204 (Tex. App.—Fort Worth 1983), *rev'd*, 671 S.W.2d 880 (Tex. 1984). For a discussion of the court of appeals decision, see McKnight, *1984 Annual Survey*, *supra* note 76, at 155.

241. 27 Tex. Sup. Ct. J. 275, 276 (March 14, 1984) (opinion withdrawn) (citing *Ex parte Gorena*, 595 S.W.2d 841, 844 (Tex. 1979); *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979)).

242. 163 Tex. 513, 520, 358 S.W.2d 370, 375 (1962).

243. Francis v. Francis, 412 S.W.2d 29, 37 (Tex. 1967); Martinez v. Guajardo, 464 S.W.2d 944, 946-47 (Tex. Civ. App.—San Antonio 1971, no writ) (per Barrow, C.J.).

244. 671 S.W.2d at 882.

245. *Ex parte Gorena*, 595 S.W.2d at 844-45.

v. *Forbes*²⁴⁶ that a vendor's lien in favor of the husband arose pursuant to a property settlement agreement incident to the spouses' divorce.²⁴⁷ The ex-husband sued on a note on the ex-spouses' residence executed in exchange for the ex-husband's share in the residence. The note provided for acceleration upon the wife's remarriage or cohabitation with an unrelated adult male at the residence. The court held that this provision created an implied vendor's lien in favor of the ex-husband.²⁴⁸

In *Patterson v. Patterson*²⁴⁹ the court considered the construction of an arguably ambiguous property settlement agreement and the evidence that the trial court could consider in determining the intent of the parties. The agreement had awarded particular property to the appellant as her separate property "subject to the indebtedness thereon." No indebtedness was secured by a lien on the property, but there was an outstanding note for money used to improve the property. When the appellant realized that there was no lien on the property, she ceased making payments on the note. The appellee sued to enforce the agreement. On appeal the appellant contended that the trial court erred in admitting evidence concerning a prior oral agreement as to payment of the note. The court of appeals held that parol evidence could be submitted to determine the parties' intent.²⁵⁰ The court then determined that the parties intended that the appellant take responsibility for the debt.²⁵¹ The loan was clearly for the benefit of the property, and the fact that the loan was unsecured was immaterial.²⁵²

A post-divorce partition of community real property alleged by the ex-wife to have been undivided at divorce was sought in *Recio v. Recio*.²⁵³ Toward defeating the former husband's claim that the parties had agreed to an oral partition of the property, the ex-wife on appeal sought to rely on the absence of a written agreement. The appellate court held that rule 11²⁵⁴ was

246. 680 S.W.2d 536 (Tex. App.—Austin 1984, no writ).

247. *Id.* at 538.

248. *Id.* The divorce decree stated that the wife owned the residence free from any claim of the husband. The court found this boilerplate language did not constitute a waiver of an implied lien. *Id.* at 538. Even though the language used was formbook language, it was nevertheless clear, and one wonders why it should have been written off as surplusage. The court also held the acceleration provision did not violate the wife's right to privacy because she had freely agreed to the provision. *Id.* at 539.

249. 679 S.W.2d 621 (Tex. App.—San Antonio 1984, no writ).

250. *Id.* at 624-25. The court noted that parol evidence has long been admissible to show that at the time of execution of a deed the parties had agreed that the grantee would assume and pay the incumbrance on the property sold. *Johnson v. Elmen*, 94 Tex. 168, 175, 59 S.W. 253, 255 (1900) (agreement to assume indebtedness not inconsistent with terms of conveyance); *Bentley v. Andrewartha*, 565 S.W.2d 590, 592 (Tex. Civ. App.—Austin 1978, no writ) (parol evidence admissible when deed recited nominal consideration); *Pucket v. Frizzell*, 406 S.W.2d 265, 267 (Tex. Civ. App.—Tyler 1966, no writ) (parol evidence showed no agreement to pay indebtedness); *Ewing v. McGee*, 314 S.W.2d 158, 160 (Tex. Civ. App.—Fort Worth 1958, writ dismissed) (consideration for conveyance may be proved by parol evidence). Hence, such evidence is admissible to construe an ambiguous term of an agreement. 679 S.W.2d at 625.

251. 679 S.W.2d at 625-26.

252. *Id.* at 626.

253. 666 S.W.2d 645 (Tex. App.—Corpus Christi 1984, no writ).

254. TEX. R. CIV. P. 11.

inapplicable to this situation because the ex-husband had relied on the oral agreement defensively,²⁵⁵ but the ex-wife's appeal succeeded because the provisions of section 5.44²⁵⁶ requiring a written partition was not met.

The property agreement need not be reduced to writing under rule 11 if made in open court and made a part of the record. In *Hahne v. Hahne*²⁵⁷ the ex-wife brought suit to force her former husband to pay a particular debt pursuant to an agreed judgment that the husband would pay all community debts incurred prior to the divorce. The ex-husband argued that the agreed division of the property was invalid because the trial court reserved its ruling on a particular debt in question and then failed to rule, and the parties never signed the judgment. The court rejected both arguments. The agreement providing that the husband would pay all debts precluded the necessity for the trial judge to consider the particular, disputed debt, and the agreed division did not require the parties' signatures since made in open court.²⁵⁸

Dividing all the Property. In *Carter v. Massey*²⁵⁹ the court addressed the issue of whether a life insurance policy was included in the divorce court's decree, which awarded all personal property in the possession of a party to that party. The right to the policy was clearly a personal property interest,²⁶⁰ but the evidence of this group policy was retained by the husband's employer. The policy was thus not in the ex-husband's physical possession, but the interest in it was under his control. The court held that the ex-wife's claim under the policy terminated on divorce and she had no right to any of the proceeds.²⁶¹

255. 666 S.W.2d at 648. Rule 11 requires that the parties must reduce their settlement of a dispute to writing, but this rule does not apply to a suit concerning an agreement.

256. TEX. FAM. CODE ANN. § 5.44 (Vernon Supp. 1985) (requiring partition or exchange agreements to be in writing and signed by the parties). The court remanded the case for a determination of the rights of the ex-spouses. 666 S.W.2d at 649.

257. 663 S.W.2d 77 (Tex. App.—Houston [14th Dist.] 1983, no writ).

258. *Id.* at 79. In fact, the court found the whole appeal frivolous and assessed damages against the husband for delay. *Id.* at 79-80. Two other decisions addressed procedural issues involved in suits concerning property settlement agreements. In *Brownlee v. Brownlee*, 665 S.W.2d 111 (Tex. 1984), the supreme court held that when the husband contended that the agreement had been modified, he was asserting an affirmative defense to the wife's suit on the prior agreement. *Id.* at 112. To avoid summary judgment he must come forward with his own evidence as to the modification. *City of Houston v. Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380 (Tex. 1978). Because the husband submitted only an affidavit concerning the modification, the court affirmed the court's summary judgment holding for the wife. 665 S.W.2d at 112.

In *Potts v. Potts*, 672 S.W.2d 28 (Tex. App.—Houston [14th Dist.] 1984, no writ), the court held that parol evidence concerning a written property settlement was admissible if the parol evidence showed that the written agreement was induced by fraudulent oral promises. *Id.* at 30. Parol evidence concerning a written agreement is admissible if not submitted to alter the written agreement. *Turner v. Houston Agricultural Credit Corp.*, 601 S.W.2d 61, 64 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). The court reversed the case to allow development of the parol evidence. 672 S.W.2d at 30.

259. 668 S.W.2d 450 (Tex. App.—Dallas 1984, no writ).

260. Life insurance policies are specifically included in the statutory definition of property in TEX. REV. CIV. STAT. ANN. art. 23(1) (Vernon 1969).

261. 668 S.W.2d at 452. For a discussion of divorced spouses rights to recover under the former spouse's life insurance policy, see Annot., 31 A.L.R. 59 (1984).

The San Antonio court of appeals²⁶² dealt with the question of whether the ex-husband's endorsement and delivery of bank stock to the ex-wife pursuant to the divorce decree constituted an effective transfer although the bank did not transfer the stock on its books. The ex-wife failed to notify the bank of the transfer, and the bank, therefore, sent all the dividends and offers of new stock to the ex-husband. The ex-wife sued the ex-husband for past dividends. The court held that the transfer was effective as to the former wife but not as to the bank.²⁶³ The husband, therefore, was liable to the ex-wife for the stock dividends paid subsequent to divorce.²⁶⁴ The ex-wife, however, was not awarded any right to the stock her former husband had purchased on the bank options because she had not claimed that right in the trial court.²⁶⁵

A Houston court of appeals in *Forney v. Forney*²⁶⁶ dealt with a wife's appeal of a trial court's denial of her bill of review concerning assets improperly dealt with by the divorce court.²⁶⁷ The wife contended that her husband's extrinsic fraud prevented her from asserting her right on divorce to some valuable community mineral interests. The wife argued that the husband failed to reveal these assets and coerced her to sign a property agreement that effectively dealt with them. The court, however, held that the pretrial motions, pleadings, and evidence indicated that the disputed mineral interests were in issue at the trial, so that any fraud committed was intrinsic.²⁶⁸ The court affirmed the trial court's denial of the wife's bill of review.²⁶⁹

262. *DeAnda v. DeAnda*, 662 S.W.2d 107 (Tex. App.—San Antonio 1983, no writ).

263. *Id.* at 109; *see also* *Cooper v. Citizens Nat'l Bank*, 267 S.W.2d 848, 853 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.) (recording requirement only to protect corporation); *Kerr v. Tyler Guar. State Bank*, 283 S.W. 601, 602 (Tex. Civ. App.—Austin 1926, no writ) (endorsement and delivery passes legal title to stock, although not recorded on corporate books).

264. 662 S.W.2d at 109.

265. *Id.*; *accord* *Rogge v. Gulf Oil Corp.*, 351 S.W.2d 565, 566 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.). Even if the wife had pleaded her right to the stock option at the trial level, the court could have done no more than given her a right to buy the stock from her ex-husband, since he alone was offered the right to buy the stock from the corporation. 662 S.W.2d at 109.

266. 672 S.W.2d 490 (Tex. App.—Houston [1st Dist.] 1983, no writ).

267. A bill of review is a new cause of action concerning an already litigated dispute. To be successful in the bill of review the complainant must show that she had a meritorious claim in the prior action, that she was kept from asserting the claim by fraud, and that neither she nor her attorney on her behalf were at fault in not presenting her claim. *Id.* at 497; TEX. R. CIV. P. 329b(f).

268. 672 S.W.2d 498-99. Extrinsic fraud is a wrongful act that prevents the losing party from knowing his rights or defenses. *Alexander v. Hagedorn*, 148 Tex. 565, 574, 226 S.W.2d 996, 1001 (1950). The extrinsic fraud must be related to some matter not in issue at the trial. Intrinsic frauds are those that relate to the merits between the parties and must be resolved at trial. *Rylee v. McMorrough*, 616 S.W.2d 649, 652 (Tex. Civ. App.—Houston [14th Dist.] 1984, writ dism'd).

269. 672 S.W.2d at 500. The court also denied the ex-wife's claim for partition of the disputed oil and gas properties under the doctrine of *res judicata*. The record indicated that the wife had claimed a right to the properties in the divorce, although the decree did not mention those properties. *Id.* at 499. If the record had made no reference to the properties, the wife could have brought a subsequent suit for partition. *Busby v. Busby*, 457 S.W.2d 551, 554-55 (Tex. 1970). In *Jacobs v. Jacobs*, 670 S.W.2d 312 (Tex. App.—Texarkana 1984, writ

Property Not Subject to Division. Although the trial court may award a homestead right to the wife in the husband's separate property for the benefit of their children, it cannot award the wife's proceeds from a forced sale. The court cannot divide the separate property of either spouse.²⁷⁰ The Houston court of appeals addressed this problem in *Gerami v. Gerami*.²⁷¹ The wife argued that the trial court had not divested the husband of his separate property, but ordered a sale and division of the proceeds. The court of appeals held, however, that the order constituted a divestiture.²⁷² The case was remanded for a new trial to determine an appropriate division of the parties' properties and to determine whether the homestead should be set aside for the wife's use during the children's minority.²⁷³

The trial court in *Smith v. Rabago*²⁷⁴ determined that the homestead was the husband's separate property, but awarded the wife the use of it until the couple's child became fourteen or the wife should remarry. Prior to the child's reaching that age the wife filed a motion to reduce arrearages in child support to judgment and admitted that she had remarried several years before. The husband then claimed back rent for use of the home since her remarriage. The trial court found that the amount owed the husband for imputed rentals for the time the wife was in unauthorized possession of the homestead was offset by the arrears owed by the husband for child support. In reversing the conclusion as to set-off, the appellate court pointed out that it is a prerequisite to set-off of monetary claims that the claims be due between the parties acting in the same capacity.²⁷⁵ Under the facts presented no such mutuality existed. Although debts were owed between the same parties, the ex-wife was owed child support for the benefit of the child, whereas the ex-husband was owed rent for the occupancy of his property. Such debts, the court held, cannot be offset against each other.²⁷⁶ The court also reiterated the principle that courts may award the use and occupancy of the husband's separate property homestead to the wife during the minority of a child of which she has custody.²⁷⁷ Although the wife had complained that the decree awarding her the use of the homestead until she remarried constituted a restraint on marriage, the court held that Texas law sanctions such restraint.²⁷⁸ The operation of the principal rule provides a stable environment for the rearing of children until the custodian's remarriage. Properly analyzed, the award of the use of the homestead is not a concession to

ref'd, n.r.e.), the ex-wife pursued such a remedy with respect to a fraudulent transfer of community property during marriage.

270. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977).

271. 666 S.W.2d 241 (Tex. App.—Houston [14th Dist.] 1984, no writ).

272. *Id.* at 242.

273. *Id.*

274. 672 S.W.2d 38 (Tex. App.—Houston [14th Dist.] 1984, no writ).

275. *Id.* at 40.

276. *Id.* Child support, however, is an amount owed the *mother* and not the child. A set-off in this sort of situation would seem reasonable.

277. *Id.*; accord *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 141-42 (Tex. 1977); see also *Bush v. Bush*, 237 S.W.2d 708 (Tex. Civ. App.—Amarillo 1950, no writ) (court awarded wife use of the homestead until she remarried, although it was the husband's separate property).

278. 672 S.W.2d at 40.

the wife, but an element of child support that might be reevaluated on the event of remarriage.

*York v. York*²⁷⁹ involved an undivided partnership interest of the ex-husband, the extent of the interest, and the divisibility of its future profits. Shortly before the divorce a partnership in which the husband had an interest acquired an oil and gas lease. Four years after the divorce the wife learned of the husband's dealings and sued to claim half of the community interest in all partnership activities before and after divorce. The jury found that the partnership had acquired an interest in only one lease prior to the divorce and that the husband had become a member of the partnership prior to the divorce. The trial judge awarded the wife a money judgment for half the value of the husband's share in the lease acquired before divorce.²⁸⁰ The El Paso court of appeals, however, awarded the wife half the value of the husband's interest in all leases the partnership acquired during its existence because the trial court concluded that the husband acquired a general partnership interest before divorce.²⁸¹ The partnership interest, thus, was deemed community property and its profits generated after the divorce were also attributed to the community.²⁸² The El Paso court ignored the possibility that the husband's partnership interest at the time of divorce may have been merely a joint venture interest limited to the one lease. No formal partnership agreement had been drawn up at that time, nor did the wife submit a jury charge concerning the extent of the partnership that existed at the time of divorce.²⁸³ In *Berry v. Berry*²⁸⁴ the Texas Supreme Court held that in a partition suit affecting retirement benefits, the value of the benefits should be determined at the date of divorce, but no more.²⁸⁵ The court of appeals did not address this issue.²⁸⁶

279. 678 S.W.2d 110 (Tex. App.—El Paso 1984), *writ ref'd n.r.e.*, 28 Tex. Sup. Ct. J. 316 (Mar. 27, 1985).

280. *Id.* at 110.

281. *Id.* at 112-13.

282. Texas Uniform Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6132b, § 28-A(2) (Vernon 1970) (allowing partnership interests to be community property); *McKean v. Thompson*, 555 S.W.2d 136, 136-37 (Tex. Civ. App.—Dallas 1977, no writ) (husband not awarded judgment for contribution against former wife who had received a half interest in the venture); *Thompson v. Thompson*, 500 S.W.2d 203, 209-10 (Tex. Civ. App.—Dallas 1973, no writ) (divorce proceeding necessitated finding on question of joint venture or partnership).

283. The jury found that the husband had an interest in a partnership at the time of divorce, and that this partnership had acquired only one lease at that time. The trial judge could have concluded that the partnership interest existing at the time of divorce was limited to the acquisition of one lease. Because no issue concerning the extent of the partnership was submitted, the trial court's judgment should have been dispositive on that point. TEX. R. CIV. P. 279.

284. 647 S.W.2d 945 (Tex. 1983).

285. *Id.* at 947.

286. For an interesting decision concerning the tax liability of partnership income during the year of divorce, see *Adams v. Commissioner*, 82 T.C. 563 (1984). In *Adams* the Tax Court addressed the question of what proportion of distributed partnership income should be charged to the community when the couple divorces during the year. On the basis of an interim closing of the partnership books, the ex-husband reported all distributable income accruing before the divorce as community. The ex-wife used the partnership year-end tax return to determine that the community income was proportionate to the number of months the couple was married during the year. Not surprisingly the two numbers differed, and the commissioner assessed a deficiency against the ex-husband. The Tax Court held the ex-husband's

The court in *Morgan v. Horton*²⁸⁷ confronted the issue of the divisibility of an ex-husband's teacher-retirement benefits in a partition suit. The divorce court had failed to divide these benefits and the prospective pensioner asserted that they were indivisible as a matter of law.²⁸⁸ The court, however, found that statute only protected the retirement fund from creditors' claims, and the ex-wife was not a creditor.²⁸⁹

In a procedural ruling concerning property not subject to division, the court held in *Stinson v. Stinson*²⁹⁰ that if the divorce court awards one spouse's separate property to the other spouse, the complaining spouse must appeal and cannot attack the judgment collaterally.²⁹¹ The ex-husband had argued that the divorce decree was void because it divided his separate property.²⁹² The court held the award of separate property was an error of substantive law subject to attack by appeal only.²⁹³

Exercise of Discretion. A Texas trial court has broad discretion in making a just division of community property on divorce and may consider, inter alia, disparity of the spouses' earning power, probable needs for future support, and the comparative size of the separate estates.²⁹⁴ Furthermore, a fraud on the community estate by one of the spouses may justify an unequal division of the community property.²⁹⁵ If the amount in issue is of trivial value, the fact that an asset was mischaracterized as separate property does not of itself amount to an inequitable property division.²⁹⁶ The complaining party must show the manifest unfairness of the division as made by the court²⁹⁷ or must demonstrate that the court would probably have made a different division of the property had it been properly characterized.²⁹⁸ Texas courts of appeals historically have tended to reject appeals on grounds of abuse of discretion. This position illustrates the broad power that courts of appeals give to trial courts in dividing community property.²⁹⁹

method improper because the interim closing of the partnership books did not accurately reflect the correct taxable income. *Id.* at 569. The decision, however, should not be read as providing an inflexible rule in determining the community share of partnership income. If the husband had conducted an audited, accurate assessment of the partnership income at the time of divorce, the court would probably have found his method to be sufficient. For a discussion concerning the tax consequence of divorce in general, see Jones, Snider & Vevleman, *Tax Consideration Upon Divorce: The Texas Case*, 46 TEX. B.J. 1118 (1983).

287. 675 S.W.2d 602 (Tex. App.—Dallas 1984, no writ).

288. TEX. REV. CIV. STAT. ANN. tit. 110B, § 31.005 (Vernon Pam. 1985) provides that "[a]ll retirement allowances . . . are exempt from garnishment, attachment, . . . and any other process"

289. 675 S.W.2d at 604.

290. 668 S.W.2d 840 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

291. *Id.* at 841.

292. If the decision was void, it was subject to collateral attack. *Templeton v. Ferguson*, 89 Tex. 47, 55, 33 S.W.2d 329, 332-33 (1895); *Williams v. Williams*, 623 S.W.2d 748, 749 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

293. 668 S.W.2d at 841.

294. *Padon v. Padon*, 670 S.W.2d 354, 359 (Tex. App.—San Antonio 1984, no writ).

295. *Belz v. Belz*, 667 S.W.2d 240, 245-47 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

296. See *McKnight*, 1984 *Annual Survey*, *supra* note 76, at 161-62.

297. *King v. King*, 661 S.W.2d 252, 255 (Tex. App.—Houston [1st Dist.] 1983, no writ).

298. *Reid v. Reid*, 658 S.W.2d 863, 865 (Tex. App.—Corpus Christi 1983, no writ).

299. *Klise v. Klise*, 678 S.W.2d 545, 547-48 (Tex. App.—Houston [14th Dist.] 1984, no

When a court makes an erroneous computation of one party's earnings, the court of appeals may find that the trial court abused its discretion in making the division. In *Simpson v. Simpson*³⁰⁰ the court of appeals held that discounting the valuation of a pension by subtracting a hypothetical tax liability was erroneous.³⁰¹ The court also found that the trial court erred in not considering substantial earnings that the husband had spent for another woman.³⁰² The court held that account should be taken of the wife's interest in the funds spent for that purpose.³⁰³ The court consequently found these errors resulted in an improper division and remanded the cause.³⁰⁴

Errors in characterization and valuation of marital property may also cause an abuse of discretion upon division at divorce. Because the trial court erred in *Cook v. Cook*³⁰⁵ in valuing various community assets and mischaracterizing certain pieces of property as entirely community instead of partly separate,³⁰⁶ the court's award amounted to only thirty-eight percent of the community to the wife rather than the sixty percent the court thought it had awarded. The court of appeals found nothing in the record to support this division and held that the trial court had abused its discretion.³⁰⁷ The court based its decision on the disparity between what the trial court believed to be the proportion of the division and the actual division, rather

writ) (although the court cannot order permanent alimony, the court does not abuse its discretion if it approves a separate contractual agreement binding one spouse to pay alimony); *Beavers v. Beavers*, 675 S.W.2d 296, 298-300 (Tex. App.—Dallas 1984, no writ) (no abuse of discretion in concluding that community claim for reimbursement from wife's separate property equalled community claim for reimbursement from husband's separate property); *Hanson v. Hanson*, 672 S.W.2d 274, 277 (Tex. App.—Houston [14th Dist.] 1984, writ dismissed) (disparity of earning capacities does not mandate a larger portion of the estate for the party with the lower earning capacity); *Gendebien v. Gendebien*, 668 S.W.2d 905, 908-09 (Tex. App.—Houston [14th Dist.] 1984, no writ) (court will not find that the trial court abused its discretion in absence of findings of fact and conclusions of law); *Ruiz v. Ruiz*, 668 S.W.2d 866, 867 (Tex. App.—San Antonio 1984, no writ) (no abuse of discretion in awarding half the community property to the wife and ordering that the husband pay child support although earning capacities were equal); *Pierce v. Pierce*, 667 S.W.2d 921, 923 (Tex. App.—Fort Worth 1984, writ dismissed) (evidence at the trial was sufficient to support the award to the wife); *Zuniga v. Zuniga*, 664 S.W.2d 810, 814-15 (Tex. App.—Corpus Christi 1984, no writ) (unequal division of property in the husband's favor was justified by the wife's greater earning power); *Roberts v. Roberts*, 663 S.W.2d 75, 76-77 (Tex. App.—Waco 1983, no writ) (wife's poor health and financial difficulties justified large award of community property to her).

300. 679 S.W.2d 39 (Tex. App.—Dallas 1984, no writ).

301. *Id.* at 42; *accord* *Freeman v. Freeman*, 497 S.W.2d 97, 100 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

302. 679 S.W.2d at 42.

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

304. 679 S.W.2d at 42. On remand the court also instructed the trial court to consider the attorney's fees of both parties in making a division. *Id.*; *accord* *Lipshy v. Lipshy*, 525 S.W.2d 222, 227 (Tex. Civ. App.—Dallas 1975, writ dismissed).

305. 679 S.W.2d 581 (Tex. App.—San Antonio 1984, no writ).

306. Portions of some community property, namely the couple's residence and automobile, were purchased with the wife's separate funds. A tenancy in common between the separate and community estates thus existed as to that property. *Gleich v. Bongio*, 128 Tex. 606, 610-11, 99 S.W.2d 881, 883-84 (1937).

307. 679 S.W.2d at 585-86.

than the disproportionality of the actual division.³⁰⁸

Military Retirement Benefits. In *McCarty v. McCarty*,³⁰⁹ decided June 26, 1981, the United States Supreme Court ruled that nondisability military retirement benefits were not divisible as community property by state courts,³¹⁰ thus reversing Texas law as it then stood. Because *McCarty* was not given retroactive effect, a bifurcated treatment of military retirement benefits resulted and turned on the date of the final divorce decree.³¹¹ The situation was further complicated when, effective February 1, 1983, Congress reversed the effect of *McCarty* by passage of the Uniformed Services Former Spouses' Protection Act (USFSPA),³¹² which permits the division of such benefits as community property for periods beginning after June 25, 1981. This ebb and flow of applicable law has generated a great deal of litigation regarding proper treatment of military retirement benefits under differing fact patterns turning on the operative dates.

In *Tyson v. Alexander*³¹³ the court held that the ex-husband could not assert that a 1979 judgment awarding the wife one-half of his past and future retirement benefits was voided by *McCarty*.³¹⁴ In the pre-*McCarty* action the ex-wife had been awarded a judgment against the ex-husband for one-half of all retirement benefits the husband would receive. Later, the ex-husband entered into a compromise agreement with his former wife regarding the judgment. The agreement provided that the husband would pay \$10,000 in cash and one-half of all future benefits. After *McCarty* the ex-husband refused to make further payments, and the ex-wife brought suit for the unpaid benefits. The court found that *McCarty* should not be applied retroactively to nullify the judgment, and the ex-husband could not claim that he had entered into a compromise agreement under a mutual mistake of fact.³¹⁵ At the time the husband entered into the agreement the divorce court had judicial power to order him to pay one-half of his benefits to his wife, and thus the agreement based on that order would stand.³¹⁶

In another case³¹⁷ the trial judge orally granted a divorce to the parties in June 1982. The next day the judge ordered a division of the property, treat-

308. *Id.* at 585. The court stated that "the trial court's errors led to the rendition of a decree bringing about a result the opposite of that which the trial court intended . . ." *Id.*

309. 453 U.S. 210 (1981).

310. *Id.* at 233.

311. *Segrest v. Segrest*, 649 S.W.2d 610, 613 (Tex. 1983); see Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1982). Under the Act a court may divide retirement benefits according to state law. *Id.* § 1408(c)(1).

312. 10 U.S.C. § 1408 (1982).

313. 672 S.W.2d 624 (Tex. App.—Amarillo 1984, no writ).

314. *Id.* at 626.

315. *Id.*

316. *Id.* The husband's error was one of law and was, therefore, not a basis for avoiding the contract. *Pollard v. Steffens*, 161 Tex. 595, 599-600, 343 S.W.2d 234, 237-38 (1961) (absent fraud or misconduct, equity will not void contract for mistake of law); *Hall v. Hayes*, 441 S.W.2d 274, 277 (Tex. Civ. App.—El Paso 1959, no writ) (every adult competent person presumed to know the law); *Ussery v. Hollebeke*, 391 S.W.2d 457, 502 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.) (parties understood the facts but not the law).

317. *Miller v. Miller*, 671 S.W.2d 135 (Tex. App.—Houston [1st Dist.] 1984, no writ).

ing the husband's military retirement benefits as separate property pursuant to the *McCarty* decision. In August 1983, over a year after the oral rendition of judgment, the judge signed a decree containing the same terms of property division. The wife filed a timely motion for a new trial, which was denied. The appellate court reversed, holding as error the trial court's refusal to reconsider its ruling in light of the passage of the congressional act in combination with the court's plenary power to vacate or to modify its judgment within thirty days after the judgment was signed.³¹⁸

In *Voronin v. Voronin*³¹⁹ the decree awarding all military retirement benefits to the husband was signed on January 31, 1983, the day before the effective date of the USFSPA. The wife filed a timely motion for a new trial, but was denied relief. Again on the basis of the trial court's plenary power to reconsider its decision, the Austin appeals court reversed and remanded.³²⁰ These two cases illustrate the proposition that the trial court should follow changes in the law as long as that court continues to have jurisdiction.³²¹

Several other cases dealt with other provisions of the USFSPA. In *Neese v. Neese*³²² the husband stopped making payments when the Supreme Court handed down *McCarty*, but resumed them after the enactment of the USFSPA. The ex-wife then sued for the missed payments and increases in retirement pay that should have accompanied her fraction of benefits awarded by the divorce court. The ex-husband argued that section 1408(c)(1) of the USFSPA mandated that the retirement benefits be divided in accordance with Texas law and that Texas law treated increases in retirement pay occurring after divorce as the husband's separate property under *Berry v. Berry*.³²³ The appellate court held that *Berry* did not govern this case.³²⁴ *Berry* was a post-divorce suit for partition of undivided retirement benefits under a private pension scheme. The ex-husband had obtained increases in retirement pay through continued employment and union negotiations after divorce. The Texas Supreme Court held in *Berry* that the benefits should be valued at

318. *Id.* at 137; see TEX. R. CIV. P. 329b. In *Harrell v. Harrell*, 684 S.W.2d 118, 123 (Tex. App.—Corpus Christi 1984, writ filed), the court allowed an ex-wife to proceed by way of bill of review to reopen a *McCarty* era decree denying her a share of her husband's military benefits. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 37 SW. L.J. 65, 103-04 n.319 (1983); Note, *Closing the McCarty-USFSPA Window: A Proposal for Relief from McCarty Era Final Judgments*, 63 TEX. L. REV. 497 (1984); see also Trahan v. Trahan, 682 S.W.2d 332, 338 (Tex. App.—Austin 1984, no writ) (partition suit brought during the *McCarty* era for prior undivided military retirement benefit).

319. 662 S.W.2d 102 (Tex. App.—Austin 1983, writ dismissed).

320. *Id.* at 105; see McKnight, *1984 Annual Survey, supra* note 76, at 164-65.

321. This does not mean that on the court of appeals' remand pursuant to the enactment of the USFSPA the appellant can raise new issues concerning post-divorce acquisitions. *Gordon v. Blackmon*, 675 S.W.2d 790 (Tex. App.—Corpus Christi 1984, no writ), illustrates this proposition. On remand the appellant-wife had attempted to obtain business records relating to income of her ex-husband earned after the trial court's initial divorce decree. The trial court quashed the notice to take her ex-husband's deposition and she petitioned for a writ of mandamus. The court held that its earlier remand for consideration of the award of property under the USFSPA did not extend the marriage and so the wife could not request additional discovery on remand as to post-divorce acquisitions. *Id.* at 793-94.

322. 669 S.W.2d 388 (Tex. App.—Eastland 1984, writ refused n.r.e.).

323. 647 S.W.2d 945 (Tex. 1980).

324. 669 S.W.2d at 390.

the date of divorce, lest the husband's separate property be divested.³²⁵ The husband in *Neese* had retired prior to divorce and his retirement benefits had, therefore, already matured. The court held that awarding the wife a right in the increase did not invade his separate property because the husband's right to his retirement benefits accrued before divorce.³²⁶ Although the language of *Berry* suggests that courts should look at the value of the right to retirement benefits at the time of divorce, the court should also determine how the pensioner obtained the right to the post-divorce increase in benefits. Even if the pensioner does not achieve the right of increase through his post-divorce labor, might such increases nevertheless be gratuities to the pensioner?

In *Oxelgren v. Oxelgren*³²⁷ the Fort Worth court of appeals held that the USFSPA does not require that the couple be married at least ten years during which one spouse performed military service toward retirement in order to make the statute applicable to the division of military retirement benefits.³²⁸ The husband had been married nine years and so claimed his retirement benefits were not subject to division. The ten-year-marriage provision of USFSPA refers to the direct payments by the federal government to the former spouse of a retired service-member.³²⁹ If the service-member was married less than ten years, the benefits would be paid directly to the pensioner, who may be responsible to transfer a portion to an ex-spouse.³³⁰

Under the USFSPA a court may not divide retirement pay unless the court has jurisdiction by reason of (1) the pensioner's residence other than because of military assignment in the territorial jurisdiction of the court; (2) his domicile within the territorial jurisdiction of the court; or (3) his consent to the jurisdiction.³³¹ In *Phillips v. Phillips*,³³² a case involving a jurisdictional controversy, the divorce decree awarding all military retirement pay to the husband was signed in December 1982. The trial court granted the wife's motion for new trial on January 19, 1983. The husband's motion for a nonsuit was granted, and the husband filed a motion attacking the court's jurisdiction with respect to the wife's previously filed cross-action for divorce. The grounds for the plea to the jurisdiction were that the hus-

325. 647 S.W.2d at 947.

326. 669 S.W.2d at 390.

327. 670 S.W.2d 411 (Tex. App.—Fort Worth 1984, no writ).

328. *Id.* at 412.

329. *Id.* 10 U.S.C. § 1408(d)(2) (1982) provides:

If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service . . . payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

330. 670 S.W.2d at 412. The legislative history of the Act fully supports this interpretation. HOUSE CONF. REP. NO. 749, 57th Cong., 2d Sess. 167, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 1569, 1571; S. REP. NO. 502, 97th Cong., 2d Sess. 10, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 1596, 1599.

331. 10 U.S.C. § 1408(c)(4) (1982).

332. 672 S.W.2d 610 (Tex. App.—Eastland 1984, no writ).

band no longer resided in Texas and that he did not consent to the court's jurisdiction. A second divorce decree, entered in March 1983, awarded the wife one-half of the husband's accrued military retirement pay. The judgment of the trial court was affirmed.³³³ The husband had, indeed, consented to the court's jurisdiction by filing the original suit.³³⁴ The husband's later motion for nonsuit did not extinguish the trial court's jurisdiction over the wife's suit because a nonsuit cannot affect the right of an adverse party to be heard on that party's claim for affirmative relief.³³⁵

*Southern v. Glenn*³³⁶ interpreted the USFSPA jurisdictional requirements to divide military retirement benefits in the context of a post-divorce partition suit. The court held that the evidence did not show that the service member had either his residence or his domicile within the jurisdiction of the trial court.³³⁷ The ex-wife argued, however, that the USFSPA did not apply to partition suits, but the court rejected the argument.³³⁸ The court held that a partition suit is one that treats the disposable retired pay of the military member as dealt with by the Act and thus applies to partition suits.³³⁹ The USFSPA is, therefore, applicable to post-divorce partitions of property that should have been divided on divorce as well as to military pensions actually divided on divorce.

Attorney's Fees. The Texas Supreme Court granted a writ of mandamus³⁴⁰ to require a trial judge to vacate his order awarding the wife interim attorney's fees pursuant to section 3.58(c)(4) of the Family Code³⁴¹ after the husband filed a motion for a new trial.³⁴² Section 3.58(c)(4) provides:

[T]he court, on the motion of any party or on the court's own motion, may grant a temporary injunction after notice and hearing for the preservation of the property and protection of the parties as deemed necessary and equitable, including but not limited to an order directed to one or both parties:

333. *Id.* at 612.

334. *Id.*

335. *Id.* (citing TEX. R. CIV. P. 164).

336. 677 S.W.2d 576 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). For a recent decision concerning the effect, with regard to property division, of jurisdiction or lack of jurisdiction over the husband, see *Kramer v. Kramer*, 668 S.W.2d 457 (Tex. App.—El Paso 1984, no writ).

337. 677 S.W.2d at 583. The service member's residence in Mississippi was undisputed. The court then defined domicile as the place where he has his fixed or permanent home and to which he has the intention of returning whenever he is absent from home. *Id.* (citing C. WRIGHT, LAW OF FEDERAL COURTS § 26 (1976)). Since the husband stated he had always intended to return to Mississippi, the court found that Mississippi continued to be his domicile. 677 S.W.2d at 583-84.

338. 677 S.W.2d at 583.

339. *Id.* at 582. The jurisdictional requirement applies to suits that treat "the disposable retired or retainer pay . . . in the manner described in paragraph (1)." *Id.* (quoting 10 U.S.C. § 1408(c)(4) (1982)).

340. *Walker v. Towslee*, 677 S.W.2d 502 (Tex. 1984).

341. TEX. FAM. CODE ANN. § 3.58(c)(4) (Vernon Supp. 1985).

342. The court's order stated that the payment of attorney's fees was made under TEX. FAM. CODE ANN. § 3.58(b)(4), which does not exist, so the supreme court held that the case could have only been related to § 3.58(c)(4). 677 S.W.2d at 503.

(4) ordering payment of reasonable attorney's fees and expenses;

³⁴³

Because the order for attorney's fees was not in conjunction with a temporary injunction, the court ruled that the order for attorney's fees was improper.³⁴⁴

In another instance³⁴⁵ the wife's attorney sued the husband for attorney's fees pursuant to an award in a suit for divorce. The trial court granted the attorney relief, and the court of appeals affirmed.³⁴⁶ The supreme court refused the husband's writ of error and further assessed damages against the husband for taking a frivolous appeal.³⁴⁷

Enforcement. In 1981 an ex-wife brought an action for contempt against her former husband for refusing to pay her a portion of his retirement benefits in accordance with the divorce decree.³⁴⁸ The court, however, discharged the husband, holding that the divorce decree was vague and ambiguous.³⁴⁹ Subsequently the ex-wife instituted a suit for declaratory judgment and bill of review. The trial court modified the divorce decree, ordering that the husband pay to the district clerk each monthly retirement check. The court of appeals held that this amounted to a modification of the divorce decree, which the trial court had no jurisdiction to make.³⁵⁰ The court of appeals accordingly simply clarified the decree that the same court had held ambiguous in the contempt proceeding.³⁵¹

The Dallas court of appeals was faced with the construction and enforcement of a similar divorce decree in *Harris v. Harris*.³⁵² The divorce decree

343. TEX. FAM. CODE ANN. § 3.58(c)(4) (Vernon Supp. 1985).

344. 677 S.W.2d at 503. The court has power to grant the writ under TEX. R. CIV. P. 483. In *Tibbetts v. Tibbetts*, 679 S.W.2d 152, 154 (Tex. App.—Dallas 1984, no writ), the court allowed an award of attorney's fees in a suit to enforce a decree for alimony and support because the parties, having been divorced in Tennessee, stipulated that Tennessee law would govern the enforcement action. In *Beavers v. Beavers*, 675 S.W.2d 296, 300 (Tex. App.—Dallas 1984, no writ), however, the court of appeals overruled the trial court's award of attorney's fees for any additional proceedings that may have been necessary to enforce the divorce court's judgment.

345. *Hennigan v. Hennigan*, 677 S.W.2d 495 (Tex. 1984).

346. *Hennigan v. Hennigan*, 666 S.W.2d 322 (Tex. App.—Houston [14th Dist.] 1984); see *Wileman v. Wade*, 665 S.W.2d 519 (Tex. App.—Dallas 1983, no writ), discussed *supra* notes 135-43 and accompanying text.

347. 677 S.W.2d at 496. An appellate court may assess damages for taking a frivolous appeal under TEX. R. CIV. P. 438, 491, and 469. In *Bainbridge v. Bainbridge*, 662 S.W.2d 655 (Tex. App.—Dallas 1983, no writ), the trial court awarded 10% of the community property as damages for the husband's frivolous appeal pursuant to TEX. R. CIV. P. 483 (damages for frivolous appeal shall constitute up to 10% of the amount in dispute). The court of appeals reversed, holding that the husband had not appealed on the ground that all community property should be awarded to him, so that was not the amount in controversy. 662 S.W.2d at 658.

348. *Ex parte Smiley*, 626 S.W.2d 817 (Tex. App.—San Antonio 1981, no writ).

349. *Id.* at 819.

350. *Smiley v. Smiley*, 679 S.W.2d 170, 172 (Tex. App.—San Antonio 1984, no writ). The only authority that allows a trial court to modify a previously entered divorce decree is TEX. R. CIV. P. 329b, which permits modification of child support and custody divisions of the decree. The court held that this provision was inapplicable. 679 S.W.2d at 172-73.

351. 679 S.W.2d at 173.

352. 679 S.W.2d 75 (Tex. App.—Dallas 1984, writ *dism'd*).

granted occupancy of the family home to the wife until a child became eighteen. At that time the wife had a reasonable time to exercise an option to purchase the home. If she failed to exercise the option, the husband could purchase the home. When the husband tried to exercise his option, the wife refused to sell and the husband sued for enforcement. The trial court, however, held that the provision of the decree was ambiguous and unenforceable. The court, therefore, ordered the property sold and directed that the proceeds be disbursed equally to the parties. The court of appeals found that the court's holding was a modification of the decree, which the court had no jurisdiction to enter, because the modified order eliminated the options entirely.³⁵³ The court remanded the case for a jury trial to determine the issues relative to the parties' property rights.³⁵⁴ Both of these cases illustrate the care a trial court must exercise in clarifying divorce decrees in order not to change the substance of the decree.

In *McDannell v. United States Office of Personnel Management*³⁵⁵ the wife attempted to force the federal government to pay her share of her husband's civil service retirement benefits directly to her when the husband became delinquent in his payments. Congressional legislation had allowed payment to a former spouse, if expressly provided for in a divorce decree, on terms similar to those of the USFSPA.³⁵⁶ The question concerned whether the statute, like the USFSPA, authorized direct payment to the former spouse of the federal employee. After examining the legislative history of the Act, the court concluded that the legislation authorized the federal agency to comply with terms of the state court decree, but not to undertake its own determination of spousal entitlement.³⁵⁷

Similarly, in *Squires v. Squires*³⁵⁸ the ex-husband had become delinquent in his payment to his former wife of one-half his retirement payments as ordered by the divorce court. The husband pleaded the statute of limitations in response to the wife's suit.³⁵⁹ The court held that the suit was not an action for debt, which might be barred by the two- or four-year statutes of limitations, but rather, a suit to revive a judgment, and ordered a division of

353. *Id.* at 77. Indeed, the court of appeals found that the provision was not at all ambiguous, but raised a fact issue as to whether the wife could still exercise her option. *Id.*

354. *Id.* The trial court had denied the husband a jury trial. The court of appeals held that the action was one the common law recognized and, therefore, that the husband had a constitutional right to a jury trial. TEX. CONST. art. I, §§ 10, 15; see *Welch v. Welch*, 369 S.W.2d 434, 436-37 (Tex. Civ. App.—Dallas 1963, no writ). In *Cohen v. Cohen*, 663 S.W.2d 617 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.), the appellate court held that the trial court had jurisdiction to interpret ambiguous provisions of a property settlement contained in a divorce decree rendered over seven years earlier. The doctrine of *res judicata* posed no bar to the motion in aid of judgment because none of the elements prerequisite to the application of the doctrine had been satisfied. *Id.* at 620.

355. 716 F.2d 1063 (5th Cir. 1983).

356. 5 U.S.C. § 8345(j) (1982).

357. 716 F.2d at 1065-66. The terms of the decree had ordered the husband, not the federal agency, to pay the wife.

358. 673 S.W.2d 681 (Tex. App.—Corpus Christi 1984, no writ).

359. The appeal also dealt with the husband's motion for a jury trial and his request to sever the wife's motion for contempt from her motion to reduce a debt to judgment. *Id.* at 683-84.

property.³⁶⁰ The latter suit falls under a ten-year bar, which the wife was well within.³⁶¹ This interpretation is, of course, consistent with the Texas Supreme Court's curious interpretation of the article 5529³⁶² in *Huff v. Huff*³⁶³ in relation to arrears in child-support payments. The entire subject is in need of legislative attention.

Other Post-Divorce Relief. A frequent source of dispute is an ex-spouse's neglect to change the beneficiary of a life insurance policy subsequent to divorce. In *Beckham v. Beckham*³⁶⁴ both the former wife and the deceased husband's administratrix claimed life insurance proceeds when the husband died thirty days subsequent to divorce without modifying the beneficiary designation in favor of the ex-wife. The trial court found that the decedent did not intend that his former wife be the beneficiary under the policy and granted judgment for the administratrix.³⁶⁵ On appeal the ex-wife contended that she retained an insurable interest under the policy even though the parties were divorced, and the intent of the decedent was irrelevant. Holding that his intent was relevant when the husband was awarded the policies and died shortly after the divorce decree, the Houston court of appeals rejected her contention.³⁶⁶ Under the circumstances a rebuttable presumption arose that the ex-husband intended his ex-wife to remain as beneficiary.³⁶⁷ The court concluded that the evidence was sufficient to support the trial court's holding that the decedent had not intended his ex-wife to continue as beneficiary.³⁶⁸

Nunc pro tunc judgments³⁶⁹ also gave rise to post-divorce disputes. In *Hutcherson v. Lawrence*³⁷⁰ the trial court had awarded the wife attorney's fees in granting the divorce, but the award was not spelled out in the written judgment. The court entered a judgment nunc pro tunc to rectify the error, and the ex-husband sought a writ of mandamus to compel the judge to vacate the order. The ex-husband argued that the failure to include attorney's fees was a judicial error. The court of appeals held it was merely a clerical

360. *Id.* at 684-85.

361. *Id.* at 685. TEX. REV. CIV. STAT. ANN. 5532 (Vernon 1958) provides: "A judgment in any court of record, where execution has not issued within twelve months after the rendition of the judgment, may be revived by scire facias or an action of debt brought thereon within ten years of such judgment, and not after."

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

363. 648 S.W.2d 286, 292 (Tex. 1983).

364. 672 S.W.2d 41 (Tex. App.—Houston [14th Dist.] 1984, no writ).

365. The former wife had used some of the proceeds to purchase a car. The trial court, however, made no adjudication in relation to the car, because the administratrix had not pleaded for possession of the car.

366. 672 S.W.2d at 42-43.

367. *Id.*; see *McDonald v. McDonald*, 632 S.W.2d 636, 638 (Tex. Civ. App.—Dallas 1982, writ ref'd n.r.e.) (animosity of decedent in divorce proceeding evidenced intent that ex-wife not receive insurance proceeds though she was named beneficiary); *Pitts v. Ashcraft*, 586 S.W.2d 685, 696 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (former wife received proceeds as named beneficiary over widow's objection).

368. 672 S.W.2d at 43.

369. A judgment nunc pro tunc may be entered to correct a clerical error beyond the period allowed for making a substantive change in the order. TEX. R. CIV. P. 301.

370. 673 S.W.2d 947 (Tex. App.—Tyler 1984, no writ).

error, but issued the writ because the judgment nunc pro tunc did not designate what was being correcting.³⁷¹ The trial judge was, therefore, required to enter a new and acceptable judgment nunc pro tunc.³⁷²

In *Garza v. Garza*³⁷³ the trial court entered a divorce decree awarding a particular piece of real property to the wife, subject to a ninety-day option of the husband to buy the property at an agreed price. The ex-husband attempted to exercise the option, but his former wife refused to convey the property, thereby forcing the ex-husband to file a motion to enforce the judgment. The ex-wife chose that opportunity to attack the validity of the judgment. The San Antonio appeals court affirmed the trial court's refusal to grant her request for relief, holding that a property division contained in a final decree is not subject to collateral attack when the decree was entered pursuant to the parties' attorneys' agreement as to form.³⁷⁴

371. *Id.* at 948-49.

372. *Id.* at 949. *Lewis v. Lewis*, 677 S.W.2d 910 (Tex. App.—Waco 1984, no writ), dealt with proper service of citation in a post-divorce dispute. The wife had obtained a default judgment against the husband in a suit for judgment nunc pro tunc alleging that two mineral interests were left undivided by the divorce court. The court of appeals reversed and remanded for a new trial because the citation had been served over 90 days after its issuance and was thus not in compliance with rule 101. *Id.* at 911. Courts will not uphold default judgments unless the opposing party has strictly complied with the rules of civil procedure. *McKanna v. Edgar*, 388 S.W.2d 927, 928-30 (Tex. 1965) (plaintiff had burden to prove proper service); *Mega v. Anglo Iron & Metal Co.*, 601 S.W.2d 501, 503 (Tex. Civ. App.—Corpus Christi 1980, no writ) (movant must have complied strictly with procedural rules for issuance, service, and return of citation).

373. 666 S.W.2d 205 (Tex. App.—San Antonio 1983, writ dism'd).

374. *Id.* at 208.

