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FAMILY LAW

by

Joseph W. McKnight and Louise Ballerstedt Raggio***

LITIGATION has only begun to give construction to the 1967 and 1969 statutory revisions of Texas family law. At the same time, matters outside the statutory scheme continue to add dimensions to the fabric of the system. During the last year a few notable cases in the areas of marriage, divorce, and parental responsibility have been before the appellate courts. As usual, most of the divorce appeals can be very nearly characterized as frivolous, or relate to well-settled propositions. But there has been a host of decisions dealing with matrimonial property law.

Title 2 of the Family Code and amendments to title 1 are before the regular session of the legislature and enactment of these proposals will give Texas one of the most progressive and comprehensive family codes anywhere. Texas has had to wait a very long time[1] but most other jurisdictions must, regrettably, wait even longer.

I. HUSBAND AND WIFE

Status. One of the most significant Texas cases of 1970 dealt with the presumption of validity accorded a later marriage, as against a prior marriage of the same person.[2] The wife sued for her share of the community estate which her deceased husband had accumulated during his putative second marriage. Since the second marriage was presumed valid,[3] the plaintiff had the burden of showing that her marriage to the decedent was never dissolved. Two elements contributed to the plaintiff's success. Testimony was offered at the trial which constituted admissions against interest by the decedent. He had confided that he was still married to the plaintiff but refused to acknowledge this marriage publicly for fear of prosecution for bigamy. Further, the plaintiff showed that no record of divorce could be found in any of several jurisdictions in which the decedent had resided since his marriage. The marriage to the plaintiff was celebrated in Italy in 1913. The decedent left the plaintiff in Italy when he immigrated to the United States in 1914. He had later made his home in Amsterdam, New York, and thence in San Antonio, and ultimately in Austin. The court held that the plaintiff sufficiently demonstrated the continued exist-

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[1] Until revised in 1969 the basic Texas divorce law dated back to An Act Concerning Divorce and Alimony §§ 1-14, [1841] Tex. Laws 19-22, 2 H. GAMMEL, LAWS OF TEXAS 483-86 (1898).

[2] Caruso v. Lucius, 448 S.W.2d 711 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*

[3] TEX. FAM. CODE ANN. tit. 1, § 2.01 (1970), codifying prior law.

ence of her marriage to the decedent by showing the absence of divorce in any of the places he had lived. The prior wife "was not required to do the unreasonable and look to every jurisdiction where a proceeding might possibly be had, but to look only where such proceeding might reasonably be expected to be had under the law."[4] Thus, she was awarded a share of the community estate. The case is significant because it demonstrates the quantum of proof that must be presented to overcome the statutory presumption of the validity of the most recent in a series of marriages.

Two other cases involved changes in circumstances of the parties after the filing of the petition. In the first case[5] the petitioner filed for divorce prior to residing for six months in the county in which the suit was instituted. The petitioning wife had been a resident of the county for only two months. The respondent promptly filed his plea in abatement. Her original petition was amended, however, shortly after the residence requirement was met. The respondent asserted that he was prejudiced by the trial court's denial of his plea in abatement. The court of civil appeals overruled this point of error, holding that the residence requirement[6] was met by the filing of an amended petition after six months of residence and prior to a hearing on the merits. The rule was considered a settled proposition of law.[7]

In the second suit,[8] after the petition was filed the husband (fraudulently as it turned out) sought and achieved a reconciliation. After a short rapprochement the husband left the United States, taking the parties' child with him. The wife amended her petition to show fraud in the reconciliation. The husband's attorney, appearing under rule 120a,[9] asserted that

[4] 448 S.W.2d at 715, quoting Dockery v. Brown, 209 S.W.2d 801, 803 (Tex. Civ. App.—El Paso 1947).

[5] Shankles v. Shankles, 445 S.W.2d 803 (Tex. Civ. App.—Waco 1969).

[6] TEX. FAM. CODE ANN. tit. 1, § 3.21 (1970).

[7] The respondent also contested the petitioner's assertion of a Texas domicile for purposes of jurisdiction. The respondent was in military service at the time of the marriage in 1958 and continuously thereafter. But he had been born in Texas from whence he entered military service; he owned realty in Texas; he had always listed Sherman as his permanent address; he and the petitioner had always kept their Texas drivers' licenses current and registered their automobile in Texas; they did their banking in Texas and filed their annual income tax returns there. The respondent testified that he had always intended to retire in Texas. TEX. REV. CIV. STAT. ANN. art. 4631 (1960) (now TEX. FAM. CODE ANN. tit. 1, § 3.22 (1970)) was, therefore, applicable to supply a Texas domicile for both husband and wife.

A recent decision by the United States Supreme Court is relevant by inference to the validity of the related TEX. FAM. CODE ANN. tit. 1, § 3.23 (1970), concerning jurisdiction for divorce of servicemen stationed in Texas for at least one year. This statute has never been before the United States Supreme Court, but it has been declared constitutional by the Supreme Court of Texas. Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807 (1959). In Evans v. Cornman, 398 U.S. 419 (1970), the Court unanimously affirmed a lower court's decision to enjoin the enforcement of the Maryland voter residence law against persons residing in a non-military federal reservation within the state. In doing so it is significant that the Court said: "Maryland may, of course, require that 'all applicants for the vote actually fulfill the requirements of bona fide residence.' . . . 'But if they are in fact residents, with the intention of making [the State] their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation.' " *Id.* at 421. Elsewhere in the opinion the Court noted with regard to residents of the federal reservation: "[T]hey are subject to the process and jurisdiction of state courts; they themselves can resort to those courts in divorce and file adoption proceedings . . . ." *Id.* at 424. In part, at least, the decision seems to rest on those arguments without spelling out just what the residence requirements are with regard to divorce in Maryland. MD. ANN. CODE art. 16, §§ 23, 30 (1966) taken together are somewhat comparable to TEX. FAM. CODE ANN. tit. 1, § 3.23 (1970).

[8] Strange v. Strange, 464 S.W.2d 364 (Tex. 1971).

[9] TEX. R. CIV. P. 120a.

the court had lost personal jurisdiction over his client as the reconciliation had this effect automatically. In response to a certified question from the court of civil appeals, the supreme court rejected the husband's contention.[10]

The finality of divorce decrees was called into question twice within the survey period—once with respect to a court that had no difficulty in making up its mind at the close of argument,[11] and once in response to a court that had great difficulty in keeping its mind made up.[12] In the former case the trial judge made an oral award for the wife and divided the couple's property between them. The husband died two days later and before a written judgment had been entered. The wife filed a motion to dismiss which was overruled, and a judgment in accordance with the court's initial award was entered. The Tyler court of appeals reversed, and the supreme court affirmed the trial court. A dismissal would have conflicted with rule 164.[13] In the latter case the district court initially granted the divorce and awarded custody of the children to the plaintiff-husband. On the motion of the defendant-wife the original judgment was modified so that she was awarded custody of the children. Thirty-two days thereafter the judgment was altered once more. In this third judgment the second judgment was set aside, and the first, awarding custody to the husband, was reinstated. The wife appealed, challenging the efficacy of the third judgment. The court of appeals reversed, holding that the second judgment had become final with the expiration of thirty days and that the court could not thereafter alter that judgment.

As to divorce defenses, there are lingering doubts as to whether the rule in *Franzetti v. Franzetti*[14] (that a spouse's adultery will bar that spouse's suit for divorce) is still viable. The rule was recently approved as a matter of dictum in a custody case.[15] Though article 4630[16] was repealed and the defense of recrimination was abolished[17] shortly after that case was decided, it may be argued that vestiges of the common law defense of adultery are still available in a suit for divorce despite the repeal of article 4630 and the provisions in the Family Code section 3.08(a).[18] Repeal of a statute

[10] The court went on to add that any implication to the contrary in Givens v. Givens, 304 S.W.2d 577 (Tex. Civ. App.—Dallas 1957), was disapproved. 464 S.W.2d 364, 367-68 (Tex. 1971).

[11] Dunn v. Dunn, 430 S.W.2d 27 (Tex. Civ. App.—Tyler 1968), *rev'd*, 439 S.W.2d 830 (Tex. 1969).

[12] Rector v. Rector, 454 S.W.2d 229 (Tex. Civ. App.—Tyler 1970).

[13] TEX. R. CIV. P. 164: "At any time before the jury has retired, the plaintiff may take a non-suit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief. When the case is tried by the judge, such non-suit may be taken at any time before the decision is announced."

[14] 120 S.W.2d 123 (Tex. Civ. App.—Austin 1938). The *Franzetti* decision rested on the general definition of recrimination as supplied in 15 TEX. JUR. *Divorce & Separation* § 39 (1955) and on the common law defense of adultery.

[15] Tapal v. Tapal, 448 S.W.2d 560 (Tex. Civ. App.—Houston 1969). In *Tapal* the husband moved for a new trial with respect to custody on the basis of newly discovered evidence substantiating his former wife's adultery. Since the adultery issue was not specially submitted to the jury and since the new evidence was merely cumulative, the husband's motion was denied.

[16] Ch. 888, § 6, [1969] Tex. Laws 2708.

[17] TEX. FAM. CODE ANN. tit. 1, § 3.08 (1970). *See* Comment, *Marriage and Divorce Under the Texas Family Code*, 8 HOUS. L. REV. 100 (1970).

[18] *Id.* § 3.08(a) abolishes the defense of recrimination, but it must be borne in mind that the

will not revive prior contrary law;[19] hence, repeal of a statute codifying the common law should not revive the identical common law rule. But the common law rule enunciated in *Franzetti* was broader than the content of article 4630: "It is conceded that adultery is generally held to be a complete defense to an action for divorce upon any ground including that of cruel treatment."[20] If, therefore, *Franzetti* and related cases are taken at face value, article 4630 codified only a part of the existing common law. Hence, if only a part of the common law were codified in article 4630, only that part of it was repealed as of January 1, 1970. If the *Franzetti* rule still has life in it, another pre-1970 case may be of more than antiquarian interest.[21] The husband, relying upon the defense of recrimination, contended that conclusive evidence of his wife's adultery should have precluded her cross-action for divorce based upon cruel treatment. But the trial court found that the wife's adultery had been condoned by the husband, and hence the court of civil appeals held that the husband's condonation of his wife's adultery would not bar her suit for divorce on grounds of cruelty. Since the decree of divorce was entered in 1969, the court was not compelled to contend with a recent Code section which severely limits the defense of condonation.[22]

Several federal cases are of interest. In one[23] a widow attempted, without success, to invoke the doctrine of equitable estoppel against the Social Security Administration in order to secure widows' insurance rights. The widow had asked if her remarriage before the age of sixty would affect her right to the benefits, and a social security employee assured her that such a change in status would not. Relying upon that information, she remarried less than a month before her sixtieth birthday. The court held that the employee had exceeded his authority in so informing the widow and that an application of the estoppel principle would violate the Social Security Act.[24]

Two other significant federal decisions invalidated Texas criminal statutes and may have a notable effect on family law. A three-judge panel declared the Texas sodomy statute[25] unconstitutional insofar as it incrimi-

Texas defense of recrimination had required that the acts for which the petitioner seeks a divorce be *induced by* or in *retaliation for* the petitioner's conduct. Ward v. Ward, 352 S.W.2d 513 (Tex. Civ. App.—Amarillo 1961); Trigg v. Trigg, 18 S.W. 313 (Tex. Comm'n App. 1891), *judgment adopted.*

[19] TEX. REV. CIV. STAT. ANN. arts. 10, § 7 (1969), 5429(b)(2), § 3.10 (Supp. 1970).

[20] Franzetti v. Franzetti, 120 S.W.2d 123, 126 (Tex. Civ. App.—Austin 1938); citing 15 TEX. JUR. *Divorce & Separation* § 39 (1955).

[21] French v. French, 454 S.W.2d 839 (Tex. Civ. App.—Houston 1970).

[22] TEX. FAM. CODE ANN. tit. 1, § 3.08(b) (1970). A nice point of constitutional law was also recently before the Wisconsin courts. The wife filed for divorce, and the husband counterclaimed, praying that the court grant him a divorce for his wife's adultery. The wife asserted the fifth amendment and refused to testify concerning her alleged adultery. The lower court granted the wife a divorce on the basis of cruel treatment, and she was awarded alimony. The Supreme Court of Wisconsin reversed, holding that the wife's adulterous conduct could be inferred from circumstantial evidence—including her invocation of the fifth amendment on cross-examination. Malloy v. Malloy, 46 Wis. 2d 682, 176 N.W.2d 292 (1970).

[23] Terrell v. Finch, 302 F. Supp. 1063 (S.D. Tex. 1969). *Cf.* Robertson v. Minister of Pensions [1949] 1 K.B. 227, and related cases discussed in 87 L.Q. REV. 15 (1971).

[24] 42 U.S.C. § 402(e)(4) (Supp. V, 1969). The Act provides that if a widow marries after the age of sixty years, such marriage will not affect her right to benefits.

[25] TEX. PEN. CODE ANN. art. 524 (1968).

nates the private consensual conduct of married couples.[26] The overbreadth of the statute was said to have invaded the area of protected freedoms. Another three-judge court held that the Texas abortion laws[27] are unconstitutional.[28] The court held that the prohibition of abortions, except to save the life of the mother, constituted a violation of the ninth amendment right to choose whether to have children. But the court failed to enjoin prosecution under the statute.[29] It is expected that the forthcoming revision of the Texas Penal Code will include a drastic alteration of both of these contested statutes.

Family Property. A spouse may put or take title to property in the other spouse's name. He may have any of a number of reasons for doing so. If the purchasing spouse makes his intentions known by way of recitals, the law gives effect to those intentions.[30] In the absence of recitals, property acquired during marriage is deemed to be community property, unless there are facts to establish that the property is the grantee's separate estate. Various presumptions of law have been invented to assist the courts in this determination. For example, if the husband conveys his separate property to his wife, a gift is presumed.[31] If he conveys community property to his wife, the deed itself evidences the intent to make a gift.[32] If the husband uses his separate property to purchase real property and title is taken in the wife's name, there is also a presumption of gift to the wife.[33] But if he purchases with *community* funds, evidence of a donative intent is required to show that the property is the wife's separate estate.[34] The Fort Worth court of civil appeals dealt with such a fact situation, and though the court may have given effect to the possible intent of the individuals concerned,[35] the reasoning of the court is somewhat less than con-

[26] Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *judgment vacated and remanded sub nom.* Buchanan v. Wade, 91 S.Ct. 1222 (1971). The three-judge court had held that TEX. PEN. CODE ANN. art. 524 (1968) "is void on its face for the unconstitutional overbreadth." 308 F. Supp. at 735. *See* 49 TEX. L. REV. 400 (1971); 2 TEX. TECH L. REV. 115 (1971).

[27] The statute in issue is TEX. PEN. CODE ANN. art. 1191 (1961).

[28] Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *cert. granted*, 39 U.S.L.W. 3477 (1971).

[29] A three-judge court in Illinois was less compromising, if divided. Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971).

[30] Messer v. Johnson, 422 S.W.2d 908 (Tex. 1968); Lindsay v. Clayman, 151 Tex. 593, 254 S.W.2d 777 (1952).

[31] Reynolds v. Lansford, 16 Tex. 286 (1856).

[32] Story v. Marshall, 24 Tex. 305 (1859).

[33] Smith v. Strahan, 16 Tex. 314 (1856).

[34] Higgins v. Johnson's Heirs, 20 Tex. 389 (1857).

[35] In Mitchell v. Mitchell, 448 S.W.2d 807 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*, the court could not find a way to carry out an even more obvious intention of a deceased spouse. This was a suit by a divorced wife against her ex-husband's widow to recover for herself and her children proceeds of a group life policy issued to the husband as an employee of the United States Post Office Department. During the first marriage the premiums were paid from the community property of the first marriage. During the second marriage premiums were paid from the second community estate. The court granted summary judgment to the widow, the second wife. The insurance was term insurance and had no cash surrender or loan value at the time of the divorce or afterwards. The statute, 5 U.S.C. § 8705 (Supp. V, 1969), states that the proceeds of the policy are to go first to a properly designated beneficiary, and if there is none, to his "widow." The divorced wife was never properly designated as beneficiary, although strong evidence indicated that the decedent intended that his first wife and children have the proceeds of the policy. The court ruled that the terms of the statute were controlling and that the second wife, or widow, was the statutory beneficiary. No argument appears to have been made that equity should have imposed a constructive trust on the beneficiary in favor of the first wife.

vincing.[36] In 1919 a city lot was conveyed to the husband. In 1922 another tract was conveyed by a third person to the wife without any recital as to its being community or separate property, and the same day the husband conveyed the city lot to the grantor of the second tract as part of the consideration. Further consideration was recited, including promissory notes signed by both husband and wife. The husband died in 1931, and the wife died in 1964, after which a dispute with respect to title to the second tract developed. The trial court found as a matter of law that the husband intended the second tract to be his wife's separate property. There was no evidence of any contrary intention. The appellate court held that since only slight evidence is required to show a gift to the wife as her separate property under these circumstances and thus to rebut the presumption of the community title, there was ample evidence in the record to support the finding of the trial court. Other than the juxtaposition of events, the appellate court did not say what constituted such evidence; however, that parol evidence may be introduced to prove intent in the absence of recitals is unquestionable.[37] In the absence of further facts, we can only speculate on the court's reasoning. One would hope that this case is quickly forgotten or confined to its own facts, incomplete though they are.

The issue of gifts between spouses was again before the court in *Bohn v. Bohn*,[38] which was once again remanded.[39] On the first appeal the court held that when, upon divorce, a wife calls her gift of separate property to her husband into question, he has the burden of showing the reality of that gift. Upon remand the trial court submitted the question whether the transaction was the result of undue influence as a special issue. The appellate court found the trial court's charge erroneous because it failed to place the burden upon the husband to show that he acted in good faith, that the gift was voluntarily made to him, and that no fraud, actual or constructive, was perpetrated upon his wife. It should be noted that since the husband was an attorney and since he requested that the property be transferred to him, the relationship between the parties was unique. However, the court relied essentially upon their relationship as husband and wife to formulate its rule. Furthermore, it was recognized that there were no Texas cases in point. The court was forced to rely upon tertiary authority to find that such gifts were presumptively unfair. It is submitted that the holding in *Bohn* is difficult to square with the policy underlying present statutes which deal with spouses generally in terms of parity.[40] In light of this liberalization of

[36] Black v. Danbom, 459 S.W.2d 195 (Tex. Civ. App.—Fort Worth 1970). On gifts of spouses to third persons, see Quilliam, *Gratuitous Transfers of Community Property to Third Persons*, 2 TEX. TECH L. REV. 23 (1971).

[37] Van Zandt v. Van Zandt, 451 S.W.2d 322 (Tex. Civ. App.—Houston 1970). Curiously enough the converse of this proposition was argued in *Van Zandt*.

[38] 455 S.W.2d 401 (Tex. Civ. App.—Houston 1970).

[39] 420 S.W.2d 165 (Tex. Civ. App.—Houston 1967), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 SW. L.J. 129, 131 (1968).

[40] TEX. FAM. CODE ANN. tit. 1, §§ 4.01-5.86 (1970).

married women's rights in Texas this "most dominating influence"[41] of husband over wife should be a waning legal concept.

In *Busby v. Busby*[42] the Supreme Court of Texas considered the interest of the community in military disability retirement benefits of a serviceman-spouse. The familiar holding in *Mora v. Mora*[43] that the interest in *ordinary retirement* benefits becomes a vested property right with the completion of a prescribed tenure of service was explicitly approved with respect to *disability* benefits. Since the right to the retirement benefits in general was deemed to have vested during marriage, and since this right was not divided on the divorce of the parties, the action by the ex-wife for a partition of the undivided community interest was successful. As a matter of fact, in *Busby* the Air Force ordered the retirement of the husband because of disability (effective a month later) on the date of the divorce. In effect the court held that if the serviceman is married at the time general retirement benefits vest, all incidents of such benefits (whether then accrued or not) are community property of that marriage in their entirety.[44] A dissenting opinion insisted that division of property upon dissolution of marriage should be left exclusively to the divorce court and, in effect, that the divorce court should be deemed to make such a division so that its disposition of the property would be res judicata to subsequent disputes. Such a result could, of course, be easily achieved by careful wording of the decree. It would also dispose of all disputes over alleged community property not divided on divorce which, in such a situation, becomes a tenancy in common of the former spouses. But given the difficulties of predicting the value of property yet to be acquired and the circumstances of the former spouses on its acquisition, the solution of both the majority and dissenting judges may produce striking inequities.[45] A better solution would be to require by statute that the subsequent undivided acquisition be put before the divorce court for disposition in the future.[46]

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[41] 41 AM. JUR. 2D *Husband and Wife* § 271 (1968), cited in Bohn v. Bohn, 455 S.W.2d 401, 405 (Tex. Civ. App.—Houston 1970).

[42] 457 S.W.2d 551 (Tex. 1970). For a comment on the case in the court below, see McKnight, *Family Law, Annual Survey of Texas Law*, 24 SW. L.J. 49, 53 (1970).

[43] 429 S.W.2d 660 (Tex. Civ. App.—San Antonio 1968), *error dismissed, noted in* 22 SW. L.J. 888 (1969). *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 SW. L.J. 44 (1969).

[44] The court awarded the ex-wife one-half the entire sum of the benefits received in spite of the fact that the couple were not married until after the husband had been in military service for four of his almost twenty-one years of service. This is puzzling in that the court seems to approve the proportionate calculation of community interest utilized by the courts in Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App.—San Antonio 1968), and Kirkham v. Kirkham, 335 S.W.2d 393 (Tex. Civ. App.—San Antonio 1960). But the *Busby* court's conclusion is, nonetheless, consistent with the long line of cases on inception of title by adverse possession. Strong v. Garrett, 148 Tex. 265, 224 S.W.2d 471 (1949); Creamer v. Briscoe, 101 Tex. 490, 109 S.W. 911 (1908); Brown v. Foster Lumber Co., 178 S.W. 787 (Tex. Civ. App.—Galveston 1915), *error ref.*

[45] *See* note 127 *infra*, and accompanying text.

[46] If the statute, TEX. FAM. CODE ANN. tit. 1, § 3.63 (1970), authorizing the divorce court to divide the matrimonial estate *in its discretion* is constitutional, a statute of the sort I here propose would be equally so. Examples of the ease with which the divorce court deals with these problems is seen in Williamson v. Williamson, 457 S.W.2d 311 (Tex. Civ. App.—Austin 1970); Smith v. Manger, 449 S.W.2d 347 (Tex. Civ. App.—San Antonio 1970). But a statutory provision that all disability benefits are separate property under TEX. FAM. CODE ANN. tit. 1, § 5.01 (1970), would be clearly unconstitutional.

Another sometimes more protracted means of dealing with undisposed of community property of spouses whose marriage has been dissolved by divorce is by way of declaratory judgment[47] to determine whether there is property to partition.[48] The Fort Worth court of civil appeals has recently concluded, however, that after a consideration of the assets and liabilities of the ex-spouses, if there is no *net* estate of the parties, there is no former community—*i.e.*, no tenancy in common to partition.[49] Grave doubts may be entertained about the soundness of this reasoning.

The federal courts, however, abstain from intervention in this area. In a proceeding against an out-of-state husband a Texas court granted the Texas wife a divorce. There was no division of the property. The wife brought suit in an Oklahoma federal court and prayed that the property be divided. Notwithstanding the existence of diversity jurisdiction, the court concluded that the determination of matrimonial property rights was a matter not within the judicial power of the federal courts.[50]

Interests governed by federal law present difficult problems of division on divorce. In *Miguez v. Miguez*[51] a federal rice acreage allotment was an interest acquired during marriage and hence presumptively a community asset.[52] But the husband argued that the interest could not be a vested property right. The trial court did not hesitate to divide this interest by awarding each spouse one-half of the allotment. On appeal the court held that the interest was not divisible by mere order of the court. However, the appellate court recognized that this intangible interest was the most valuable asset of the marriage. The court also considered the inequity that could result if, by investment in such allotments, a spouse could put the assets of the marriage beyond the power of a divorce court to divide them. It was suggested that if on retrial the husband should refuse to apply to the federal government to effectuate a division of the allotment, the trial court should enter an order to compel his cooperation.[53]

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[47] TEX. REV. CIV. STAT. ANN. art. 2524-1 (1965).

[48] Dessommes v. Dessommes, 461 S.W.2d 525 (Tex. Civ. App.—Waco 1970).

[49] Fyke v. Fyke, 463 S.W.2d 242 (Tex. Civ. App.—Fort Worth 1971).

[50] Williamson v. Williamson, 306 F. Supp. 516 (W.D. Okla. 1969).

[51] 453 S.W.2d 514 (Tex. Civ. App.—Beaumont 1970).

[52] TEX. FAM. CODE ANN. tit. 1, § 5.12 (1970).

[53] Practical advice on utilizing the assistance of a federal agency was offered by the Amarillo court in Goodwin v. Goodwin, 451 S.W.2d 532 (Tex. Civ. App.—Amarillo 1970). The trial court enjoined the parties from selling community property prior to final judgment. Without the court's permission, the husband sold an airplane which was community property. In the divorce decree the wife was awarded a sum of money to be secured by a lien on the airplane which was awarded to the husband. On discovering that the airplane had been sold, the wife sought to enjoin any further transfer of the property. The appellate court found that if the wife could show that the transferee had actual notice of a fraudulent transfer, the attempt to alienate the property would be treated as void. Assuming such notice, the title to the plane would still be in the husband. The court advised the plaintiff that she should then file her later judgment with her divorce judgment with the Federal Aviation Administration in order to achieve her lien with a right to foreclosure. In granting the temporary injunction, however, the trial court had not provided for a bond as required under TEX. R. CIV. P. 684. It was contended by the husband and his vendee that this error made the injunction ineffective. Although the wife obtained an amended order setting the bond, the supreme court reversed the appellate court and held, per curiam, that the setting of bond was a condition precedent to the issuance of the temporary injunction. Thus the injunction was not merely voidable, but rather it was void *ab initio*. Goodwin v. Goodwin, 456 S.W.2d 885 (Tex. 1970).

In *Riley v. Brown*[54] a married veteran entered into a contract to purchase land from the Veteran's Land Board. In a divorce proceeding the court found that the property was community in character and awarded both husband and wife an undivided one-half interest. Since the land could not be partitioned in kind, the former wife filed a subsequent suit to have the land sold and the proceeds divided. The assignee of the former husband claimed to be a bona fide purchaser, but it was held that by taking a quitclaim deed to the property, he was cloaked with notice. The assignee also asserted that since the husband had (as a veteran) obtained the right to purchase prior to his marriage, the property was the husband's separate property. The court concluded that by being a veteran, the former husband had acquired no property right. Veteran status was merely a prerequisite to the making of an application to buy land—not a right to land or a right to buy land.

An appeal was taken by a husband from a judgment directing the division of community property at the time of granting a divorce to the wife. The property involved was an interest in a profit-sharing trust in which the husband participated. The husband did not contend that the interest was not community, but rather that the trial court lacked the power to order him to withdraw from participation in the trust to allow the fund to be divided. In order to give the wife a share it was necessary for the husband to withdraw from the trust completely pursuant to its terms. The husband contended that such a withdrawal was detrimental to both parties in the long run and penalized him more than the mere division of the funds. Purporting to follow *Duncan v. Estes*,[55] which was inapposite, the court held that the trial court had the power to order the withdrawal.[56] The question of detriment to the husband was a matter within the trial court's discretion.

Among the most significant cases considering the discretion of the court to divide property on divorce was *Dobbs v. Dobbs*.[57] The glaring inequality in the division of community assets prompted the husband to allege that the trial court had clearly abused its discretion. Although the court had awarded the husband $3,000 in cash, the award to the wife consisted of a duplex dwelling, an automobile, and over $27,000 in cash. Nevertheless the court of civil appeals affirmed the judgment. It appeared from the findings of fact that the husband had relinquished all claim in the house and automobile. Further, the money on hand was mainly money recovered by the parties for personal injuries sustained by the wife.

Among the other factors to be considered in dividing the property of the marriage is fault. *Harrington v. Harrington*[58] stands for the proposition that the court may consider, *inter alia*, the "cause of the parties' inability to live together" and the conduct that led to the divorce. Should any distinction be drawn between division on divorce based on fault or

[54] 452 S.W.2d 548 (Tex. Civ. App.—Tyler 1970).
[55] 428 S.W.2d 675 (Tex. Civ. App.—El Paso 1968).
[56] Taylor v. Taylor, 449 S.W.2d 368 (Tex. Civ. App.—El Paso 1969).
[57] 449 S.W.2d 119 (Tex. Civ. App.—Tyler 1969).
[58] 451 S.W.2d 797 (Tex. Civ. App.—Houston 1970).

non-fault grounds? In *Preston v. Preston*[59] it was contended that the trial court abused its discretion in dividing the community estate because of error in the valuation of the assets of the marriage. The court of civil appeals refused to hold that such a mistake amounted to a prima facie abuse. Since no manifest inequity could be shown, the division was affirmed. *Dobbs, Preston,* and *Harrington* all support the proposition that the determination by the trial court of an equitable division of property on dissolution of marriage is not to be altered unless the appellant can bear the very onerous burden of showing clear abuse of discretion.

Another case[60] dealt with the authority of the trial court to divest a spouse of separate realty. On divorce the trial court had granted the wife a life estate in one-fourth of the land and an additional one-fourth undivided interest in fee. The court of civil appeals reversed, holding that the trial court was precluded by statute[61] from divesting the husband of any fee interest in his separate real property. This rule limiting the power of equitable division on divorce was repealed effective January 1, 1970.[62] Will habit and restraint hereafter cause the courts to be reluctant to divest title to separate realty?

Maryland Casualty Co. v. Schroeder[63] was a suit by a bonding company against an ex-husband and his ex-wife to recover money that the husband had embezzled during their marriage. The embezzled funds were traced by the plaintiff (but not as to amount) into various community assets that had been awarded to the wife on divorce. The court held that this was sufficient to fix a constructive trust on those properties and that, as *trustee,* it was incumbent on the husband to show which funds were *not* held in trust. The plaintiff was not required to show the specific amounts of the embezzled funds invested in each asset. It was irrelevant that the ex-wife knew nothing of the embezzlement.

In *Amarillo National Bank v. Liston*[64] the husband's judgment creditors sued the husband and wife to reach assets assigned by the husband to the wife in a 1960 agreement executed in contemplation of divorce. It was not clear when the debts arose, but the judgments were rendered in 1967. It must be assumed that the debts arose after 1960. The agreement recited that all the property would be that of the wife and she would assume all indebtedness. The property in issue was a commingled mass of community property and unidentifiable and untraceable separate property so that the whole was community property as a matter of law. The majority of the court treated the agreement as a partition of community property pursuant to the 1948 amendment to the Constitution[65] and the act of 1948 passed pursuant thereto.[66] But, because the agreement failed to com-

[59] 453 S.W.2d 389 (Tex. Civ. App.—El Paso 1970).
[60] Holmes v. Holmes, 447 S.W.2d 423 (Tex. Civ. App.—Waco 1969).
[61] TEX. REV. CIV. STAT. ANN. art. 4636 (1960).
[62] Ch. 888, § 6, [1969] Tex. Laws 2708.
[63] 446 S.W.2d 117 (Tex. Civ. App.—El Paso 1969).
[64] 464 S.W.2d 395 (Tex. Civ. App.—Amarillo 1970).
[65] TEX. CONST. art. XVI, § 15.
[66] Ch. 242, § 1, [1949] Tex. Laws 450. The 1949 Act was replaced in 1967, ch. 309, § 1, [1967] Tex. Laws 735. A substantial change was made in the partition statute in 1967. Whereas

ply with the requirements of the statute, it was held to be ineffective. Chief Justice Denton, dissenting, distinguished a statutory partition and a separation agreement under the rule in *Rains v. Wheeler*.[67] The couple had permanently separated when the agreement was entered into. Though they were later reconciled they did not intend that the reconciliation should cancel the agreement.[68] The majority's conclusion is the first judicial determination that the constitutional-statutory partition is the exclusive mode of partition—thus putting aside the rule in *Rains*. The majority also adds its weight to the minority view[69] that even if valid, such a partition does not operate prospectively to cover after-acquired income.[70]

Allowing separate property to lose its identity in the community is one thing, but a spouse's deliberate attempt to make a gift to the community is quite another.[71] The Eastland court of civil appeals rejected the holding in *Jones v. Jones*[72] that the husband can make a gift to the community estate. The rest of the case dealt with the right of reimbursement. The facts are not altogether clear, but it appears that the husband bought a ranch on credit and later used separate funds to discharge the debt. On dissolution of the marriage his separate estate had a right of reimbursement from the community. The measure of reimbursement is nicely exemplified in *Harris v. Royal*.[73] The husband brought suit against his deceased wife's executrix for reimbursement of community funds which were used to build a house on the deceased wife's separate lot. Relying on *Dakan v. Dakan*[74] and *Lindsay v. Clayman*[75] the court held that the amount of reimbursement is determined by the enhanced value of the land or improvement cost, whichever is less. In this instance the enhanced value was less than the cost. The fairness of the rule may be seriously questioned during a period of inflation. In a period of deflation the spouse seeking reimbursement also stands to lose.

In *Caruso v. Lucius*[76] the court by way of obiter dictum concluded that a putative spouse is entitled, under Texas law, to one-half of the property acquired during the putative marriage. The remaining half is to be equally divided between the prior spouse and the twice-married spouse.

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when the agreement in issue was entered into such agreements required recordation for *essential validity*, the new statute only requires recordation for purposes of constructive notice. Under the present statute a person who becomes a creditor subsequent to the agreement and without actual or constructive notice of it would have to show a fraudulent conveyance in order to proceed against property subject to the agreement. Pre-existing creditors are protected by the terms of the Constitution and the statute. The Act was reenacted effective Jan. 1, 1970, in TEX. FAM. CODE ANN. tit. 1, § 5.42 (1970).

[67] 76 Tex. 390, 13 S.W. 324 (1890).

[68] Speckels v. Kneip, 170 S.W.2d 255 (Tex. Civ. App.—El Paso 1942), *error ref.*

[69] This view is represented by George v. Reynolds, 53 S.W.2d 490 (Tex. Civ. App.—Eastland 1932), *error dismissed*, which the court does not cite. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 134 n.36 (1968).

[70] Chief Justice Denton cites the contrary authorities: Speckels v. Kneip, 170 S.W.2d 255 (Tex. Civ. App.—El Paso 1942), *error ref.*; Corrigan v. Goss, 160 S.W. 652 (Tex. Civ. App.—El Paso 1913), *error ref.*

[71] Higgins v. Higgins, 458 S.W.2d 498 (Tex. Civ. App.—Eastland 1970).

[72] 181 S.W.2d 988, 991 (Tex. Civ. App.—Dallas 1944), *error ref. w.o.m.*

[73] 446 S.W.2d 351 (Tex. Civ. App.—Waco 1969), *error ref. n.r.e.*

[74] 125 Tex. 305, 83 S.W.2d 620 (1935).

[75] 151 Tex. 593, 254 S.W.2d 777 (1952).

[76] *See* note 2 *supra*, and accompanying text.

In this dictum the court tacitly rejects a line of authority which had required that the putative spouse prove her participation in the acquisition of the property which vested during the putative marriage.[77] It is submitted that though the *Caruso* approach may be equitably sound with respect to a putative marriage of long standing, other approaches also have their equitable attractions from the point of view of the undivorced wife and the husband's heirs.[78]

The necessity of joinder of the uninjured spouse in suits by the other spouse for recovery for personal injuries was before the Tyler court of civil appeals in *Charter Oak Fire Insurance Co. v. Few*.[79] The injured wife, who was joined pro forma by her husband, brought suit to recover workmen's compensation benefits. The trial court granted the relief sought by the plaintiff over the objection of the defendant that the husband should have been joined as a real party in interest. The intermediate appellate court held that there was fundamental error for failure to join an indispensable party under rule 39.[80] The supreme court affirmed the holding of the trial judge.[81] Rule 39, which requires joinder of parties holding joint interests, gave way under the court's construction of recently enacted statutes governing joinder of husbands and wives.[82] The court held that the statute defining managerial authority of spouses[83] should not be limited by the rule, especially in view of the statute[84] which provides that a spouse may sue and be sued without joinder of the other spouse. The legislature did not intend, by adding in the latter statute that the spouses *may* be joined, to reduce to a nullity the right extended by the first sentence of the statute. Thus, the court has made clear that a suit by an injured spouse on behalf of the community is not defective because the other spouse is not joined.[85]

The problem of the joint bank account[86] was again before the Supreme Court of Texas during the survey period. Nevertheless, the classic question of the right of a surviving spouse in a community account was not at issue.[87] With her separate funds the decedent purchased certificates of

[77] *See, e.g.*, Fort Worth & R.G. Ry. v. Robertson, 103 Tex. 504, 131 S.W. 400 (1910); *cf.* Lee v. Lee, 112 Tex. 392, 247 S.W. 828 (1923).

[78] *See* 11 Sw. L.J. 245 (1957); *cf.* Hudspeth v. Hudspeth, 198 S.W.2d 768 (Tex. Civ. App.—Amarillo 1946), *error ref. n.r.e.* But there it was the second wife who was attacking the validity of her own marriage.

[79] 456 S.W.2d 156 (Tex. Civ. App.—Tyler 1970).

[80] TEX. R. CIV. P. 39.

[81] Few v. Charter Oak Ins. Co., 463 S.W.2d 424 (Tex. 1971).

[82] TEX. REV. CIV. STAT. ANN. arts. 4621, 4626 (1968); TEX. FAM. CODE ANN. tit. 1, §§ 5.22, 5.23, 4.04 (1970).

[83] TEX. REV. CIV. STAT. ANN. art. 4621 (1968); TEX. FAM. CODE ANN. tit. 1, §§ 5.22, 5.23 (1970).

[84] TEX. REV. CIV. STAT. ANN. art. 4626 (1968); TEX. FAM. CODE ANN. tit. 1, § 4.04 (1970).

[85] In arriving at this conclusion, Justice Pope noted two discussions of this question in prior *Survey* Articles. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 55 (1969); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 132 (1968). *See also* Ramos v. Horton, 456 S.W.2d 565 (Tex. Civ. App.—El Paso 1970).

[86] Forehand v. Light, 452 S.W.2d 709 (Tex. 1970).

[87] The subject has produced a spate of recent literature. Virden, *Joint Tenancy Savings Accounts Funded With Community Property*, 33 TEX. B.J. 1029 (1970). Comment, *Community Property and the Right of Survivorship*, 18 BAYLOR L. REV. 501 (1966); Comment, *Survivorship Bank Accounts in Texas*, 18 BAYLOR L. REV. 517 (1966). But neither the literature nor the courts

deposit in her name and that of her daughter, without more. The decedent died before the maturity dates of the certificates, and both the daughter and the decedent's executor claimed the certificates. The evidence revealed no reason why the decedent had made the certificates read as they did, nor was there any language of survivorship or any instrument setting out a right of survivorship. The supreme court awarded the certificates to the decedent's estate. The court held that mere designation of an account as payable to either of two parties was insufficient to establish a right of survivorship. To constitute a joint tenancy it is not necessary that the "joint control card" or similar instrument contain the words "joint tenants with right of survivorship," but the word "survivor" is crucial.[88]

Teas v. Republic National Bank[89] concerned a creditor's foreclosure on community property that was given as security, but pledged with the ultimate objective of defrauding the other spouse. The husband borrowed funds from the bank. His father acted as surety, and the husband also pledged both his separate property and community property subject to his management to secure the debt. The husband failed to meet his obligation. The father, a substantial stockholder in the bank with which he did extensive business, "advised" the bank to foreclose on the property, rather than proceed against him. The bank was the buyer at the sale. The bank then sold to the husband's father. The wife sued to set aside the sales and for damages. The jury found that with respect to most of the property the acts of the father and husband evidenced a concerted scheme to defraud the wife of her community interest, and the officers of the bank were aware of their intent. The jury further found that the bank had paid a reasonable price for the properties and awarded exemplary damages against the husband and father. The court of civil appeals affirmed the lower court's decision to render judgment in favor of all the defendants, notwithstanding the verdict. As manager of the pledged community property, the husband was capable of dealing with the property, and the wife had grounds to complain "only if the husband dispose[d] of the property capriciously or by excessive gifts or for inadequate compensation so as to deprive her of the value of her interest."[90] The court appears to conclude that if the husband wishes to deprive his wife of her community interest, he may do so if he clothes the transaction as a business

have yet explored the incidents of true joint tenancies in Texas. Calvert v. Wallrath, 457 S.W.2d 376 (Tex. 1970), *noted in* 23 BAYLOR L. REV. 141 (1971), was principally concerned with whether the surviving joint tenant with right of survivorship acquires an interest subject to state inheritance taxation. In concluding that he does not, the court held that the survivor has the whole, which he has always had in line with traditional doctrine. The court also concluded for tax purposes that survivorship rights are not to be construed as dispositions in contemplation of death.

[88] The court pointed out that the word "survivor" was vital to its decision in Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962). *See also* Steinbach v. Kieke, 451 S.W.2d 956 (Tex. Civ. App.—Houston 1970).

[89] 460 S.W.2d 233 (Tex. Civ. App.—Dallas 1970), *error ref. n.r.e.* National Maritime Union v. Augustine, 458 S.W.2d 832 (Tex. Civ. App.—Beaumont 1970), was a more prosaic fraud case. The court held that the substitution by the husband-employee of another's name for his wife's as beneficiary under his union pension plan constituted constructive fraud against his wife who had filed a petition for divorce against him.

[90] 460 S.W.2d at 242.

arrangement—as opposed to a gift or capricious disposition. The court also appears to hold that a transfer (*i.e.*, the bank's purchase) is not void under the fraudulent conveyance statute[91] because a reasonable consideration was paid. But in this particular case the sale is not void *because* the consideration would be used to discharge a validly incurred debt and the wife could not thereby be defrauded. It is puzzling that title in the father was allowed to stand, however. The wife's standing to sue was not raised.[92]

Family Creditors. Henry S. Miller v. Evans[93] is a sequel to the 1968 decision *Henry S. Miller Co. v. Shoaf*,[94] in which a judgment creditor of the ex-husband sought to satisfy his judgment against real property awarded to the ex-wife in a divorce proceeding. The ex-wife was successful in asserting the homestead character of the property. The more recent case involved a further attempt by the ex-husband's creditor to levy execution on another tract, which had been conveyed to the former wife as her "sole and separate estate" during the marriage, and which was awarded to her as such on divorce. The sheriff of the county in which the property was located refused to levy on the ground that the property was not subject to execution against the husband. The creditor then brought suit against the sheriff. The creditor's contention was that the property was a part of the former spouse's community estate. As such, it would be subject to execution in order to satisfy the creditor's judgment—despite the fact that the property was awarded to the wife on divorce. The sheriff contended that the tract was the separate property of the former wife *prior* to the divorce and was, therefore, not subject to execution for satisfaction of her former husband's judgment debt.[95] If this were so, it would follow that the creditor could have suffered no actual damages from the failure of the sheriff to levy execution on the property. The Supreme Court of Texas held for the creditor, but awarded only nominal damages of one dollar. The acquisition of the property was by a deed which was executed four years before the former husband incurred the obligation to the creditor. The deed recited that the consideration would be paid out of the former wife's "sole and separate estate" and that the property was conveyed to her as her "sole and separate estate." Since the husband was a participant in the transaction, the latter recital was prima facie evidence that the property was separate. The conclusion was sealed by the other recital that the separate credit of the wife would be looked

[91] TEX. BUS. & COMM. CODE ANN. § 24.02 (1968).

[92] It seems to have been assumed by all parties. *See* Stramler v. Coe, 15 Tex. 211 (1855). But note the court's language, *id.* at 215: The husband's bond for title to the land in controversy "was proved to be for valuable consideration, and as such it was as much binding on the wife as on the husband, unless it had been shown that it was made with the intention to defraud the wife of her rights in the community." *See also* Mahoney v. Snyder, 93 S.W.2d 1219 (Tex. Civ. App.—Amarillo 1936); Note, *Abolition of the Interspousal Immunity in Community Property States*, 17 Sw. L.J. 280, 285 (1963).

[93] 452 S.W.2d 426 (Tex. 1970), *rev'g* 440 S.W.2d 317 (Tex. Civ. App.—Waco 1969).

[94] 434 S.W.2d 243 (Tex. Civ. App.—Eastland 1968), *briefly discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 24 Sw. L.J. 49, 54 (1970).

[95] TEX. REV. CIV. STAT. ANN. art. 4616 (1960), *replaced by*, TEX. FAM. CODE ANN. tit. 1, § 5.61 (1970).

to for payment. The creditor was barred from introducing extrinsic evidence to contradict the recitals except to show fraud (which was not operative here). The operation of the rule in *Messer v. Johnson*[96] with respect to creditors was thereby made perfectly clear.[97] However, since a sheriff is required by statute to execute *all* processes directed to him,[98] and since a wrongful levy on *land* does not subject the levying officer to personal liability,[99] he cannot refuse to comply with a court order, however misguided.

The ground valuation of urban homestead property was recently raised by constitutional amendment from $5,000 to $10,000.[100] The *statute* increasing the value was passed at the regular legislative session of 1969,[101] but by its terms did not take effect until the people approved the constitutional amendment.[102] The constitutional amendment raising the homestead valuation was submitted to the people and passed on November 3, 1969. The constitution provides that if a majority of the votes cast favor an amendment, it will become law, and the governor shall proclaim the results of the election.[103] It has been held that the effective date of the amendment is not the date of proclamation, but rather the date upon which the votes are canvassed (forty days after the election).[104] Under this holding, the increase became effective December 13, 1969.

Two recent cases involved a determination of the existence of a homestead. In one[105] the court sustained the homestead character of a mobile trailer home. The structure had been purchased with proceeds derived from the sale of the couple's home. It was placed on property which they leased under a month-to-month tenancy. The wheels had been removed leaving the structure resting on cement blocks. In determining that this chattel could be a homestead the court deemed it most significant that the couple intended that it should be annexed to the soil as a home, and that the month-to-month tenancy was a sufficient interest in land to support the homestead. That the Texas Penal Code defined a "house trailer" as a chattel was considered to be irrelevant. The court distinguished the holding in *Gann v. Montgomery*[106] which involved an old-fashioned, very *mobile* house trailer. The trailer was merely parked on the property of another (who was himself a tenant) when the mortgage on it was given.

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[96] 422 S.W.2d 908 (Tex. 1968).

[97] This might have been anticipated by the holdings in McCutchen v. Purinton, 84 Tex. 603, 19 S.W. 710 (1892), and Morrison & Hart v. Clark, 55 Tex. 437 (1881).

[98] TEX. REV. CIV. STAT. ANN. arts. 3825 (1966), 6873 (1960).

[99] Wilson v. Dearborn, 174 S.W. 296 (Tex. Civ. App.—Dallas 1915).

[100] TEX. CONST. art. XVI, § 51.

[101] TEX. REV. CIV. STAT. ANN. art. 3833 (Supp. 1970), *amending* TEX. REV. CIV. STAT. ANN. art. 3833 (1966).

[102] Ch. 841, § 1, [1969] Tex. Laws 2518.

[103] TEX. CONST. art. XVII, § 1.

[104] Texas Water & Gas Co. v. Cleburne, 1 Tex. Civ. App. 580, 21 S.W. 393 (1892).

[105] Capitol Aggregates Inc. v. Walker, 448 S.W.2d 330 (Tex. Civ. App.—Austin 1970). The Texas attorney general has ruled that a non-resident serviceman's mobile home is not subject to ad valorem taxes when the trailer is situated on land owned by the serviceman but not intended to be permanently affixed. TEX. ATT'Y GEN. OP. No. WW-742 (1959). As to removable improvements, see TEX. ATT'Y GEN. OP. No. WW-691 (1959).

[106] 210 S.W.2d 255 (Tex. Civ. App.—Fort Worth 1948), *error ref. n.r.e.*

In *Gann* the structure was not attached to the realty and was placed there on a temporary basis only.

The other case dealing with the existence of a homestead arose in the aftermath of a divorce.[107] In the divorce decree the former husband was awarded a tract of rural land, while his former wife was awarded a $40,000 judgment in order to equalize the division of the property. After the divorce, the former husband remarried and filed a voluntary designation of homestead in the county in which the property was located. His first wife later perfected a lien upon the tract to secure her unsatisfied judgment. The former husband and his new wife contended on appeal that the homestead designation prevented foreclosure by the former wife. The family requirement was met by the former husband's second marriage. Furthermore, the couple built a dwelling on the property, moved in and lived there, and maintained no other residence. Even if actual occupancy began after the lien was perfected, the homestead character was fixed by the couple's prior acts evidencing an intention to make the property their home—followed by home construction and occupancy. The fact that the homestead was established with the express intention of putting property out of reach of the former wife added to, rather than detracted from, the former husband's argument. The trial court's determination that the property could be sold to satisfy the judgment of the former wife was erroneous.

In *Gross National Bank v. Merchant*[108] a creditor of the deceased husband took his claim to judgment and later sued the widow and her vendees to foreclose a lien upon the value of the property in excess of the homestead exemption. There was evidence to support a finding that the value of the property was well in excess of the exemption. But since the estate was insolvent and the widow's and family's allowance, funeral expenses, and management expenses had exhausted the excess, the plaintiff's judgment had been extinguished by payment of claims of higher priority.[109] The creditor also failed because it tacitly elected the remedy of having the claim treated as a preferred debt and lien against the particular property securing the indebtedness.[110] The debt upon which the creditor brought the suit was secured by a chattel mortgage on the decedent's automobile. Since the car had been sold and the proceeds accepted by the creditor, any further claim was barred.

A case before the Fort Worth court of civil appeals involved accidental encroachment on a homestead against which the builder attempted to foreclose his mechanic's lien.[111] The contractor had built a building under a contract which called for the structure to be placed upon a lot adjacent to the owner's homestead property. The contractor made a mistake and part of the building extended onto a part of the exempt property. The

[107] Spence v. Spence, 455 S.W.2d 365 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*
[108] 459 S.W.2d 483 (Tex. Civ. App.—San Antonio 1970).
[109] *See* TEX. PROB. CODE ANN. §§ 279, 320, 322 (1956).
[110] *See id.* §§ 306(a)(2), (c) (1970).
[111] Doyle v. Second Master-Bilt Homes, Inc., 453 S.W.2d 226 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

court of civil appeals held that the lien included the intended lot and the improvements on it. Further, it extended to the improvements mistakenly placed on the homestead lot—as distinct from the homestead property itself. The court intimated that the owner might have had some offset if he had complained of the builder's negligence in placing a portion of the structure on the wrong lot. Here no such complaint was presented, and no evidence was introduced to show the cost of removing the improvements which extended onto the homestead property.

Family Taxes. Two Ninth Circuit cases[112] held that under Washington and Arizona law a spouse's undivided interest in the community could be reached to recover antenuptial taxes of that spouse. In the Washington case[113] the court said that although the community might not be reached by an ordinary antenuptial creditor of the taxpayer, the United States might reach his interest under section 6321 of the Internal Revenue Code,[114] which provides for the fixing of a lien on "all property and rights to property . . . belonging to such person."[115] It was admitted that if the state's rule shielding the community from creditors' claims was a mere *exemption* from liability, it could not prevail against the United States. But the taxpayer contended that the Washington rule was one of *property*, creating "a limitation on the extent and quality of [the husband's] ownership rights under state law."[116] The court brushed this argument aside with the observation that the taxpayer simply has a "property" interest in the community estate under Washington law—as that term was used in the federal statute. Further, and as a separate proposition, the court held that the trial court in its discretion might allow the federal government to "foreclose its lien during the life of the community even though, under state law, such foreclosure was not generally allowed a state creditor."[117]

In the Arizona case[118] the dispute was between the federal taxing authorities and other creditors of the bankrupt taxpayer. The community property law of Arizona was not materially different from that of Washington, and the Ninth Circuit reached the same result. It seems likely that an effort may be made sometime in the future to apply the principles enunciated in these cases in a Texas tax case. If, for example, there is a prenuptial tax liability of the wife and no community property subject to her management, control, and disposition, the Internal Revenue Service might seek to reach her interest in community property subject to her husband's management, control, and disposition. A substantial bulwark

[112] United States v. Overman, 424 F.2d 1142 (9th Cir. 1970); Ackerman v. United States, 424 F.2d 1148 (9th Cir. 1970).

[113] 424 F.2d 1142 (9th Cir. 1970).

[114] INT. REV. CODE of 1954, § 6321.

[115] *Id.*

[116] 424 F.2d at 1145.

[117] 424 F.2d at 1149-50. INT. REV. CODE of 1954, § 7403 is the lien-enforcement section. As to the ordering of a forced sale, the court cites as *contra*, Folsom v. United States, 306 F.2d 361, 367 (5th Cir. 1962), wherein the court refused to go beyond ordinary state remedies in favor of the taxing authorities.

[118] 424 F.2d at 1148.

against such a conclusion is constituted by the well-known line of Texas tax cases[119] in which the Internal Revenue Service has been unable to recover from the property of or subject to the management of one spouse for the tax liability of the other spouse in comparable situations.[120] But two Texas cases decided under pre-1968 law may be offered as counterweight.[121] Both cases involved the propriety of granting injunctive relief sought by the husband to enjoin a levy of execution by a creditor of the wife on community realty subject to the husband's management. In both cases the husband did not prevail. Since the latter case rests squarely on the former, it will suffice to dispose of it. The principal thrust of *Durian v. Curl*[122] is *not* with respect to community liability for the wife's debts, but rather the necessary proof that should be offered to entitle a petitioner to injunctive relief. The husband failed to offer sufficient evidence to support his prayer and, hence, the community estate incurred liability. Further, legislation subsequently enacted clearly excludes all recovery by creditors in this instance.[123] It should also be pointed out that *Durian* and the case following it dealt with debts incurred *during* marriage.

Two cases, *Estate of Wildenthal*[124] and *Parson v. United States*,[125] considered whether certain insurance proceeds were subject to estate tax. In *Wildenthal*, applying the inception-of-title doctrine, the court found that a life insurance policy taken out by the decedent before marriage was his separate property. Since community funds were used to pay the premiums during marriage, the community was entitled to reimbursement in that amount. Hence, for estate tax purposes the proceeds of the policy, less one-half of the premiums paid with community funds, were taxable. By way of contrast, in *Parson* a tracing test was used to reach an equitable result in a fact situation not wholly rooted in Texas. With the wife named as beneficiary, fourteen life insurance policies were purchased while the decedent was an Arkansas resident, and premiums were paid from the separate funds of the decedent and his wife until 1945. Thereafter, the spouses moved to Texas and made premium payments from their community estate. One-half of the proceeds was included in the estate tax return. The Internal Revenue Service contended that all of the proceeds should have been included in determining the gross estate. To support

[119] See McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 144 nn.85, 86 (1968), and accompanying text.

[120] Lawrence v. United States, 299 F. Supp. 187 (N.D. Tex. 1969), is a sequel to an identically styled case of 1967, 265 F. Supp. 590 (N.D. Tex. 1967). In the more recent case the court upheld the assessment of a penalty against the wife, individually and in her capacity as executrix of her husband's estate, for failure to pay excise taxes on a private club operated by her husband prior to his death. The control of the club passed to her on her husband's death, and she could not delegate responsibility for the club's fiscal affairs to the attorney or accountant. It was held that absent a showing of some reasonable cause for her lack of awareness, she was liable for the failure to pay F.I.C.A. and withholding taxes for the club.

[121] Durian v. Curl, 155 Tex. 377, 286 S.W.2d 929 (1956); Flores v. Bailey, 341 S.W.2d 473 (Tex. Civ. App.—El Paso 1960), *error ref. n.r.e.*

[122] 155 Tex. 377, 286 S.W.2d 929 (1956).

[123] TEX. FAM. CODE ANN. tit. 1, § 5.61(b)(1) (1970).

[124] 29 CCH Tax Ct. Mem. 519 (1970).

[125] 308 F. Supp. 1159 (E.D. Tex. 1970).

this contention it was asserted that the Texas courts have held that property acquired in another state before the owner's removal to Texas retains its original character.[126] Under the inception-of-title doctrine, a policy which was separate as of the date of acquisition remains separate, despite the fact that community property is used to pay later premiums. The court noted that such a rule is justifiably open to criticism because it tends to produce highly inequitable results.[127] The court adopted the tracing principle to achieve an equitable disposition of the case. The estate was taxed for only that proportion of the proceeds which were traceable to the premiums paid from the decedent's separate estate—plus one-half of the proceeds traceable to the premiums paid from community funds. In the light of *Busby v. Busby*,[128] however, the approach of *Wildenthal* must, as a matter of law, be preferred to that of *Parson*—despite the inequities.

Also before the court in *Parson* was the issue of a transfer in contemplation of death. The decedent assigned an accidental death policy on his life to his wife over three years prior to his drowning. The Internal Revenue Service contended that the assignment was ineffective, since the community may possess all of the incidents of ownership despite the fact that legal title is taken in the name of but one of the spouses. The argument is unsound, as it fails to appreciate the distinction between a transfer to a spouse by a third person and a transfer made by one spouse to the other. Here the decedent had simply made a gift to his wife, and since the transfer was made more than three years prior to his death, it could not be presumed to be a gift in contemplation of death. It followed that the proceeds under the policy were not includable in the insured's estate. Alternatively, the federal government contended that since the policy in this case required annual premium payments to keep the policy in effect, the payment made in the final year worked a transfer in contemplation of death. However, the court reasoned if the earlier assignment were effective, the last payment could not be considered an effective transfer of the policy rights.

Another case also involved estate taxes on insurance proceeds.[129] Two daughters of the decedent took out life insurance policies on the decedent's life. For eight years the premiums were paid by the decedent and his spouse out of their community funds. The Internal Revenue Service contended that the transaction fell within the code provision governing transfers of property interests in contemplation of death.[130] If that provision were controlling, the proceeds of the two policies would be subject to estate taxes. The federal district court agreed with the Government's construction of the code provision.[131] On appeal, the executors and trustees

[126] McClain v. Holder, 279 S.W.2d 105 (Tex. Civ. App.—Galveston 1955), *error ref. n.r.e.*

[127] *See* Note, *Community Property—Life Insurance—Application of the Inception of Title Doctrine*, 18 Sw. L.J. 521 (1964).

[128] *See* note 42 *supra*.

[129] First Nat'l Bank v. United States, 423 F.2d 1286 (5th Cir. 1970), *noted in* 49 TEX. L. REV. 365 (1971).

[130] INT. REV. CODE of 1954, § 2035.

[131] First Nat'l Bank v. United States, 69-1 U.S. Tax Cas. ¶ 12,574 (W.D. Tex. 1968).

of the decedent's estate contended that since the decedent had made no *transfer*, the transaction could not possibly fall within the purview of the Code. The Fifth Circuit agreed. As a matter of law, the premium payments "constituted donations includable at their dollar value."[132] No rights under the policies were transferred to the decedent's daughters merely because their father gratuitously made the payments. It should be noted that although the issue in this case has been discussed in law reviews,[133] this decision represents the first discussion of the problem by a federal appellate court.[134]

Bel v. United States,[135] a Louisiana case, raised a similar issue—*i.e.*, did an accident policy insuring the life of the decedent, but held in the names of his children, constitute a gift made in contemplation of death? The court noted that since the policy was transferred to the decedent's children within three years of his drowning, the transaction was rebutably presumed to have been made in contemplation of death. This had the effect of placing the burden of proof on the executors, who contended that the transfer was not the result of the decedent's "death motives."[136] The executors in *Bel* were unable to defeat the statutory presumption. But the court went on to say that since the decedent's children were the sole owners of the policy, only the premium payments made by the decedent were includable in the estate—and not the insurance proceeds.[137] This result is contrary in approach to the trial court's holding in the Texas case last discussed.[138]

The Ninth Circuit also recently considered the tax consequences of an exercise of the widow's equitable right of election. In *Gist v. United*

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[132] 423 F.2d at 1288.

[133] *E.g.*, Simmons, *Contemplation of Death and the New Premium Payment Test*, 53 A.B.A.J. 475 (1967); 82 HARV. L. REV. 1765 (1969); 67 MICH. L. REV. 812 (1969); 64 NW. U.L. REV. 116 (1969); 43 TUL. L. REV. 882 (1969).

[134] *See also* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 SW. L.J. 44, 50-51 (1969).

[135] 310 F. Supp. 1189 (W.D. La. 1970). The executors of the decedent's estate also filed a claim for a refund of estate taxes paid on stocks and bonds owned by the decedent's daughter. The Government contended that under state law the parents of a minor child have the enjoyment of the estate of their children until those children reach majority or are emancipated. LA. CIV. CODE ANN. art. 223 (West 1952). The executors countered with the assertion that the local statutes also provided that an *inter vivos* gift from a parent would allow no such right of enjoyment unless the gift were bestowed with an express reservation that the right of enjoyment is retained by the donor-parent. LA. CIV. CODE ANN. art. 226 (West 1952). The court held that since the gifts were irrevocable and unconditional, they could not properly be included in the decedent's estate.

[136] But all accidental death cases before the courts did not stem from drownings. In Great Am. Reserve Ins. Co. v. Sumner, 464 S.W.2d 212 (Tex. Civ. App.—Tyler 1971), the insurance company resisted liability on an accidental death policy because the cause of death was not accidental, but could be reasonably anticipated as the natural and reasonable consequence of the decedent's acts. The decedent was shot while taken in adultery with the assailant's wife. Under TEX. PEN. CODE ANN. art. 1220 (1961) this was justifiable homicide; hence, the defendant argued that the decedent should have anticipated his fate. The court was unimpressed. "Even though we recognize that the act of adultery is morally reprehensible, yet we do not believe death is the usual or expected result of it. In other words, participation in an adulterous affair does not naturally lead to a violent and fatal ending." 464 S.W.2d at 215-16.

[137] *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 SW. L.J. 44, 50 (1969).

[138] *See* note 31 *supra*. In that case the estate conceded that on proper pleadings the United States would have been entitled to include the amount of premiums paid by the estate for estate tax purposes.

States[139] the widow brought an action for a refund of income taxes. Her husband had disposed of all of the community estate under the terms of his will, but the instrument provided that such property be placed in trust and that the income was to be paid to his wife for life with a remainder to their descendants. The widow elected to take under the will, thus validating the disposition of the entire community estate. She then attempted to amortize the value of her life estate for income tax purposes.[140] The widow contended that under California law she had *purchased* her interest under the terms of the trust instrument by giving up her share of the community. The Commissioner argued that the widow's interest in the trust had been acquired via bequest, and was, therefore, within the code provision that prohibits amortization of bequests.[141] The appellate court affirmed the district court's decision, which allowed amortization of the cost of the life estate acquired in the husband's share of the community.[142] It was decided that her exchange of the remainder interest in her share of the community for a life estate in her husband's share constituted a purchase. The court cautioned, however, that similar but not identical situations might call for different tax treatment. The case opens some attractive estate planning possibilities.

II. CHILDREN

Adoption.[143] In *Heard v. Bauman*[144] the Texas supreme court held that a parent who arranged for others to provide care for his child had not failed to support the child—insofar as that might be a ground for adoption by another. Nor would a father's non-support of his children for over two years have been grounds for adoption when he had demonstrated a willingness to support the children, but the mother had kept their whereabouts from him.[145]

Two other cases[146] involved children left in the care of relatives, who proceeded to adopt them without giving notice to the mother. In one[147] the child had been living with her mother's sister since shortly after her birth in 1958. Alleging that the child had been voluntarily abandoned by her mother and, hence, that her consent was not required for adoption,[148] the sister filed a petition for adoption which was granted in 1965. Three years later the child's mother was granted a bill of review to set aside the adoption on the ground that she had not been notified and that the child was placed in her sister's custody with the express agreement

[139] 423 F.2d 1118 (9th Cir. 1970). *See also* Estate of Christ, 54 T.C. 493 (1970).
[140] INT. REV. CODE of 1954, § 167.
[141] *Id.* at § 273.
[142] 296 F. Supp. 526 (S.D. Cal. 1969).
[143] *See* Wilson, *Observations on Current Texas Adoption Laws and Practices*, 22 BAYLOR L. REV. 473 (1970).
[144] 443 S.W.2d 715 (Tex. 1969).
[145] Drieth v. Lightfoot, 446 S.W.2d 390 (Tex. Civ. App.—Waco 1969), *error ref. n.r.e.*
[146] Wood v. Cosme, 447 S.W.2d 746 (Tex. Civ. App.—Houston 1969); Colwell v. Blume, 456 S.W.2d 174 (Tex. Civ. App.—San Antonio 1970), *error ref. n.r.e.*
[147] Wood v. Cosme, 447 S.W.2d 746 (Tex. Civ. App.—Houston 1969).
[148] TEX. REV. CIV. STAT. ANN. art. 46a, § 6 (1969).

that the child would not be adopted. Judgment was for the mother on her bill of review. A month later the sister filed for adoption. The mother pleaded res judicata. The appellate court held that the suit was barred since issues were raised which, with diligence, might have been litigated in the prior cause.[149]

In the other case[150] the mother had filed suit for divorce. Several days later she signed a written consent to the adoption of her children by their grandparents. About ten weeks later the mother (by her attorney) advised the grandparents in writing that she desired custody of the children. (She also filed an amended divorce petition seeking custody and rescinding her "consent agreement.") At the divorce hearing custody was given to the father by agreement with the requirement that the children be kept at the home of his parents. Less than three weeks later the grandparents filed their petition to adopt the children and supported it with the mother's written consent as well as that of the father. Several months later the adoption was granted. The mother knew nothing of this until she came to visit the children six months later. She promptly filed a bill of review. The court held that the mother's letter inferentially revoked her written consent and set aside the adoption.

Another case[151] concerned the right to jury trial in adoption cases. The custody of the child had been awarded to her mother on divorce. After the child's mother died, the persons with whom the child had been living, both before and after the mother's death, petitioned for her adoption. The father was given notice, and he contested the petition. The trial court denied his request for trial by jury. Relying on *Hickman v. Smith*,[152] the appellate court concluded that the right to jury trial in Texas[153] exists only insofar as that right existed at common law or was provided for by statute when the Texas Constitution was adopted in 1876. Since adoption was unknown at common law, and since jury trial was not guaranteed by the adoption statutes extant in 1876, a jury trial in adoptions was held to be within the *discretion* of the trial judge.

Lutheran Social Services, Inc. v. Meyers[154] was a mandamus proceeding brought by a licensed adoption agency. An unwed mother had released her baby to the agency for adoption. Two months later the mother and both of her parents were killed in a common disaster. The brother of the baby's grandfather then filed a petition for adoption. He had also qualified as executor of the considerable estate of the baby's grandparents—to which the child was the presumptive heir, whether adopted by others or not. On the motion of the adoption-petitioner the district court ordered the agency to show cause why adoption of the child by others should not be enjoined. The district court decided that an order should issue

[149] With suitable pleading the sister should have proved facts on which she chose to rely for adoption at the hearing on the bill of review.
[150] Colwell v. Blume, 456 S.W.2d 174 (Tex. Civ. App.—San Antonio 1970), *error ref. n.r.e.*
[151] *In re* Pate, 449 S.W.2d 372 (Tex. Civ. App.—El Paso 1969).
[152] 238 S.W.2d 838 (Tex. Civ. App.—Austin 1951), *error ref.*
[153] TEX. CONST. art. I, § 15.
[154] 460 S.W.2d 887 (Tex. 1970).

to bring the adoptive parents before the court for a hearing. The agency's petition for the writ of mandamus to the supreme court sought to prevent the issuance of this order. Thus the question was whether issuance of the order was within the discretionary power of the district court. If it was, the relator-agency would bear the very heavy burden of showing that it was a clear abuse of discretion. The agency argued that it stood *in loco parentis* to the child on the basis of the parental release and, hence, that the issuance of the order was beyond the district court's discretionary powers. The majority of the supreme court disagreed, although its own opinion in *Catholic Charities v. Harper*[155] was cited in support of the agency's position. That authority, the court said, must be limited to the facts with which it was concerned—*i.e.*, a dispute between a licensed agency and a parent who wished to revoke her release (for reasons other than fraud or the like). The district court must remain the guardian of the best interests of the child. Nor had the court abused its discretion in determining that process should be directed to the prospective adoptive parents. The agency argued that the court's order would have the undesirable effect of exposing the child's background to the child and the adoptive parents. The court agreed, but pointed out that in the circumstances this was inevitable anyway. The district court's order, however, would not require the relator-agency to inform the petitioner of the child's whereabouts or of the identity of the prospective adoptive parents as they might appear by counsel at the hearing.[156]

In the light of the peculiar facts of the case, one can appreciate why the district judge might conclude that it would be in the best interest of the child to make the prospective adoptive parents aware of them before proceeding with the adoption. But obscured as it is in the niceties of procedure and the unusual natures of its facts, what light does *Lutheran Services* throw on the Texas law of adoption? There are no hints that the majority has had any second thoughts about the soundness of *Catholic Charities v. Harper* except to limit it to its facts, which are the only ones in which its holding is ever likely to have much impact. But the case does point up the need to abolish the right of the adopted child to inherit from its actual parents. Complete confidentiality of adoption proceedings will never be achieved until that rule is abrogated. The case also points up the need for the institution of an independent proceeding for termination of parental rights preliminary to an adoption proceeding. Then if it is necessary to raise any questions with respect to the validity of termination of parental rights, that proceeding can be attacked without in any way interfering with the adoption proceeding until the termination proceeding is set aside.

[155] 161 Tex. 21, 337 S.W.2d 111 (1960). This was a unanimous opinion. Of the judges then on the court Chief Justice Calvert and Justices Smith and Walker were among the majority in *Lutheran Services*. Justices Greenhill and Hamilton were among the dissenters.

[156] Four dissenting justices agreed that since potential harm to the child might follow, the district judge had abused his discretion. Three dissenters also took the position that since the petitioner could not file a petition for adoption (because he lacked parental consent and possession of the child), TEX. REV. CIV. STAT. ANN. art. 46a, §§ 1a(5), 1a(6) and 3 (1969), the district court's jurisdiction had not been properly invoked.

In *Dickerson v. Texas Employers' Insurance Association*[157] the Dallas court of civil appeals allowed an actual child of a deceased workman to recover workmen's compensation benefits—despite the fact that the child had been adopted by another at the time the benefits vested and contrary to *Patton v. Shamburger*[158] and *Zanella v. Superior Insurance Co.*[159] The court did not ignore these precedents but attempted to distinguish them on the ground that *all* the possible claimants in *Patton* and *Zanella* had been adopted by third persons. In *Dickerson*, on the other hand, there were two classes of claimants—*i.e.*, children adopted by others and the rest of the children of the decedent. The court concluded that to exclude the child who was adopted by a third person would amount to a denial of equal protection under the fourteenth amendment. This decision followed *Levy v. Louisiana*[160] which declared that the exclusion of illegitimates from recovery under the Louisiana wrongful death statute was unconstitutional. Under this reasoning is it constitutional for Texas to fail to afford a means of proving paternity[161] and the right of parental support for illegitimates?

Backing away from a further extension of *Levy* in *Labine v. Vincent*,[162] the Supreme Court of the United States has made the answer more difficult to prophesy. There an illegitimate, acknowledged as such by her father, attacked the constitutionality of the Louisiana statute which barred illegitimates from taking equally with legitimates in intestate succession. The statute so provided even though acknowledged illegitimates could take just ahead of the state in the absence of all other designated relations, and the illegitimate could take by will in the absence of legitimates. The father could also have legitimated the child by marriyng the mother, by formal instrument, or by adoption.

> In *Levy* the Court held that Louisiana could not consistently with the Equal Protection Clause bar an illegitimate child from recovering for the wrongful death of its mother when such recoveries by legitimate children were authorized. The cause of action alleged in *Levy* was in tort. It was undisputed that Louisiana has created a statutory tort and had provided for the survival of the deceased's cause of action so that a large class of persons injured by the tort could recover damages in compensation for their injury. Under those circumstances the Court held that the State could not totally exclude from the class potential plaintiff's illegitimate children who were unquestionably injured by the tort that took the mother's life. *Levy* did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring.[163]

[157] 451 S.W.2d 794 (Tex. Civ. App.—Dallas 1970).

[158] 431 S.W.2d 506 (Tex. 1968). *See also* Gentry v. Travelers Ins. Co., 459 S.W.2d 709 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

[159] 443 S.W.2d 95 (Tex. Civ. App.—Eastland 1969).

[160] 391 U.S. 68 (1968). The correlative right of a parent to recover for the wrongful death of an illegitimate was dealt with in Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

[161] For one of those rare instances of disproof of paternity, see the inconclusive case of Garcia v. Garcia, 444 S.W.2d 207 (Tex. Civ. App.—Corpus Christi 1969).

[162] 91 S. Ct. 1017 (1971). The Court divided five to four.

[163] *Id.* at 1019 (notes omitted). *See also* Estate of Pakarinen, 178 N.W.2d 714 (Minn. 1970), which held that a statutory provision requiring an illegitimate child to produce an attested written declaration of paternity made by the decedent in order to inherit from an actual father does not deny equal protection under *Levy* and *Glona*.

Parental Responsibility. Real confusion seems to exist in the trial and appellate courts with respect to the rules governing change of custody. Time and again the question has come before the supreme court,[164] and year in and year out a variety of tests are applied in the lower courts. A court (often a foreign court in these situations) makes a determination of custody that will be in the best interests of the child on the basis of all the facts before it. Somehow, as a result of a visit with a parent domiciled in Texas or some other circumstance, the Texas parent brings a proceeding in Texas for a redetermination of custody. The Texas parent must show a material change of condition since custody was last determined to avoid the application of res judicata. But what kind of change? Apart from a material change in the child's condition,[165] what changes with respect to the contestants for custody will suffice? What about an improvement in the condition of the environment of the non-custodian? This may indeed affect the current best interests of the child. Or must there be some change of conditions with respect to the custodian, quite apart from those of the non-custodian?[166] Until the supreme court enunciates a clear rule, diverse approaches will continue to be followed.[167]

Venue in custody matters properly exists in the county of the defendant's residence.[168] In *Boney v. Boney*[169] the supreme court enunciated the same principle for change of visitation suits, although the "prerequisite proof of change of circumstances is quite different as between custody and visitation."[170] Continuing exclusive jurisdiction of the divorce court in these matters is, contrary to previous assumptions, no longer applicable.[171]

Though the supreme court has yet to rule on the constitutionality of article 4639a[172] (as to whether the jury verdict as to custody is binding

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[164] The most recent in the series is Meucci v. Meucci, 457 S.W.2d 48 (Tex. 1970). *See also* Knowles v. Grimes, 437 S.W.2d 816 (Tex. 1969); Bukovich v. Bukovich, 399 S.W.2d 528 (Tex. 1966); Mumma v. Aguirre, 364 S.W.2d 220 (Tex. 1963); Ogletree v. Crates, 363 S.W.2d 431 (Tex. 1963); Short v. Short, 163 Tex. 287, 354 S.W.2d 933 (1962).

[165] As in Carver v. Carver, 457 S.W.2d 591 (Tex. Civ. App.—Waco 1970).

[166] This is the view succinctly expressed by Justice Smith in his concurring opinion in Bukovich v. Bukovich, 399 S.W.2d 528, 530 (Tex. 1966), and inferentially bolstered by Meucci v. Meucci, 457 S.W.2d 48 (Tex. 1970); Knowles v. Grimes, 437 S.W.2d 816 (Tex. 1969); and Short v. Short, 163 Tex. 287, 354 S.W.2d 933 (1962). Other opinions are not so clear.

[167] Meucci v. Meucci, 457 S.W.2d 48 (Tex. 1970) (an improvement in the condition of noncustodian and no change in the condition of the custodian; hence, no change in custody); Love v. Love, 461 S.W.2d 437 (Tex. Civ. App.—Waco 1971), *error ref. n.r.e.* (no material change in condition of the custodian; hence, no change of custody); Wilson v. Mathis, 459 S.W.2d 952 (Tex. Civ. App.—Waco 1970) (a material change in the condition of the custodian; hence, change of custody); Green v. Davis, 451 S.W.2d 579 (Tex. Civ. App.—Fort Worth 1970) (a deterioration in the condition of the custodian and an improvement in the condition of the noncustodian; hence, change of custody). The approach of these cases is consistent, but in the first instance supreme court action was required to make it conform to the pattern. *See* Comment, *Article 4639a—Custody, Support and Visitation Re: Suits to Have These Rights Changed Modified or Enforced*, 22 BAYLOR L. REV. 497 (1970).

[168] Branham v. Anderson, 450 S.W.2d 370 (Tex. Civ. App.—San Antonio 1970), *error dismissed*; Chambers v. Wilson, 448 S.W.2d 861 (Tex. Civ. App.—Houston 1969). *See also* Smith, *Family Law, Annual Survey of Texas Law*, 22 Sw. L.J. 115, 119 (1968).

[169] 458 S.W.2d 907 (Tex. 1970), *relying on* Smith, *supra* note 168.

[170] 458 S.W.2d at 911.

[171] *See* Smith, *supra* note 168, at 119 n.31, and accompanying text.

[172] TEX. REV. CIV. STAT. ANN. art. 4639a (Supp. 1970).

on the trial court),[173] if more than one child is concerned, the best interests of each child must be submitted to the jury separately.[174]

In *Bohn v. Bohn*[175] the trial court's power to provide for the support of children *over a period of years* under article 4639a[176] was also in dispute. In the divorce decree the court set up a trust for the spouses' two children out of the husband's separate property to finance their higher education "until they reach the age of twenty-eight years."[177] The court concluded that "[s]ince the obligation to support and educate children continues only during the minority of the children, the trial court exceeded its authority in providing that the trust should continue after the youngest child attained his majority, or the daughter married."[178] Thus a court may go beyond the age of eighteen specified in article 4639a for requiring periodic payments for child support by subjecting property to a trust for such payments over the longer period defined.

A pair of cases[179] from different judicial districts raised the question of the power of courts to change the amount of support when it was initially based on a contract between the spouses. In each instance the courts concluded that whether or not the original order was based on an agreement of the parties, the divorce court had the power to alter support upon a showing of good cause.[180] But good cause can scarcely be based upon an unwillingness to work.[181]

Several habeas corpus cases were also before the courts, many of which related to the imposition of contempt for violation of custody and support orders.[182] One case,[183] which arose as a sequel to *Knowles v. Grimes*,[184] was of particular interest. After the supreme court had made a final determina-

[173] The supreme court reserved this question in a per curiam opinion, Cook v. Wofford, 458 S.W.2d 653 (Tex. 1970).

[174] Griffith v. Griffith, 462 S.W.2d 328 (Tex. Civ. App.—Tyler 1970).

[175] 455 S.W.2d 401 (Tex. Civ. App.—Houston 1970), *error dismissed*. *See* note 38 *supra*, and accompanying text.

[176] TEX. REV. CIV. STAT. ANN. art. 4639a (Supp. 1969).

[177] 455 S.W.2d at 413.

[178] *Id.* at 415, citing *Ex parte* Williams, 420 S.W.2d 135 (Tex. 1967).

[179] Davi v. Davi, 456 S.W.2d 238 (Tex. Civ. App.—Texarkana 1970), *error dismissed*; Duke v. Duke, 448 S.W.2d 200 (Tex. Civ. App.—Amarillo 1969). In *Davi* the court also held that it was immaterial that the defendant-former husband was no longer a domiciliary of Texas. The original jurisdiction of the court was continuing. There was no question of adequacy of notice.

[180] In *Davi* the Texarkana court of civil appeals held that the prior order was based on a finding of the divorce court rather than the agreement of the parties, but even if it had been based on the property settlement, the court's power to alter the support order is unquestionable. In *Duke* the prior order was based on the spouses' agreement. In Faulk v. Castaneda, 450 S.W.2d 438 (Tex. Civ. App.—Austin 1970), a similar result was reached when the former spouses purported to bind themselves to future arbitration of child support matters after entry of the original decree, and the agreement was made a part of a subsequent court order.

[181] Curtis v. Curtis, 448 S.W.2d 242 (Tex. Civ. App.—Austin 1969). In *Curtis* the father quit work in order to enjoy a more leisurely life with a new wife, who apparently was able to provide for him while he pursued a life of travel.

[182] These cases dealt with a wide variety of issues—*e.g.*, procedural matters, notice, and poverty of relator. *See e.g.*, *Ex parte* Peterson, 444 S.W.2d 286 (Tex. 1969); *Ex parte* Straughan, 459 S.W.2d 653 (Tex. Civ. App.—Houston 1970); *Ex parte* Arledge, 459 S.W.2d 941 (Tex. Civ. App.—Texarkana 1970); *Ex parte* Howe, 457 S.W.2d 642 (Tex. Civ. App.—Houston 1970); *Ex parte* Craddock, 452 S.W.2d 954 (Tex. Civ. App.—Houston 1970); *Ex parte* Davis, 450 S.W.2d 97 (Tex. Civ. App.—Houston 1970). *See also* Chadick, *Original Habeas Corpus Proceedings in the Court of Civil Appeals*, 33 TEX. B.J. 183 (1970).

[183] *Ex parte* Grimes, 443 S.W.2d 250 (Tex. 1969).

[184] 437 S.W.2d 816 (Tex. 1969).

tion of the custody of the child, the rightful custodians sought possession of the child against the claimants via an application for habeas corpus. Writs of habeas corpus were issued against both claimants, who failed to produce the child. The district court thereupon ordered the claimants to jail until they would obey the writs. The claimants then sought a writ of habeas corpus from the supreme court, asserting that they were being punished for constructive contempt. The supreme court held, however, that the district court was merely enforcing the provisions of the Texas Code of Criminal Procedure,[185] which requires that persons on whom writs of habeas corpus are served shall immediately obey the writs. The court, therefore, was merely seeking to enforce its order—a matter of civil, rather than criminal, contempt. Although the inability to perform the action commanded by the writ renders commitment thereunder void, the reviewing court must presume that the committing court found that the relator had the ability to perform.

Non-Parental Responsibility. The inability of parents to sustain their duty to provide support for their minor children[186] shifts this responsibility to the state.[187] A number of recent decisions examined legislative plans which undertake to assume that responsibility. Most of the cases dealt with local laws requesting the operation of the Aid to Families with Dependent Children Program.[188] Most of the AFDC cases, in turn, dealt with the constitutionality of attempts by state legislatures to regulate their local plans.[189]

Dandridge v. Williams,[190] for example, involved an attack upon Maryland's attempt to place a limitation upon the amount which would be paid to a family member under AFDC. The local welfare department fixed a ceiling upon the benefits available to any particular family, regardless of the size of the family or its relative need. It was contended by the recipients of this maximum amount that the regulation was unconstitutional. The United States Supreme Court sustained the validity of the regulation by holding that as long as there was some reasonable basis for the classification and as long as the regulation did not result in invidious discrimination, the law was permissible. In his dissenting opinion Justice Marshall contended that the Court had correctly decided in *Shapiro v. Thompson*[191] that one's rights under welfare statutes which provided for basic human necessities were fundamental in nature. Where funda-

[185] TEX. CODE CRIM. PROC. ANN. art. 11.29 (1966).

[186] *See* TEX. FAM. CODE ANN. tit. 1, § 4.02 (1970).

[187] One writer has asserted that apart from the imposition of a responsibility to support, a constitutional right to support may be inferred. Bendick, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407, 434-41 (1966).

[188] 42 U.S.C. §§ 601-10 (Supp. V, 1969). The program is regulated by local law but is supported by federal grants-in-aid, and the local plans must conform to federal guidelines.

[189] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (right to evidentiary hearing before benefits are discontinued); Rosado v. Wyman, 397 U.S. 397 (1970) (right to evaluation of needs in accordance with changing economic conditions); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to benefits in spite of noncompliance with residence requirement).

[190] 397 U.S. 471 (1970).

[191] 394 U.S. 618 (1969).

mental rights are concerned, the "compelling interest" test is applicable. It therefore followed from these premises that the Maryland regulation was violative of equal protection in the absence of a showing that the classification was compelling. The discrimination between children born into a family of one size and children born into a larger family was, according to Justice Marshall, reminiscent of Louisiana's former distinction between legitimate and illegitimate children.[192] It should be noted that a three-judge panel recently reached a conclusion which might be construed to be contrary to *Dandridge*. In *Kaiser v. Montgomery*[193] the California welfare statute which imposed a flat limitation on AFDC payments to families of a given size was held unconstitutional as violative of equal protection.[194]

In 1968 the Supreme Court held unconstitutional an Alabama regulation which denied AFDC payments to the children of a mother who lived in or outside of her home with an "able-bodied man."[195] The crux of Chief Justice Warren's opinion was that there was no reason to jeopardize a child's right to welfare benefits because the child's mother chose to cohabit with a man who owed neither mother nor child any duty of support. In 1970 the Court made what was only implicit in the 1968 decision an explicit ruling of constitutional law. In *Lewis v. Martin*[196] a California law which presumed that "an adult male person assuming the role of a spouse"[197] was supporting children otherwise entitled to AFDC support was held unconstitutional. The law contravened a Department of Health, Education and Welfare regulation[198] which the Court interpreted to mean that unless such an "adult male" is required to support certain children, no such presumption can be prescribed. If there is no duty of support, a state welfare agency may not consider a child's resources to include the income of a non-adopting stepfather, nor may the state presume that the income of a man assuming the role of a spouse is being used to provide support in the absence of proof of contribution.[199]

The problem of the non-adoptive stepparent was considered a few months later by a Dallas federal district court. In *Ojeda v. Hackney*[200] a group of Texas families instituted a class action against the Texas Department of Public Welfare. The plaintiffs asserted that their AFDC payments were wrongfully withheld and that withholding of payments was a violation of their fourteenth amendment rights. They further asserted that they were entitled to redress under the old civil rights act.[201] The benefits had been withheld because the state interpreted Texas law to

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[192] Levy v. Louisiana, 391 U.S. 68 (1968).

[193] 319 F. Supp. 329 (N.D. Cal. 1970).

[194] *But cf.* Wyman v. Rothstein, 397 U.S. 903 (1970). *See also* Robinson v. Hackney, 307 F. Supp. 1249 (S.D. Tex. 1969).

[195] King v. Smith, 392 U.S. 309 (1968).

[196] 397 U.S. 902 (1970).

[197] CAL. WELF. & INST'NS CODE § 11351 (West 1966).

[198] 45 C.F.R. § 203.1 (1968).

[199] For the stepfather's right of reimbursement against the father, see 22 BAYLOR L. REV. 580 (1970).

[200] 319 F. Supp. 149 (N.D. Tex. 1970).

[201] 42 U.S.C. § 1983 (1964).

require a non-adoptive stepfather to support his wife's children. In a memorandum opinion, the court relied on *King v. Smith*[202] and *Lewis* in sustaining the plaintiff's motion for summary judgment. The defendant misinterpreted Texas law in concluding that a non-adoptive stepfather owed an enforceable duty of support to his wife's minor children. The defendant was accordingly enjoined from any further denial of AFDC payments to the plaintiffs on this ground.

A very different type of civil right was before a federal court in Texas in the form of a class action brought by a high school student to enjoin the enforcement of a portion of the school dress code which related to the length of hair.[203] The federal district court for the western district of Texas held that the evidence before it failed to establish that the length of a male student's hair was reasonably related to the educational process. Instead, the evidence established that the classification of male high school students on the basis of length of hair was unreasonable and violative of the right of equal protection. The school's assertion that the doctrine of *in loco parentis* justified its regulation was met by the fact that in this instance the parents sided with the child.

[202] 392 U.S. 309 (1968).
[203] Karr v. Schmidt, 320 F. Supp. 728 (W.D. Tex. 1970).