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January 1974

## Family Law

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### Recommended Citation

Joseph W. McKnight, *Family Law*, 28 Sw L.J. 66 (1974)  
<https://scholar.smu.edu/smulr/vol28/iss1/4>

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# FAMILY LAW

by

Joseph W. McKnight\*

THE most significant event in the development of Texas family law during the past year was the legislative completion of the Family Code. Title 1 (Husband and Wife), enacted in 1969 and slightly amended in 1971, was further amended in minor particulars. Title 2 (Parent and Child) constitutes a major revision of existing statutory law and contains many new provisions, including an effective means of termination of the parent-child relationship and significant innovations in adjective law. The amendments to title 1 became effective January 1, 1974, as did the provisions of title 2 with the proviso that proceedings to modify orders affecting the parent-child relationship entered prior to that time will be treated as new suits.<sup>1</sup> Title 3 (Juvenile Delinquency), dealing with the unruly child, contains a number of significant innovations in that regard. It became effective September 1, 1973. Since these statutory provisions will be dealt with in detail elsewhere,<sup>2</sup> only passing reference will be made to particular provisions here. As though the profession, bench and bar alike, was preoccupied with completion of the Family Code, there has been relatively little significant case law during the period under review.

## I. SPOUSES

### A. Status

The year was not an eventful one for judicial developments with respect to marital status, at least insofar as embellishment of the established rules of marriage was concerned.<sup>3</sup> The most striking cases relating to the marital union were those which dealt with its inception or disruption, and many were marked with overtones of crime. The Dallas court of civil appeals held that the adoption of the amendment to the Texas Constitution providing that equality under the law shall not be denied or abridged because of sex<sup>4</sup> does not in any way affect the action for breach of promise of marriage, since the action is available to males and females equally.<sup>5</sup> In *Felsenthal v. Mc-*

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1. See Act of June 15, 1973, ch. 543, § 4(b), [1973] Tex. Laws 1459.

2. See 5 TEX. TECH L. REV. NO. 2 (1974), an entire issue devoted to the Texas Family Code, including a section-by-section commentary on all three titles.

3. To be sure, there were the usual factual disputes with respect to evidence of informal marriages, but nothing of any consequence to note. See *Gary v. Gary*, 490 S.W.2d 929 (Tex. Civ. App.—Tyler 1973), *error ref. n.r.e.*; *Rey v. Rey*, 487 S.W.2d 245 (Tex. Civ. App.—El Paso 1972); *Malone v. Treadville*, 487 S.W.2d 210 (Tex. Civ. App.—Houston [1st Dist.] 1972).

4. TEX. CONST. art. I, § 3a; see Comment, *Is the Texas Equal Rights Amendment the Answer?*, 15 So. TEX. L.J. 111 (1974).

5. *Scanlon v. Crim*, 500 S.W.2d 554 (Tex. Civ. App.—Dallas 1973), *error ref.*

*Millan*,<sup>6</sup> a case of first impression, the Supreme Court of Texas declared by way of dictum in a five-to-four decision that the tort of criminal conversation is a part of the common law of Texas which should be extended to married women as a matter of equal protection. The court also pointed out that the tort of criminal conversation not only supplies civil recovery for adultery but also for rape.<sup>7</sup> Though the question of the wife's right to sue for loss of consortium has never been before our supreme court, the cause of action was precluded prior to the enactment of section 3a by a court of civil appeals.<sup>8</sup> Future development is indicated by *Felsenthal* and by a Pennsylvania decision recognizing extension of the right to married women as the result of Pennsylvania's enactment of a constitutional amendment similar to that adopted in Texas in 1972.<sup>9</sup>

In *Coulter v. Melady*<sup>10</sup> relatives of a deceased woman sought to annul her alleged marriage of less than three months on the ground of a lack of consent (or failure of a meeting of the minds in formulating a marriage contract) indicated by her standing mute at a marriage ceremony entered into after the usual medical examination and procurement of a license to marry. It seems to have been the plaintiffs' contention that the marriage was in its nature void, though not so defined by statute, and, hence, subject to being declared void after the death of one of the purported spouses.<sup>11</sup> The Texarkana court of civil appeals nevertheless treated the marriage as merely voidable under the circumstances and subject to the provisions of section 2.47 of the Family Code that preclude dissolution of a voidable marriage after death of one of the spouses. The court found consent to marry as a matter of law in the knowing compliance of the alleged wife in the medical examination process, procurement of the marriage license, and participation in the marriage ceremony itself. The court was at pains to point out that

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*n.r.e.* For affirmative impact of § 3a with respect to child custody, see *Perkins v. Freeman*, 501 S.W.2d 424 (Tex. Civ. App.—Beaumont 1973), *error granted*.

6. 493 S.W.2d 729 (Tex. 1973).

7. It has been suggested that the tort of criminal conversation should be abolished by statute. If it is, the remedy for rape should be preserved.

Civil recovery for conduct allegedly constituting the crime of barratry was sought by a former wife against her former husband in *Payne v. Laughlin*, 486 S.W.2d 192 (Tex. Civ. App.—Dallas 1972). The former wife claimed that her former husband had stirred up a suit against her by a married woman for alienation of the woman's husband's affection. The former wife's pleadings and proof, however, fell short of satisfying the trial or appellate courts of the actionability of her cause.

Two workmen's compensation cases arose out of criminal violence causing death to an employee. In *Liberty Mut. Ins. Co. v. Upton*, 492 S.W.2d 623 (Tex. Civ. App.—Fort Worth 1973), the employee was killed by her former husband at her place of employment. The claim on behalf of the decedent's children was rejected, *inter alia*, because the victim's death was the result of personal relations between her and her assailant and did not originate in the work of the employer. In *Commercial Standard Ins. Co. v. Marin*, 488 S.W.2d 861 (Tex. Civ. App.—San Antonio 1972), *error ref. n.r.e.*, however, the victim was raped and murdered when opening her employer's business. The court held that her death was the result of an injury sustained in the course of employment. There was no hint of any prior relationship between the employee and her murderer.

8. *Garrett v. Reno Oil Co.*, 271 S.W.2d 764 (Tex. Civ. App.—Fort Worth 1954), *error ref. n.r.e.*

9. *Hopkins v. Blanco*, 224 Pa. Super. 116, 302 A.2d 855 (1973).

10. 489 S.W.2d 156 (Tex. Civ. App.—Texarkana 1972), *error ref. n.r.e.*

11. TEX. FAM. CODE ANN. § 2.47 (Supp. 1973).

though the Family Code does not list want of consent as rendering a marriage void or voidable, "free consent and agreement of the parties is essential to a valid ceremonial marriage."<sup>12</sup> It is therefore suggested that some circumstances might be imagined by which a marriage may be void or voidable for reasons other than those set out in the Code.

A means of attack on a subsequent marriage, not specifically alluded to by the Code, is the suit to set aside a prior divorce as invalid. In *Miller v. Miller*<sup>13</sup> the first wife of a decedent brought suit through a next friend in the nature of a bill of review against the decedent's second wife as administratrix of his estate. The first wife asserted that she had been mentally incompetent when her husband sued for divorce, that she had not been served with process, and that she did not have a guardian *ad litem* appointed for her.<sup>14</sup> The second wife sought to intervene in her individual capacity as his widow, and her right to do so was sustained as that of an indispensable party to the suit to set aside the divorce.

The long-awaited recognition of an enforceable right of spouse-support as an incident of Texas marriage came by way of a reason given for rejecting a three-judge court to consider the constitutionality of the Texas county-residence requirement for divorce.<sup>15</sup> Prior to the enactment of Family Code section 4.02, no right of spouse-support existed in Texas unless ordered by a court pending divorce, or as might have been prompted by criminal sanction or by pledge of the non-supporting spouse's credit for supplying necessities. Section 4.02<sup>16</sup> states that each spouse has the duty to support the other, though there is a different standard imposed with respect to each. The section is so drafted that it is not clear whether its second sentence provides an independent cause of action for spouse-support or is merely repetitive of earlier law with respect to the duty to compensate third persons who provide necessities to a spouse.<sup>17</sup> Judge Mahon's reasoning is the first judicial authority for a literal reading of the second sentence in favor of the first alternative.<sup>18</sup>

Texas conflict of laws rules regard a suit for divorce as quasi-in-rem, and a Texas domiciliary may proceed against a spouse of foreign nationality and domicile.<sup>19</sup> In *Dosamantes v. Dosamantes*<sup>20</sup> the husband, a Mexican citizen

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12. 489 S.W.2d at 158.

13. 487 S.W.2d 382 (Tex. Civ. App.—Fort Worth 1972), *error ref. n.r.e.*

14. *Cf. Clarady v. Mills*, 431 S.W.2d 63 (Tex. Civ. App.—Houston [1st Dist.] 1968), in which the husband was held to be entitled to maintain a divorce action against his mentally ill wife provided a guardian *ad litem* was appointed to represent her.

15. *Hughes v. Briscoe*, Civil No. CA 3-6985-E (N.D. Tex., Aug. 6, 1973). The residence requirement is found in TEX. FAM. CODE ANN. § 3.21 (Supp. 1973).

16. TEX. FAM. CODE ANN. § 4.02 (Supp. 1973).

17. The second sentence states: "The husband has the duty to support the wife, and the wife has the duty to support the husband when he is unable to support himself." *Id.*

18. The section was deliberately drawn to define liability for support in terms of duty rather than in terms of property as was previously the case. McKnight, *The 1967 Recodification and Revision of the Matrimonial Property Law of Texas*, 6 NEWSLETTER OF THE REAL ESTATE, PROBATE AND TRUST LAW SECTION No. 1, Nov. 1967, at 9.

19. This is a matter of very considerable concern in international affairs and one with which the proposed international convention with respect to divorce will effec-

domiciled in Mexico, sued for divorce in Mexico. The wife, an American citizen domiciled in Texas, was served with notice in Texas. Thereafter she commenced a divorce action in Texas. Since the marital res was *sub judice*, considerations of comity should have allowed the proceeding first filed to go to judgment if pleaded in bar of the second suit. The second suit, however, went to judgment, and the Texas court lost jurisdiction of it before the husband appeared to contest jurisdiction in the wife's Texas suit. The husband's bill of review to set aside the Texas decree was denied. Though the court concluded that the husband had not been properly served in the wife's proceeding under rules 106 and 108,<sup>21</sup> his failure to plead and prove a meritorious defense foreclosed his bill of review.

A really significant question of divorce jurisdiction continues to be litigated with respect to the constitutionality of a mandatory period of habitation within a state or county before the court can exercise its power of dissolution. Texas has long maintained statutory requirements of durational habitation both with respect to domicile within the state and residence within the county in which the proceeding is filed.<sup>22</sup> As regards county residence, it has long been the settled Texas rule that the requirement is not jurisdictional but rather merely a prerequisite to judicial action when brought to the attention of the court.<sup>23</sup> When the county residence requirement was recently attacked on federal constitutional grounds, the federal court refused to convene a three-judge court to consider the matter.<sup>24</sup> But as pointed out in *Wilson v. Wilson*,<sup>25</sup> residence in this sense must be more than merely notional, though brief periods of non-residence may occur without interrupting the residence period. A different test may be applicable to domicile.<sup>26</sup> There is now a national dispute with respect to whether states may constitutionally require a durational period for measuring domicile, and in turn, whether domicile itself is a jurisdictional requirement for dissolution of marriage which can properly be imposed by the states. Disputes with respect to the first question have been recently adjudicated in a number of states.<sup>27</sup>

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tively deal once ratified. See Dyer, *The Hague Conventions on Family Law*, 7 NEWSLETTER OF THE FAMILY LAW SECTION No. 2, Apr. 1973, at 4, 6.

20. 500 S.W.2d 233 (Tex. Civ. App.—Texarkana 1973), *error dismissed*.

21. TEX. R. CIV. P. 106, 108.

22. TEX. FAM. CODE ANN. § 3.21 (Supp. 1973) requires, as of Jan. 1, 1974, six months' domicile within the state and 90 days' residence within the county, whereas one year and six months respectively were previously required.

23. See *Schreiner v. Schreiner*, 502 S.W.2d 840 (Tex. Civ. App.—San Antonio 1973), *error dismissed*.

24. *Hughes v. Briscoe*, Civil No. CA 3-6985-E (N.D. Tex., Aug. 6, 1973).

25. 494 S.W.2d 609 (Tex. Civ. App.—Houston [14th Dist.] 1973), *error dismissed*.

26. See *Shankles v. Shankles*, 445 S.W.2d 803 (Tex. Civ. App.—Waco 1969), noted in *McKnight & Raggio, Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 35 (1971).

27. State durational domicile requirements upheld: *Sosna v. Iowa*, 360 F. Supp. 1182 (N.D. Iowa 1973), *cert. granted*, 42 U.S.L.W. 3457 (U.S. Feb. 19, 1974) (No. 73-762); *Shiffman v. Askew*, 359 F. Supp. 1225 (N.D. Fla. 1973); *Davis v. Davis*, 210 N.W.2d 221 (Minn. 1973). State requirements declared unconstitutional: *McCoy v. South Dakota*, 366 F. Supp. 1244 (D.S.D. 1973); *Larsen v. Gallogly*, 361 F. Supp. 305 (D.R.I. 1973); *Au v. Lum*, 360 F. Supp. 219 (D. Hawaii 1973). See also Short, *What Constitutes Residence or Domicile Within a State by a Citizen of Another Country for Purpose of Jurisdiction in Divorce*, 51 A.L.R.3d 223 (1973).

Although the courts had seemingly already disposed of it,<sup>28</sup> the legislature removed any doubt of the demise of the defense of adultery as of January 1, 1974.<sup>29</sup> The courts also considered other small, though nevertheless significant, ancillary points with respect to divorce practice. Waiver of jury trial does not preclude the right of such trial on remand in a divorce matter.<sup>30</sup> Standing alone, an amount in controversy of less than \$100 does not give jurisdiction for appeal with regard to costs.<sup>31</sup> As grounds for a bill of review there must be a showing of a meritorious defense<sup>32</sup> and a showing of fraud or like cause preventing the presentation of that defense.<sup>33</sup> Two cases dealt with alleged professional misconduct as grounds for review. In one case<sup>34</sup> the husband asserted as his grounds for bill of review the withdrawal of his counsel without adequate notice and his lack of knowledge concerning the trial until receipt of a copy of the decree. In the confused state of the facts and pleadings, the appellate court concluded that the complainant had failed in his proof of the facts alleged as grounds of his lack of fault, quite apart from his failure to show a meritorious defense. In the other case<sup>35</sup> the wife's bill of review was founded on the fault or negligence of her attorney in forgetting to file an answer. The court held that she could not rely on this apparent slip of her agent as a basis for her equitable proceeding.

The latest statistics of the Texas Civil Judicial Council do not indicate any significant increase in the divorce rate that may have been attributable to a relaxation of the grounds for divorce.<sup>36</sup>

### B. *Characterization of Marital Property*<sup>37</sup>

The simplest type of characterization problem may be resolved by tracing—showing that property existing at the termination of the marital relationship constituted a mutation of separate estate, thereby rebutting the pre-

28. See *Cusack v. Cusack*, 491 S.W.2d 714 (Tex. Civ. App.—Corpus Christi 1973), *error dismissed*. See also *McKnight & Raggio*, *supra* note 26, at 36-37.

29. TEX. FAM. CODE ANN. § 3.09(b) (Supp. 1973).

30. *Harding v. Harding*, 485 S.W.2d 297 (Tex. Civ. App.—San Antonio 1972).

31. *McIsaac v. McIsaac*, 488 S.W.2d 157 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error dismissed*.

32. *Dosamantes v. Dosamantes*, 500 S.W.2d 233 (Tex. Civ. App.—Texarkana 1973), *error dismissed*.

33. *Bohn v. Bohn*, 498 S.W.2d 267 (Tex. Civ. App.—Houston [14th Dist.] 1973), *error dismissed*; *Innmon v. Mouser*, 493 S.W.2d 290 (Tex. Civ. App.—Austin 1973).

34. *Blancas v. Blancas*, 495 S.W.2d 597 (Tex. Civ. App.—Texarkana 1973).

35. *Swearingen v. Swearingen*, 487 S.W.2d 784 (Tex. Civ. App.—San Antonio 1972), *error dismissed*.

36. See ANNUAL REPORT OF THE TEXAS CIVIL JUDICIAL COUNCIL FOR 1972, at 185 (1973). For comments on the ground of insupportability, see *Renfro v. Renfro*, 497 S.W.2d 807 (Tex. Civ. App.—Waco 1973); *Cusack v. Cusack*, 491 S.W.2d 714 (Tex. Civ. App.—Corpus Christi 1973), *error dismissed*; *McKibbin v. McKibbin*, 488 S.W.2d 541 (Tex. Civ. App.—San Antonio 1972).

37. As pointed out in Smith, Book Review, 36 TEX. B.J. 72 (1973), there is still "a crying need for a comparative study of marital rights in the community property states" in spite of the appearance of two recent books that deal with the subject. Though about one-third of I. BAXTER, *MARITAL PROPERTY* (1973) is devoted to community property, it does not fill the need. The research behind it is markedly derivative and was somewhat out-of-date by the time of publication. W. DEFUNIAK & M. VAUGHAN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971) constitutes the most modest revision of 1 W. DEFUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* (1943).

sumption of community.<sup>38</sup> In *McKinley v. McKinley*<sup>39</sup> a declaratory judgment proceeding was brought in district court by the surviving wife for adjudication that two savings certificates were the community property of her and her late husband. In the probate of the husband's estate the executor had termed the certificates separate property. No question had been raised with respect to the probate court's approval of the executor's inventory.<sup>40</sup> The court's handling of the two savings certificates presents a good illustration of the operation of the tracing doctrine. With respect to one of the certificates the separate character of a specific part of it was clearly demonstrated. It had been bought from the proceeds of a savings account in which separate property was initially deposited. The decedent had on one occasion withdrawn an amount equal to the total interest paid on the account up until that time. The court treated this act as leaving only separate property in the account. Two years later the decedent withdrew virtually all of the money from the savings account (including then-accrued interest). These funds along with other assets were used to purchase a savings certificate. Though a small sum of money was left in the savings account, the court treated the separate portion of the certificate as equal to the amount of separate property originally deposited in the savings account. But by disregarding the sum left in the savings account, the court's characterization of separate and community character of the sums withdrawn on the two occasions of withdrawal is inconsistent. In the case of the second certificate, since more than half of the sum used to purchase it was demonstrably community and the rest was not capable of characterization as separate property, the court treated it as community as presumed in law.

In a somewhat unusual context a federal court applied the tracing principle and the doctrine that recovery for certain personal injury is separate property as enunciated in *Graham v. Franco*.<sup>41</sup> In *Martin v. General Electric Co.*<sup>42</sup> the husband brought suit for extensive personal injury. Prior to judgment in that action the husband also filed suit for divorce. Thereafter the wife was joined as a party in the husband's personal injury action in order to determine the community element in the recovery for purposes of

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38. For example, capital profits distributed on separate stocks in a mutual fund constitutes separate property. *Bakken v. Bakken*, 503 S.W.2d 315 (Tex. Civ. App.—Dallas 1973).

39. 496 S.W.2d 540 (Tex. 1973).

40. In response to the executor's jurisdictional argument, the Texas Supreme Court held that the district court had concurrent jurisdiction with the probate court to declare the rights under a will and relief was, therefore, properly sought in the district court under the declaratory judgments act. Further, the "order of the probate court approving an inventory and appraisal is not an adjudication of title to property." *Id.* at 542. But under the 1973 amendment to the Texas Constitution with respect to concurrent jurisdiction of the district and probate courts, TEX. CONST. art. V, § 8, and the implementing legislation passed in 1973, TEX. PROB. CODE ANN. § 5 (Supp. 1974), in the future the statutory probate courts will handle such disputes in those counties having such courts.

41. 488 S.W.2d 390 (Tex. 1972), discussed in McKnight, *Matrimonial Property*, *Annual Survey of Texas Law*, 27 Sw. L.J. 27, 27-29 (1973), and Smith, *Family Law*, *Annual Survey of Texas Law*, 27 Sw. L.J. 45, 53-55 (1973). See also Comment, *Reclassification of Tort Recoveries by Spouses—Possible Effects of Graham v. Franco*, 4 TEXAS TECH L. REV. 359 (1973).

42. Civil No. 7487 (E.D. Tex., filed Nov. 27, 1973).

the divorce proceeding. The court found that sixty percent of the husband's recovery was attributable to his bodily loss, thirty percent to loss of wages, earnings, and earning capacity during his life expectancy of twenty-eight years, and ten percent to future medical expenses.

If community property is not dealt with by a divorce court, it becomes a tenancy in common of the former spouses. In *Dessommes v. Dessommes*<sup>43</sup> the former wife asserted an interest in the husband's retirement benefits undivided on divorce. After the divorce the former husband continued to augment the fund and the prior retirement plan was superseded by a new one under which the ex-husband was entitled to an annuity when he subsequently retired. The trial court granted an instructed verdict for the husband. Reversing and remanding, the appellate court first observed that the oversight of the divorce court left the spouses with a tenancy in common. The court stated that

when the proportions contributed by several owners to a common fund cannot be established and the equities are equal, the owners must be considered equal tenants in common. . . . [But] the circumstances shown here justify imposing on the former husband the burden to establish the portion of the commingled retirement fund attributable to contributions since the divorce. . . . One of the recognized principles in determining the burden is to place it on the party having peculiar knowledge of the facts to be proved. . . . [I]f the parties are shown to have been the equal owners of a fund at a certain time, and one of them is shown to have made additions to that fund in an undetermined amount, the party who made the additions should have the burden to show the amount of the additions.<sup>44</sup>

On motion for rehearing, however, the ex-wife argued that

since the parties were married when the employee's interest vested, that interest was community property, just as if it were a tract of land then acquired, and contributions either after the divorce or before the marriage would not affect the parties' equal ownership, although she concede[d] that on proper pleading and proof the former husband would have the right to reimbursement for enhancement resulting from contribution after divorce.<sup>45</sup>

The court did not agree. It found that the characterization of the benefits as community property under the doctrine of inception of title would not do substantial justice and the benefits should be apportioned to the former spouses by recognizing the accrual of interests before, during, and after the marriage. The court recognized that *Busby v. Busby*<sup>46</sup> presented some difficulty in this regard but concluded that "the law on this point cannot be regarded as settled . . ."<sup>47</sup> A better result would be achieved by following

43. 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973), *error ref. n.r.e.*, a sequel to *Dessommes v. Dessommes*, 461 S.W.2d 525 (Tex. Civ. App.—Waco 1970), *noted in McKnight & Raggio, supra* note 26, at 41.

44. 505 S.W.2d at 679.

45. *Id.* at 681.

46. 457 S.W.2d 551 (Tex. 1970).

47. 505 S.W.2d at 681.



*Busby* and leaving the spouses to any rights of reimbursement they might have rather than pursuing an apportionment approach in derogation of the doctrine of inception of title.

But if no right vests during marriage, there is no interest subject to division. *Davis v. Davis*<sup>48</sup> also involved retirement benefits, but in that case their division in the divorce proceeding itself was in issue. The military retirement rights of the husband were in no sense vested prior to divorce and could not have become vested under normal circumstances until the husband performed about twelve additional years of military service.<sup>49</sup> Distinguishing *Miser v. Miser*,<sup>50</sup> where it had approved an order prospectively dividing retirement benefits when only a relatively short period remained before the right to the benefits would vest, the Dallas court of civil appeals reversed the trial court's order dividing the retirement benefit "when and if" they should become vested on the ground that there was no vested community interest to divide. The court put some emphasis on the statement in the dissenting opinion in *Busby* "that the 'right' of a member or former member of the armed forces to retirement benefits that are payable in the future, resting as it does on a statute that is subject to modification or repeal at any time, does not constitute property."<sup>51</sup>

The related question of property *vel non* with respect to agricultural acreage allotments was again an issue in *In re Adams*.<sup>52</sup> In this case the issue was whether the allotment passed to a bankrupt's trustee. The court concluded that as a property interest transferable by the bankrupt under section 70(a)(5) of the Bankruptcy Act<sup>53</sup> it would, provided that it did not constitute exempt property.<sup>54</sup> The issue was, therefore, somewhat different from that faced by the courts in other recent cases involving agricultural acreage allotments where the courts have reached somewhat different conclusions.<sup>55</sup>

Texas spouses may freely partition their community estate as interests in separate property, but an involuntary partition is not available to one or the

48. 495 S.W.2d 607 (Tex. Civ. App.—Dallas 1973), *error dismissed*.

49. In *In re McCurdy*, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973), *error dismissed*, it is not clear whether similar facts were before the court. If the facts were similar, a contrary conclusion was reached.

California authorities agree with the decision in *Davis*. See *French v. French*, 17 Cal. 2d 775, 112 P.2d 235 (1941); *In re Wilson*, 32 Cal. App. 3d 546, 108 Cal. Rptr. 371 (1973). But the question has been raised whether military retirement benefits can be properly characterized as community property at all. See *Goldberg, Is Armed Services Retired Pay Really Community Property?*, 48 CAL. STATE B.J. 12 (1973). See also Comment, *The Unsettled Question of the Military Pension: Separate or Community Property?*, 8 CAL. W.L. REV. 522 (1972). For a California case in which an attorney was sued for malpractice in failing to consider pension rights in settling a divorce case, see *Smith v. Lewis*, 31 Cal. App. 3d 677, 107 Cal. Rptr. 95 (1973).

50. 475 S.W.2d 597 (Tex. Civ. App.—Dallas 1971), *error dismissed, discussed in McKnight, supra note 44, at 30-31.*

51. 457 S.W.2d at 555 (Walker, J., dissenting).

52. 357 F. Supp. 1184 (S.D. Tex. 1973).

53. 11 U.S.C. § 110(a)(5) (1970).

54. Act of May 6, 1935, ch. 145, [1935] Tex. Laws 384 (repealed by TEX. REV. CIV. STAT. ANN. art. 3836(a)(2) (Supp. 1974)). On remand the court rejected the argument that the allotment was an implement of husbandry and, therefore, exempt.

55. See McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27 (1973).

other. No attack has as yet been made on this rule on constitutional grounds. A recent federal case involving a tenancy by the entireties suggests that such an attack would fail.<sup>56</sup> Though the revised marriage contract statute has not been before a Texas appellate court, the old article 4610<sup>57</sup> was again commented on in *Weaver v. Citizens National Bank*.<sup>58</sup> The dispute arose out of what seems to have been a rather curious estate plan. The husband and wife, owning only community estate, executed formal wills on the same day, but there was no evidence of their contractual nature. The husband's will, dealing with his share of the community, created a trust with the wife as life beneficiary and remainders. The wife's will left her entire estate to her husband. At the time the wills were executed the wife also executed what was referred to in its context as an "agreement" that her interest in the community estate should become part of the trust created by her husband's will and that she would take all necessary steps to achieve this result after admission of her husband's will to probate. The husband died in 1968 and his wife survived him until 1971, at which time the husband's trustee learned of his will, which had not been admitted to probate. The sole issue before the court was whether the wife's agreement was valid and hence caused her share of the community estate to pass into the husband's testamentary trust. The court concluded that the agreement was invalid as in conflict with the provisions of old article 4610 and the case law construing it that made agreements between husband and wife during marriage, as well as before, invalid if for the purpose of altering the order of descent. The instrument executed by the wife was, at most, evidence of an agreement between her and her husband not executed with formalities required of a testamentary disposition. It is unclear what the draftsman and the parties had in mind in executing the three documents referred to. It may have been anticipated that the wife would destroy her will if she survived her husband and would probate her husband's will and deliver the previously executed agreement as an assignment of her share of the community to his trustee. One wonders why the scheme was not carried out and whether it was anticipated that the agreement would be destroyed had the husband survived the wife. An assignment of property to an entity such as the husband's trust to come into effect on probate might fail because of its tentative nature, but apart from that reason, if the agreement had been couched in terms of assignment (rather than a unilateral declaration of agreement to assign) in consideration of the provisions made for the wife under the husband's will, nothing in old article 4610 indicates that an assignment should not have been given effect.<sup>59</sup>

Another post mortem dispute as to characterization of matrimonial prop-

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56. *Klein v. Mayo*, 367 F. Supp. 583 (D. Mass. 1973).

57. Act of Jan. 20, 1840, § 5, [1840] Tex. Laws 5, 2 H. GAMMEL, LAWS OF TEXAS 179 (1898) (repealed 1969).

58. 490 S.W.2d 887 (Tex. Civ. App.—Waco 1973).

59. Two foreign cases dealt with the effects of antenuptial agreements on the right of support. One involved the husband's right, *Higgason v. Higgason*, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973), and the other that of the wife to support pendente lite. *Belcher v. Belcher*, 271 So. 2d 7 (Fla. 1972).

erty occurred in *Carriere v. Bodungen*.<sup>60</sup> The court rightly refused to attach any importance to the fact that the testator denied in his will that he owned any separate property other than things so identified. With respect to other property that was clearly separate, the court passed it to the residuary takers in spite of the recital. The case also exemplifies the well-known rule that if a husband buys property with his separate estate and takes title either partly or wholly in the wife's name, a gift to the wife has been achieved.<sup>61</sup>

### C. Division on Divorce

The appellate courts were twice called upon to say that a prayer for general relief was sufficient to empower a court to make a complete division of the matrimonial estate of the parties.<sup>62</sup> The broad power of the court in making discretionary division of matrimonial property was repeatedly stressed.<sup>63</sup> There was no further discussion of the construction of section 3.63 of the Family Code with respect to the court's power to divest title to separate realty.<sup>64</sup> But several broad dicta supported its literal interpretation.<sup>65</sup> With respect to a foreign decree of divorce making a division of Texas realty, a Houston court of civil appeals concluded that the judgment is not subject to collateral attack in Texas.<sup>66</sup>

The most significant cases dealing with division of matrimonial property on divorce were those dealing with vested retirement benefits. In *Dessom-*

60. 500 S.W.2d 692 (Tex. Civ. App.—Corpus Christi 1973).

61. See McKnight, *supra* note 55, at 33 n.47.

62. Schreiner v. Schreiner, 502 S.W.2d 840 (Tex. Civ. App.—San Antonio 1973), *error dismissed*; Zaruba v. Zaruba, 498 S.W.2d 695 (Tex. Civ. App.—Corpus Christi 1973), *error dismissed*.

63. Reaney v. Reaney, 505 S.W.2d 338 (Tex. Civ. App.—Dallas 1974) (award of virtually all the community property to the wife as well as her attorney's fee and a money judgment against the husband to compensate for profligate loss of the community estate without any substantial award to the husband); Womble v. Womble, 502 S.W.2d 886 (Tex. Civ. App.—Fort Worth 1973) (husband required to execute a note in favor of the wife to achieve an equitable division; for tax consequences, see Showalter, CCH Tax. Ct. Mem. 32,462(M) (1974)); Peterson v. Peterson, 502 S.W.2d 178 (Tex. Civ. App.—Houston [1st Dist.] 1973) (dealing both with division of property and award of costs and attorney's fees); Hensley v. Hensley, 496 S.W.2d 929 (Tex. Civ. App.—El Paso 1973); Brunell v. Brunell, 494 S.W.2d 621 (Tex. Civ. App.—Dallas 1973) (granting the wife a money judgment for her interest in the homestead and the amount of her attorney's fees with a judgment lien on the homestead to secure the interest therein *only* and denying any recovery to her for delinquent temporary alimony and child support payments).

64. TEX. FAM. CODE ANN. § 3.63 (Supp. 1973); see McKnight, *supra* note 55, at 38-39. The legislature considered but did not pass H.B. 102 to reinstate in § 3.63 the second sentence of old art. 4638, Act of Jan. 6, 1841, § 4, [1841] Tex. Laws 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898) (repealed 1969).

65. Harrison v. Harrison, 495 S.W.2d 1 (Tex. Civ. App.—Tyler 1973) (separate property was given to its owner and the community property was divided equitably); *In re McCurdy*, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973), *error dismissed* (there was apparently no separate property to divide); Medearis v. Medearis, 487 S.W.2d 198 (Tex. Civ. App.—Austin 1972) (separate property was given to its owner and the community property was divided equitably). In *McCurdy* the trial court found constructive fraud on the wife in the husband's making a substantial diversion of community funds as a gift for a minor child. In that there was a conflict of testimony as to the wife's knowledge of the transfer prior to its completion, the appellate court sustained the trial court's handling of the attempted gift.

66. Forman v. Forman, 496 S.W.2d 243 (Tex. Civ. App.—Houston [14th Dist.] 1973); cf. McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961).

*mes v. Dessommes*<sup>67</sup> it was concluded that a divorce decree providing that each spouse keep "the property now in the possession of such party" did not cover a spouse's vested interest in a retirement fund giving the spouse control over the equitable interest in the fund through the exercise of various options including the right to determine the time of retirement, to change the beneficiary of death benefits, and to convert the interest to a policy of life insurance. "Possession" as that word was used in the decree could not properly be interpreted as "including such intangible contract rights as these. The term is ordinarily understood as referring to property over which the parties have physical control or, at least, a power of immediate enjoyment and disposition."<sup>68</sup>

In other cases involving retirement benefits, the trial courts exercised their discretion (in those cases which reached the appellate level) in a great variety of ways: awarding all of the interest in the husband's retirement plans to him and awarding other property to the wife;<sup>69</sup> dividing the retirement benefits equally between the husband and wife;<sup>70</sup> apportioning the benefits between the spouses with a credit for taxes payable by the husband on the share received by the wife;<sup>71</sup> dividing the property, taking into consideration an evaluation of the present interest in a military retirement plan from which payments would be made in the remote future;<sup>72</sup> and awarding a money judgment to the wife and allocating all of the interest in the retirement plan to the husband on the basis of its equity value rather than its lesser value if cancelled prematurely under the husband's employment contract.<sup>73</sup> Though the discretion of the trial court is rarely successfully challenged with respect to division of marital property, if the trial court exercises its discretion on the basis of erroneous premises of law or fact which causes a significantly unjust result,<sup>74</sup> reversal of the trial court's judgment will result. In

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67. 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973), *error ref. n.r.e.*

68. *Id.* at 676.

69. *Mercer v. Mercer*, 503 S.W.2d 395 (Tex. Civ. App.—Corpus Christi 1973).

70. *Gaulding v. Gaulding*, 503 S.W.2d 617 (Tex. Civ. App.—Eastland 1973); *Daniels v. Daniels*, 490 S.W.2d 862 (Tex. Civ. App.—Eastland 1973), *error dismissed*.

71. *Troutenko v. Troutenko*, 503 S.W.2d 686 (Tex. Civ. App.—Houston [1st Dist.] 1973).

72. *Freeman v. Freeman*, 497 S.W.2d 97 (Tex. Civ. App.—Houston [14th Dist.] 1973). In *Freeman* the trial judge also awarded the wife real property which was the principal asset of a corporation which she apparently owned. In dividing the estate of the parties the court considered the value of the corporate stock independently of the value of the land and, hence, fell into error; *cf.* *Bell v. Bell*, 504 S.W.2d 610 (Tex. Civ. App.—Beaumont 1974), *error granted*.

73. *Maddox v. Maddox*, 489 S.W.2d 391 (Tex. Civ. App.—Houston [1st Dist.] 1973); *cf.* *Taylor v. Taylor*, 449 S.W.2d 368 (Tex. Civ. App.—El Paso 1969), *noted in McKnight & Raggio, supra* note 26, at 42. With respect to whether contempt is an appropriate remedy for the husband's failure to comply with an order to pay a portion of his retirement pay to his former wife, *Hamborsky v. Hamborsky*, 497 S.W.2d 405 (Tex. Civ. App.—San Antonio 1973), is perhaps misleading. The court did not hold that civil and criminal contempt would be inappropriate remedies in all cases of failure to comply with the court's order, but merely that civil contempt is not the proper remedy if the husband is unable to comply with the proposed order.

74. In *Gaulding v. Gaulding*, 503 S.W.2d 617 (Tex. Civ. App.—Eastland 1973), the appellate court concluded that an error of law was made by the trial court, but that its effect was harmless. In *Freeman v. Freeman*, 497 S.W.2d 97 (Tex. Civ. App.—Houston [14th Dist.] 1973), significant errors in valuations were made which required remand to the trial court.

*Bell v. Bell*<sup>75</sup> the trial court characterized the substantially appreciated value of separate shares of corporations wholly owned by the husband as separate property and failed to consider their value in dividing the marital property on divorce.<sup>76</sup> The majority of the Beaumont court of civil appeals termed this an abuse of discretion. The dissenting judge concluded rather broadly that the "essence of the holding . . . is that the increase in value of corporate assets becomes community property . . ." <sup>77</sup>

Instances are also rarely encountered when the trial court refuses to approve the spouses' property settlement. In *Myers v. Myers*<sup>78</sup> the appellate court affirmed the refusal of the trial court to approve the property settlement under circumstances in which the husband successfully resisted efforts of the wife's attorney to discover the extent of the community estate so that the trial judge was unable to determine whether the proposed settlement was fair to the spouses. The result was to leave the husband and wife as tenants in common as to their former community estate.<sup>79</sup>

Resort has also been had to the bankruptcy court in an effort to discharge liability arising under a property settlement agreement. In *In re Smith*<sup>80</sup> the district court affirmed the conclusion of the bankruptcy judge that obligations under a property settlement agreement could not be discharged under section 17(a)(7) of the Bankruptcy Act.<sup>81</sup> The court relied on California and Missouri authorities in reaching its conclusion.<sup>82</sup> But a

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75. 504 S.W.2d 610 (Tex. Civ. App.—Beaumont 1974), *error granted*.

76. In *Harrison v. Harrison*, 495 S.W.2d 1 (Tex. Civ. App.—Tyler 1973), it was the wife who had a substantial separate estate. "In view of the fact that the trial court awarded appellant [husband] a substantial part of the community property as well as a going business enterprise from which he made substantial profits, we are not prepared to hold that the division was such as to demonstrate that the court failed to consider the relative wealth of the parties and the relative need of the parties for future support, so as to constitute an abuse of judicial discretion." *Id.* at 4.

77. 504 S.W.2d at 613 (Keith, J., dissenting). This extreme view was espoused by the Fort Worth court of civil appeals in *Dillingham v. Dillingham*, 434 S.W.2d 459 (Tex. Civ. App.—Fort Worth 1968), *noted in McKnight, Family Law, Annual Survey of Texas Law*, 24 Sw. L.J. 49, 52 (1970). The dissenting judge also leaned heavily on such authorities as *Scofield v. Weiss*, 131 F.2d 631 (5th Cir. 1942), and *Beals v. Fontenot*, 111 F.2d 956 (5th Cir. 1940).

78. 503 S.W.2d 404 (Tex. Civ. App.—Houston [14th Dist.] 1973), *error dismissed*.

79. For an example of protracted litigation with respect to post-divorce problems involving tenancies in common and fluctuating values of securities, see *Lifson v. Dorfman*, 491 S.W.2d 198 (Tex. Civ. App.—Eastland 1973), *error ref. n.r.e.* With respect to tax questions that may arise in connection with a transmutation of community property to a tenancy in common, see *Hammerstrom v. Commissioner*, 60 T.C. No. 21 (1973). The Internal Revenue Service has reiterated its ruling that community property converted into separate property after 1941 is considered community property for purposes of determining the marital deduction. Rev. Rul. 73-309, 1973 INT. REV. BULL. No. 29, at 9. *See also* Tinio, *Divorce or Separation: Consideration of Tax Liability or Consequences in Determining Alimony or Property Settlement Provisions*, 51 A.L.R.3d 461 (1973). *Fahrer v. Fahrer*, 36 Ohio App. 2d 208, 304 N.E.2d 411 (1973), serves to remind the draftsman of property settlement agreements to make careful provision for any future liaison that might constitute an informal marriage in Texas if that eventuality is to terminate contractual alimony.

80. No. BK3-2065 (N.D. Tex., July 2, 1973). An earlier stage of the proceeding was discussed in *McKnight*, *supra* note 55, at 42.

81. 11 U.S.C. § 35(a)(7) (1970).

82. Related cases have recently come from both those jurisdictions: *In re Hargrove*, 361 F. Supp. 851 (W.D. Mo. 1973) (award of attorney's fees in a suit to modify an original divorce decree constitutes "alimony" under Missouri law and was, therefore, not dischargeable in the husband's bankruptcy); *Sloan v. Mitchell*, 28 Cal. App. 3d 47,

money judgment awarded to achieve an equitable division of property<sup>83</sup> or to compensate a spouse for culpable dissipation of the community estate,<sup>84</sup> or a note given pursuant to a court order to facilitate property division<sup>85</sup> would all seem to be dischargeable in bankruptcy. In *Ex parte Parr*<sup>86</sup> the wife had recourse to the bankruptcy court as an apparent strategy to snarl a pending divorce proceeding.<sup>87</sup> Already rankled by her behavior, the trial judge apparently responded by increasing the wife's punishment for contempt and she responded by bringing an original petition of habeas corpus to the Texas Supreme Court. The court released her on the ground that she had not been given fair notice of the grounds for her increased penalty.

#### D. Management

Two cases raised significant questions of management of community property in relation to litigation concerning it. In *Dulak v. Dulak*<sup>88</sup> suit was brought against the husband to cancel the release of a note made by the husband and wife given for real property.<sup>89</sup> The release was given as a result of undue influence exerted by the husband on the payee. Judgment was for the plaintiff and one of the husband's points of error on appeal was that his wife was an indispensable party. The husband's liability seems incontestable, but some of the court's general remarks regarding judgments against the husband or wife cannot go without comment. The court quoted article 1986 to the effect that "a principal obligor in a contract, may be sued either alone or jointly with any other party who may be liable therein"<sup>90</sup> and noted that this provision is applicable when a husband and wife are joint obligors on a note. The court went on, however, to consider sections 4.04 and 5.22(c)<sup>91</sup> of the Family Code, concluding that "the husband and the wife are each the representative of the other with respect to the community. A judgment against the wife concerning the community would be binding upon the husband though he was not made a party. Likewise, as before, a judgment against the husband concerning the community would bind the wife though she was not a party."<sup>92</sup> If the court was saying that a judgment against the spouse who is manager of particular community property would bind the other spouse's interest in that property, the statement is perfectly accurate. But if the court was suggesting that a judgment against only one spouse would always bind the community property subject

104 Cal. Rptr. 418 (1972) (support provisions in a property settlement agreement were not dischargeable in bankruptcy).

83. *Weaks v. Weaks*, 471 S.W.2d 454 (Tex. Civ. App.—Beaumont 1971), *error dismissed*.

84. *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. Civ. App.—Dallas 1974).

85. *Womble v. Womble*, 502 S.W.2d 886 (Tex. Civ. App.—Fort Worth 1973).

86. 505 S.W.2d 242 (Tex. 1974).

87. For other snarling devices see *Davis, Hiding, Diverting and Snarling Marital Assets in Anticipation of Divorce—And What Can Be Done About It*, in INSTITUTE ON TEXAS FAMILY LAW AND COMMUNITY PROPERTY 73 (1973).

88. 496 S.W.2d 776 (Tex. Civ. App.—Austin 1973), *error granted*.

89. It does not appear when this transaction occurred, but the payee had the note in his possession in Jan. 1971.

90. TEX. REV. CIV. STAT. ANN. art. 1986 (1964).

91. TEX. FAM. CODE ANN. §§ 4.04, 5.22(c) (Supp. 1973).

92. 496 S.W.2d at 782.

to the management of the other spouse or subject to their joint management, the comment is erroneous, unless the cause of action sounds in tort, in which event all community property is subject to liability regardless of which spouse is culpable.<sup>93</sup> The spouse who is not an alleged tortfeasor need not be joined as a party in order to make that spouse's interest in community property subject to satisfaction of the judgment.<sup>94</sup>

In *Cooper v. Texas Gulf Industries*<sup>95</sup> realty was conveyed to spouses and a dispute arose between them and the grantor with respect to the sale. The husband brought suit for rescission of the contract of sale. Thereafter the husband and wife entered into an agreement with the grantor to cancel a collateral management contract dealing with the property and the husband's suit was dismissed with prejudice. The husband *and wife* later brought another suit for rescission of the sale. Summary judgment was awarded to the grantor on the ground that the dismissal of the prior suit with prejudice was a bar to the second suit. The plaintiffs asserted, in turn, that the dismissal of the husband's suit could not be a bar to the subsequent suit on behalf of the wife. The issue was thus whether it was within the power of one spouse to settle the first suit, and, if so, whether the rights of the other spouse in the second proceeding were thereby concluded. If the first proceeding were clearly a matter of community property management (as all parties appear to have assumed in the court of civil appeals), the problem would be that of determining the manager. If the property was clearly community property on the basis of the pleadings and presumptions of law and there were no fact issues to be resolved in that regard and the sole manager was the husband, dismissal of the first suit at the husband's instance would seem to bar the second suit. But if the husband and wife together purchased the real property in their joint names, they would both seem to have joint powers of management under section 5.22(b).<sup>96</sup>

A number of cases dealt with gifts of community property. *Murphy v. Metropolitan Life Insurance Co.*<sup>97</sup> comes as a sequel to *Givens v. Girard*

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93. TEX. FAM. CODE ANN. § 5.61 (Supp. 1973). A somewhat similar point was alluded to in *Miller v. Cretien*, 488 S.W.2d 893 (Tex. Civ. App.—Fort Worth 1972), *error ref. n.r.e.*, where there is a brief discussion of the power to bind an unjoined spouse-defendant's interest in community homestead. Again, if the spouse sued has management over the community constituting the homestead, judgment against that spouse would be sufficient to bind the property if the right in question can be unilaterally determined as a matter of homestead law. But if the right of the non-joined spouse to the homestead is infringed by way of execution on the judgment, the non-joined spouse still has a remedy available.

94. *Contra*, *Maness v. Reese*, 489 S.W.2d 660 (Tex. Civ. App.—Beaumont 1972), *error ref. n.r.e.* But abstracting a judgment against one spouse will not be constructive notice against one dealing with the other with respect to property subject to the other's sole management.

95. 495 S.W.2d 273 (Tex. Civ. App.—Waco 1973), *error granted*.

96. TEX. FAM. CODE ANN. § 5.22(b) (Supp. 1973). See also *Phillips v. Teinert*, 493 S.W.2d 584 (Tex. Civ. App.—Houston [14th Dist.] 1973), a personal injury action by a husband and wife in which the husband died between the date of filing and that of trial. The court held that failure to make the husband's successors parties constituted fundamental error in spite of the failure of the defendants to raise the point at trial. *Brown, J.*, dissented. *Id.* at 586.

97. 498 S.W.2d 278 (Tex. Civ. App.—Houston [14th Dist.] 1973), *error ref. n.r.e.*

*Life Insurance Co. of America*.<sup>98</sup> Shortly before his death and while separated from his wife, the husband changed the beneficiary of an insurance policy on his life from his wife to his mother. In *Givens* the court held that except in instances when a gift is motivated by a moral obligation owed to a close relative, the burden of proof is on the donee of community property to prove that it was fair under the circumstances. But this was an instance when the donee was a close relative, sixty-four years old and in necessitous circumstances. The gift of the entire proceeds of the policy amounted to almost one-sixth of the entire community estate, though the wife's share did not provide her with a high degree of financial security. The trial court awarded half of the proceeds to the wife and half to the mother. The appellate court concluded that decision in favor of the mother *or* the wife was supportable by the facts and hence sustained the trial court's exercise of its discretion in making its award in favor of the wife.<sup>99</sup>

The courts continued to wrestle with federal estate and gift tax questions with respect to interspousal transactions. In *Waite v. United States*<sup>100</sup> the federal district court concluded that insurance proceeds on the life of the decedent were not includable in his estate for estate tax purposes if all his interest in the community policy had been assigned to the beneficiary.<sup>101</sup> In another case<sup>102</sup> the Fifth Circuit Court of Appeals concluded that the insured husband under a group life insurance policy died possessed of an incident of ownership in the policy subject to estate tax because he retained the right to alter the time and manner of enjoyment.<sup>103</sup> Elsewhere<sup>104</sup> the court concluded that the proceeds of a flight insurance policy on the life of an insured were includable in his gross estate as a transfer in contemplation of death.<sup>105</sup> The purchaser of the policy was in good health and did not expect to die when he bought the policy just before boarding an airplane that crashed soon afterward. The court rejected "an expectation of death" test in favor of the contemplation of death approach previously enunciated. Though the court attempted to stop short of concluding that the proceeds of all flight insurance policies taken out shortly before death are in contemplation of death, there is no suggestion how an estate tax might be avoided in such an instance.<sup>106</sup> That a taxable gift may be involved in relinquish-

98. 480 S.W.2d 421 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*, discussed in McKnight, *supra* note 41, at 36. See also Comment, *Gifts in Fraud of the Rights of the Wife*, 26 BAYLOR L. REV. 85 (1974).

99. In *In re McCurdy*, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973), *error dismissed*, the husband's apparently unilateral gift of a substantial amount of community property to a minor child was set aside by the divorce court to the extent of an award of one-half in favor of the wife.

100. 73-2 U.S. Tax Cas. ¶ 12,951 (N.D. Tex. 1972).

101. Caution is given against too much reliance on this authority, however, in the light of the terms of the assignment of the interest of the insured and the fact that the contemplation-of-death problem was not dealt with by the court. Donoghue, *Taxation Developments*, 11 NEWSLETTER OF REAL ESTATE, PROBATE AND TRUST LAW SECTION, No. 3, Mar. 1973, at 7, 8.

102. *Estate of Lumpkin v. Commissioner*, 474 F.2d 1092 (5th Cir. 1973).

103. INT. REV. CODE OF 1954, § 2042.

104. *Berman v. United States*, 73-2 U.S. Tax Cas. ¶ 12,949 (5th Cir. 1973).

105. INT. REV. CODE OF 1954, § 2035.

106. *But see* Skall v. United States, 355 F. Supp. 778 (N.D. Ohio 1972), where the



ment of the right in a policy on one's life or that of another is incontestable. The Internal Revenue Service has recently ruled that if a wife owns policies of insurance on the life of her husband, a "consent of spouse" cannot be filed by the husband's executor after his death because the spousal relationship no longer exists.<sup>107</sup>

With respect to presumption of death, article 5541<sup>108</sup> was amended in 1973 to add to the presumption of death after seven years' absence a presumption of death when any branch of the armed services issues a death certificate with respect to a member of the armed forces.<sup>109</sup>

### E. Liability

Liability with respect to marital property is closely related to its management<sup>110</sup> but may be broader in the case of tortious liability. Though the concept of "community debt" has served some useful purposes,<sup>111</sup> its serviceability as a concept of liability has been badly eroded by the statutory changes enacted in 1963 and 1967 with respect to the contractual capacity of married women and the management of community property, respectively. The phrase can now be regarded as generally misleading. To characterize an obligation "a community debt" means nothing more than that some community property is liable for its satisfaction. The creditor who is owed a contractual debt must find community property subject to management of the spouse who incurred the liability.

In *First State Bank v. Tanner*<sup>112</sup> the court concluded that a wife who maintains a joint checking account with her husband is not liable to the bank in a suit on the husband's endorsement of a check deposited to the account but later dishonored by the maker. The court relied on old article 5932,

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court held that assignments of an inheritance made by an eighty-nine-year-old woman a year before her death were not made in contemplation of death. See also a discussion of related cases in *McKnight*, *supra* note 41, at 33.

107. Rev. Rul. 73-207, 1973-1 CUM. BULL. 409.

108. TEX. REV. CIV. STAT. ANN. art. 5541 (Supp. 1973).

109. For an analysis of a variety of problems arising with respect to members of the armed forces missing in action, see Haeussler, *Missing in Action*, 36 TEX. B.J. 797 (1973).

110. As the Texas Constitutional Convention considers whether to include a provision in the constitution allowing spouses to create the right of survivorship in community property or joint tenancies with rights of survivorship out of community property, there is no further development in either statutory or case law with respect to the incidents of a joint tenancy with respect to the rights of creditors. Should such a provision be inserted in the Texas Constitution, foreign treatment of creditors' rights with respect to joint tenancies of spouses or tenancies by the entirety might provide guides to the way ahead. A suggestion was made that the constitution might even allow tenancies by the entirety. It was pointed out in *Lewis v. United States*, 485 F.2d 606 (Ct. Cl. 1973), that under Pennsylvania law a tenancy by the entirety is immune from claims of sole creditors of the husband or the wife. As to Virginia law with respect to tenancies by the entirety, see *In re Hawks*, 471 F.2d 305 (4th Cir. 1973). See also *Farmington Production Credit Ass'n v. Estes*, 504 S.W.2d 149 (Mo. Ct. App. 1974), to the effect that only a joint judgment against spouses is enforceable against a tenancy by the entirety.

111. For example, in characterizing property acquired on credit in the absence of an agreement by the seller to look only to the separate estate of the acquiring spouse. *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881 (1937).

112. 495 S.W.2d 267 (Tex. Civ. App.—Houston [1st Dist.] 1973).

section 18,<sup>113</sup> since the wife was not a signatory to the endorsement. Had the account been community property subject to the joint management of the spouses, it might have been argued that the wife would be subject to suit in quasi-contract for the benefit realized by the community subject to joint management.<sup>114</sup> It is submitted that for a third party creditor to reach an account held in the joint names of spouses for the debts of each he must show that the account is subject to joint management as a result of deposit of community property as defined in section 5.22 of the Family Code,<sup>115</sup> not merely as a consequence of an agreement with the bank. The bank, however, might have an action against the spouse having management rights in an account on the basis of the agreement with the bank, unless, as *Tanner* suggests, the specific provisions of the banking law preclude such liability.

It has been long established that a division of community property on divorce does not prejudice the rights of creditors to reach property partitioned to the non-contracting spouse.<sup>116</sup> The protection of creditors was a strong argument against allowing spouses to partition their community estate during marriage.<sup>117</sup> When the provision allowing partition was inserted in the constitution, it was provided that rights of pre-existing creditors should not be infringed. This rule has always been taken to include unsecured as well as secured creditors. But why this rule should prevail in the absence of an intent to defraud creditors, actually or constructively entertained, has never been adequately justified, though the juristic difference between a transfer and a partition has been offered as a rationalization. It may be better explained as an extension of the outworn concept of "community debt."<sup>118</sup> Why the constitution should give protection to unsecured creditors under these circumstances and thus make any partition of community property between spouses a constructive fraud on pre-existing unsecured creditors is difficult to fathom. But that understanding of the rule clearly persists, as exemplified in *Dean v. First National Bank*.<sup>119</sup>

In *Hoffman v. Love*<sup>120</sup> it was finally authoritatively determined that the amount of the homestead exemption on particular property increases from

113. Act of March 24, 1919, ch. 123, § 18, [1913] Tex. Laws 193 (repealed by Act of June 30, 1965, ch. 721, §§ 10-102, [1966] Tex. Laws v. 2, at 179).

114. An agency theory of liability was suggested and rejected in *Conway v. Signal Oil & Gas Co.*, 229 Ga. 849, 194 S.E.2d 909 (Ga. 1972), with respect to the wife's payments of bills incurred by her husband through credit card charges.

115. TEX. FAM. CODE ANN. § 5.22 (Supp. 1973).

116. *Boyd v. Ghent*, 93 Tex. 543, 57 S.W. 25 (1900); *Grandjean v. Runke*, 39 S.W. 945 (Tex. Civ. App. 1897).

117. *Protzel v. Schroeder*, 83 Tex. 684, 19 S.W. 292 (1892); *Cox v. Miller*, 54 Tex. 16 (1880).

118. For related doctrine in New Mexico, see *Moucka v. Windham*, 483 F.2d 914 (10th Cir. 1973), commented on in 1 COMMUNITY PROP. J. 45 (1974).

119. 494 S.W.2d 222 (Tex. Civ. App.—Tyler 1973). As to another aspect of post-divorce liability, the Ninth Circuit recently concluded that arrearages for child support might constitute a bad debt for income tax purposes, provided the taxpayer properly evidenced the amount expended for support. *Imeson v. Commissioner*, 487 F.2d 319 (9th Cir. 1973). Under the new provision of the TEX. FAM. CODE ANN. § 14.09(c) (Supp. 1973) one might anticipate that the Internal Revenue Service would argue that the arrearages for child support must also be first reduced to judgment.

120. 494 S.W.2d 591 (Tex. Civ. App.—Dallas 1973), error ref. n.r.e. (per curiam).

the time of designation as homestead in the same proportion as the actual value of the land increases from that time. At the time the property was impressed with homestead character the value of the urban lot was \$12,250. At the time the lot was sold it was worth \$36,750. In the meantime a judgment of approximately \$34,000 had been abstracted against the homestead claimant. Throughout the entire period the homestead exemption was \$5,000. It was concluded that the lot was exempt in the proportion that \$5,000 bears of \$12,250 so that 20/49ths of the total remained constantly exempt. The court allowed the purchaser to assert this homestead claim of his predecessor in title. But further mathematical complications would have arisen if the sale had occurred after the exemption was increased to \$10,000 on December 13, 1970, a problem that still remains to be resolved.

The impact of prior homestead status on a subsequent purchaser was also considered in *Julian v. Andrews*.<sup>121</sup> During marriage judgments were rendered and abstracted against the husband. The husband abandoned his wife who continued to assert her homestead claim, and in their divorce the property was awarded to her. The property was subsequently sold and the buyer later contracted to resell it. On discovery of the alleged cloud on the title created by the abstract of judgment, the contracting purchaser brought a suit for specific performance or an award of damages, and a counterclaim for specific performance was asserted by the seller. In rendering judgment for the seller against the buyer, the court concluded that the wife's homestead claim had never been lost and, therefore, the abstract of judgment never fixed any lien upon the property.

[A] husband has no right to abandon any homestead in fraud of or prejudice to his wife pursuant to action against her matrimonial right. It is only where the husband is, or is supposed to be, the head of the family that he has the right to select or abandon a 'homestead.' Where he abandons and disclaims his status as such he might have effected an abandonment insofar as his own right should pertain; but it does not follow that insofar as the wife's right is involved, absent her independent act of abandonment, that there would necessarily be an accompanying forfeiture of her homestead right. When one spouse dies the fact of his death does not operate to deprive the survivor of a homestead right theretofore existent, and the same thing is true as applied to the homestead where the husband has abandoned his wife and left the premises with intent never to return.<sup>122</sup>

This view of unilateral abandonment extracts a good deal of the sting from such authorities as *Marler v. Handy*<sup>123</sup> and makes considerably less vital the language adopted as a constitutional amendment to the effect that both spouses must join in abandoning the homestead in accordance with statutory standards.<sup>124</sup>

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121. 491 S.W.2d 721 (Tex. Civ. App.—Fort Worth 1973).

122. *Id.* at 726-27. See also *Prince v. North State Bank*, 484 S.W.2d 405, 412 (Tex. Civ. App.—Amarillo 1972). Abandonment of the homestead by both spouses cures lack of joinder in a homestead conveyance. *Pollard v. State*, 484 S.W.2d 387 (Tex. Civ. App.—Waco 1972).

123. 88 Tex. 421, 31 S.W. 636 (1895).

124. TEX. CONST. art. XVI, § 50; see *McKnight & Raggio*, *supra* note 26, at 48.

In *Allen v. Monk*<sup>125</sup> the Texas Supreme Court gave effect to reform legislation enacted in 1967 equalizing the rights and responsibilities of spouses.<sup>126</sup> The fact that a married woman has complete capacity to contract under section 4.03 of the Family Code<sup>127</sup> works a reversal of the rule in *Jones v. Goff*<sup>128</sup> to the effect that specific performance could not be decreed against a married woman's executory contract to sell her homestead.

Significant changes were made with respect to exempt realty through constitutional amendment<sup>129</sup> and exempt personally by way of statute.<sup>130</sup> The constitutional amendment extends the homestead provisions to allow an exemption for "a single adult person."<sup>131</sup> The statutory limitation of the exemption to "each single, adult person, not a constituent of a family,"<sup>132</sup> to the extent that it may be narrower than the language of the constitution, seems to be invalid as in derogation of a constitutional right.<sup>133</sup> The statutory limitation of the rural homestead exemption of a single adult to one hundred acres,<sup>134</sup> on the other hand, is not in conflict with the constitutionally prescribed maximum of two hundred acres.<sup>135</sup> The extension of constitutional homestead protection to the single adult carries with it the mortgage prohibition, thereby disposing of the contrary rule in *Lacy v. Rollins*<sup>136</sup> with respect to widows and widowers. It also negates the rule that the right to claim a homestead is extinguished on divorce of a childless couple if there is no other family relationship to perpetuate it.

If a single adult maintains a homestead in property co-owned with another, as frequently occurs in the case of unmarried siblings, each may claim the full amount of the exemption as against his or her creditors with respect to the owner's share of the property, but this cannot occur until the single person achieves adulthood, either by attaining the age of eighteen, by mar-

125. 505 S.W.2d 523 (Tex. 1974).

126. See Hudspeth, *The Matrimonial Property Act of 1967—Six Areas of Change*, 31 TEX. B.J. 477, 551-52 (1968).

127. TEX. FAM. CODE ANN. § 4.03 (Supp. 1973).

128. 63 Tex. 248 (1885).

129. TEX. CONST. art. XVI, §§ 50, 51.

130. TEX. REV. CIV. STAT. ANN. art. 3836 (Supp. 1974).

131. TEX. CONST. art. XVI, § 50. Further suggested constitutional changes include a provision that three-fourths of the rural homestead and the urban business homestead be available as ordinary mortgage security and that a change from rural to urban homestead shall not occur without the consent of the claimant. Cf. *Lauchheimer & Sons v. Saunders*, 97 Tex. 137, 76 S.W. 750 (1903). For a situation involving the difficult question of whether a homestead is rural or urban, see *First State Bank v. Brown*, 490 S.W.2d 248 (Tex. Civ. App.—Tyler 1973).

A revision of constitutional provisions with respect to ad valorem tax relief on homesteads is also under consideration. With respect to tax relief for persons over 65, see TEX. ATT'Y GEN. OP. No. H-162 (1973). *Nacogdoches Ind. School Dist. v. McKinney*, 504 S.W.2d 832 (Tex. 1974), holding in effect that the entity theory of partnership is controlling with respect to ad valorem personal property taxes, gives added weight to the view that a homestead cannot be claimed in partnership property. See McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 40 (1972).

132. TEX. REV. CIV. STAT. ANN. art. 3833 (Supp. 1973).

133. The constitutional amendment became effective Dec. 13, 1973, while the statute did not become effective until Jan. 1, 1974.

134. TEX. REV. CIV. STAT. ANN. art. 3833 (Supp. 1973).

135. TEX. CONST. art. XVI, § 51.

136. 74 Tex. 566, 12 S.W. 314 (1889).

riage, or by earlier emancipation.<sup>137</sup> But if two single adults who have previously maintained separate homesteads marry, one homestead at least must lose its character as such, depending upon the intention of the spouses. It may be conjectured that a single adult co-tenant of a homestead may force partition against the other single adult co-tenant.<sup>138</sup> It should be emphasized that the word "single" was meant by the draftsmen to refer to a person who is not married and not to refer to an adult who is merely living alone. The constitutional amendment in favor of single adults was motivated by a sense of essential fairness.<sup>139</sup>

Whereas the recognition of individual and familial rights in land harks back to the provisions of the constitution of 1836, the statutory revision of the personal property exemption<sup>140</sup> returns to the pattern abandoned in 1870 whereby an upper limit is put on the claim of exempt personalty: \$30,000 for families, \$15,000 for single adults.<sup>141</sup> Like the 1973 homestead amendment to the constitution, the reform of the personal property exemption extends to single adults the same exemptions available to the family except as to the maximum amount. The extension was limited to a single person "not a constituent of a family" out of an abundance of caution to discourage any assertion that might be made in favor of double exemptions. The phrase, "not otherwise entitled to exempt personal property," would have been a happier choice of words, and it is hoped that the courts will construe the statutory phrase as though it had been so put. Otherwise, as it stands, the statute might exclude one of the groups it was designed to include: elderly spinster sisters who live together in a state of familial dependence and own most of their personal property jointly.<sup>142</sup>

The inclusion of "current wages" in the category of exempt properties subject to a fixed ceiling was unfortunate as it raises a possible conflict with article XVI, section 28 of the constitution and article 4099, both of which prohibit garnishment of wages.<sup>143</sup> The maximum ceiling on personal property exemptions will not have very much effect unless the debtor owes debts

137. *But see* TEX. CONST. art. XVI, § 52, with respect to the probate homestead held on behalf of minors by their guardian.

138. *Scoggins v. Taylor*, 248 S.W.2d 549 (Tex. Civ. App.—Amarillo 1952), *error ref.* *See also* *Rettig v. Houston West End Realty Co.*, 254 S.W. 765 (Tex. Comm'n App. 1923), *judgment adopted*.

139. The equal protection argument on behalf of homesteads for single persons was rejected in *In re Statham*, 483 F.2d 436 (9th Cir.), *cert. denied*, 94 S. Ct. 578, 38 L. Ed. 2d 474 (1973).

140. Because TEX. CONST. art. XVI, § 49, has remained unchanged, there is no conflict between its mandate for an exemption and the specific provisions enacted by the legislature.

141. TEX. REV. CIV. STAT. ANN. art. 3836 (Supp. 1974).

142. For a general discussion of the statutory revision, *see* Bateman, *A Major Revision of the Texas Statutes on Debtors' Exemptions*, 11 BULL. OF THE SECTION ON CORPORATION, BANKING & BUSINESS LAW No. 1, Oct. 1973, at 5; McKnight, *Modernization of Texas Debtor-Exemption Statutes Short of Constitutional Reform*, 35 TEX. B.J. 1137 (1972). For a further note on the constitutional amendment and statutes concerning homesteads, *see* Bateman, *Recent Developments Relating to Texas' Homestead Exemption*, 11 BULL. OF THE SECTION ON CORPORATION, BANKING & BUSINESS LAW No. 2, Dec. 1973, at 2. For a discussion of some developments that suggested a need for legislation for the protection of creditors, *see* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 58-59 (1969).

143. TEX. CONST. art. XVI, § 28; TEX. REV. CIV. STAT. ANN. art. 4099 (1966).

to a particular creditor in excess of the ceiling. But if the debtor is thrust into bankruptcy or becomes a voluntary bankrupt, the question will be presented whether current wages would be subject to a turnover order. In article 3833,<sup>144</sup> the reference to current wages was merely harmless surplusage; the reference in article 3836 may be troublesome surplusage. It may be argued that though the legislature cannot allow seizure of an employee's wages in the hands of the employer, it may nevertheless allow that amount to be included in computing a maximum amount of exemptions for any particular debtor. But that argument seems to fail when "current wages" in addition to other personalty owned by the debtor exceed the fixed maximum, for then the fixed maximum is completely inapplicable to the subject matter of "current wages." The fixed maximum principle really has no application to subject matter that is *wholly exempt* and subject to no limitation by legislative action. It would, therefore, seem advisable at the earliest possible time to delete the seventh category of exempt personal property in article 3836(a) in order to dispose of this argument.

A 1972 constitutional amendment was adopted allowing the legislature to grant exemptions from ad valorem taxes to disabled war veterans and their dependents.<sup>145</sup> Enabling legislation was passed by which a surviving spouse of a disabled veteran would be entitled to an exemption from tax on "the first \$2,500 of the assessed value of the spouse's property during the period that the surviving spouse remains unmarried."<sup>146</sup> The attorney general rendered an opinion to the effect that the provision is unconstitutional as limiting that which the legislature does not have the power to limit, and since it does not contain the normal type of severability clause, the whole statute in which it is contained is invalid.<sup>147</sup>

Commenting on the provisions of the old article 3832<sup>148</sup> in a way that would be equally applicable to the new article 3836(a), a federal district judge remanded a dispute concerning a rice acreage allotment to the bankruptcy judge with the observation that "[a]n acreage allotment could be considered an implement of husbandry and given the same protection from turnover."<sup>149</sup> On remand, however, it was concluded that the allotment is not exempt.<sup>150</sup>

## II. PARENTS AND CHILDREN

### A. Status

Though at its last session the legislature declined to enact rules prescribing an orderly process for determination of paternity, there are clear rights

144. Act of April 26, 1897, ch. 101, [1897] Tex. Laws, 10 H. GAMMEL, LAWS OF TEXAS 1185 (1898) (repealed by TEX. REV. CIV. STAT. ANN. art. 3833 (Supp. 1973)).

145. TEX. CONST. art. VIII, § 2.

146. TEX. REV. CIV. STAT. ANN. art. 7150(h) (Supp. 1973).

147. TEX. ATT'Y GEN. OP. No. H-88 (1973). See also TEX. ATT'Y GEN. OP. Nos. H-9, H-162 as to homestead tax exemptions for persons over 65.

148. Act of Jan. 6, 1841, ch. 20, § 4, [1841] Tex. Laws, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898) (repealed 1969).

149. *In re Adams*, 357 F. Supp. 1184, 1187 (S.D. Tex. 1973).

150. *In re Adams*, 11 TEX. LAW WEEKLY LETTER, April 24, 1974, at 17-4.

and duties stemming from the paternal status which will necessitate findings of a paternal relationship in the future.<sup>151</sup> But an action of a mother of an illegitimate child to compel law enforcement authorities to apply criminal sanctions to the father under the criminal non-support statute, hitherto applicable under state law to fathers of legitimate children only, was unsuccessful.<sup>152</sup> Legislation was enacted, however, to regularize status of children born in wedlock through artificial insemination with the husband's consent.<sup>153</sup>

A child born subsequent to divorce but conceived during marriage is nonetheless the legitimate child of the marriage.<sup>154</sup> The ordinary rules of proof of status are applicable, including the corollary of Lord Mansfield's rule that the former husband must prove non-access in order to deny paternity effectively. But there is a significant exception to the application of Lord Mansfield's rule—if a child is conceived during marriage and after dissolution of that marriage the mother marries the father of the child, the husband at the time of conception as well as the mother and father are allowed to testify as to the child's paternity since the child will be the *legitimate* child to *someone*.<sup>155</sup> This exception suggests a solution of a number of persistent problems with respect to children born *during* but not *of* a marriage. Formerly, article 4639a<sup>156</sup> required that the names and ages of all children "born of the marriage" sought to be dissolved by divorce be set out in the petition. No appellate case declared this provision jurisdictional, though some feared that it was. As long as the defense of adultery subsisted with respect to fault grounds for divorce, attorneys frequently suppressed recitals with respect to children born *during* (but admittedly not *of*) a marriage in order to encourage the husband to waive service of citation and to discourage him from pleading the defense of adultery as a matter of leverage against being ordered to pay for support of the child which was admittedly the biological offspring of the man the mother was about to marry. So that the petition did not reveal the defense of adultery on its face and therefore impel the court to apply it *sua sponte*, this ruse of "born of"—"born during" was commonly practiced with an oral explanation to the judge of the situation involved. The practice continues to be utilized under current law. Although the Family Code does not authorize the divorce court to waive the thirty-day period during which the parties are not allowed to remarry,<sup>157</sup> the court can and frequently does encourage the parties to make

151. *Gomez v. Perez*, 409 U.S. 535 (1973), *rev'g* 466 S.W.2d 41 (Tex. Civ. App.—San Antonio 1971), *error ref. n.r.e.*, noted in Smith, *supra* note 41, at 52. In past years there have been a number of suits for proof of paternity in the Texas courts using scientific evidence to prove or disprove paternity.

152. *S. v. D.*, 410 U.S. 614 (1973), *aff'g* 335 F. Supp. 804 (N.D. Tex. 1971).

153. TEX. FAM. CODE ANN. § 12.03 (Supp. 1973). Even without a statute to the same effect, a New York court reached the same conclusion. *In re Adoption of Anonymous*, 345 N.Y.S.2d 430 (Sur. Ct. 1973).

154. *Zimmerman v. Zimmerman*, 488 S.W.2d 184 (Tex. Civ. App.—Houston [14th Dist.] 1972).

155. *Caddel v. Caddel*, 486 S.W.2d 141 (Tex. Civ. App.—Amarillo 1972), noted in Smith, *supra* note 41, at 45-46. See also *Gravley v. Gravley*, 353 S.W.2d 333 (Tex. Civ. App.—Dallas 1961), *error dismissed*.

156. Act of May 14, 1953, ch. 127, [1953] Tex. Laws 439 (repealed by TEX. FAM. CODE ANN. § 3.55(a) (Supp. 1973)).

157. TEX. FAM. CODE ANN. § 3.66 (Supp. 1973).

an immediate recordation of their informal marriage after the divorce is granted.<sup>158</sup> Hence, the child becomes the legitimate child of the second husband by operation of law, and the application of Lord Mansfield's rule is circumvented. But the child is nonetheless still as a matter of law the legitimate child of the first husband as well. It is suggested that by a modest extension of the *Caddel* principle (with joinder of the prospective husband in the proceeding) the status of the child might be regularized by court decree and so make unnecessary a later termination and legitimation or name change.<sup>159</sup>

Though there are inevitable arguments that can be raised with respect to its applicability in particular instances, the enactment of the statute<sup>160</sup> reducing the general age of majority to eighteen greatly reduces the ambit of the related statutes allowing removal of the disabilities of minority<sup>161</sup> and the concept of the actually emancipated minor.<sup>162</sup>

Until January 1, 1974, the Texas law of termination of parental rights was tied to that of adoption because the adoption code, along with the dependent child statutes,<sup>163</sup> provided a means of adoption of the child of another without his consent.<sup>164</sup> Though infant adoption will continue to be the most common cause of judicial proceedings for termination of parental rights, hereafter adoption and termination proceedings will be considered separate legal concepts.

Prior to January 1, 1974, Texas had no proceeding by which parental rights could have been finally terminated. The dependency proceeding was as close as Texas had then come to allowing termination of parental rights. The proceeding was subject to being reopened.<sup>165</sup> A reconsideration of the finding of dependency or neglect was available under a showing of changed circumstances.<sup>166</sup> But now under chapter 15 of the Family Code termina-

158. Such advice appears to be grounded in the supposition that the proscription of marriage in TEX. FAM. CODE ANN. § 3.66 (Supp. 1973) refers to ceremonial and not informal marriage.

159. A father's entitlement to notice with respect to change of name of his child was reiterated in *Scucchi v. Woodruff*, 503 S.W.2d 356 (Tex. Civ. App.—Fort Worth 1973). But the court held that since there was no conflict of interest between the minor plaintiffs and their mother, the trial court's failure to appoint a guardian *ad litem* for the child was not an abuse of its discretion.

160. TEX. REV. CIV. STAT. ANN. art. 5923(b) (Supp. 1973), effective Aug. 27, 1973.

161. TEX. FAM. CODE ANN. §§ 31.01-.08 (Supp. 1973).

162. In TEX. ATT'Y GEN. OP. NOS. H-82, H-83, H-84, H-85 (1973), the attorney general attempted to answer some of the more immediate questions with respect to the applicability of the legislation. See also Knag, *The Connecticut Eighteen-Year-Old Emancipation Act: Problems of Construction and Application Encountered by the Estates and Trust Practitioner*, 47 CONN. B.J. 147 (1973).

163. TEX. REV. CIV. STAT. ANN. arts. 2330-37 (1971) (repealed 1973). See also *id.* art. 46a, § 6 (1969) (repealed 1973).

164. A court declaring a child dependent and neglected need not find that the parents are unfit nor need the judgment so state. *Hicks v. Brooks*, 504 S.W.2d 942 (Tex. Civ. App.—Tyler 1973), *error ref. n.r.e.* In another jurisdiction parents were found unfit for their low mental ability. *In re McDonald*, 201 Iowa 447, 201 N.W. 447 (1972). With respect to the parents' right to counsel in cases of involuntary termination of parental rights, see *In re Adoption of R.L.*, 455 Pa. 29, 312 A.2d 601 (1973); *In re Watson*, 450 Pa. 579, 301 A.2d 861 (1973). See also Smith, *supra* note 41, at 53 n.52.

165. See Smith, *supra* note 41, at 53, and authorities there cited.

166. *Jones v. Travis County Child Welfare Unit*, 487 S.W.2d 252 (Tex. Civ. App.—Austin 1972).



tion once finally decreed is irrevocable. But under section 15.05(c)(2)<sup>167</sup> courts may still make a determination that will stop short of final termination of parental rights in cases which would have merited a decree of dependency or neglect but hold some possibility of changed circumstances.

Under the old law failure of support for two years by a parent was a ground for granting adoption by another.<sup>168</sup> Once it was held that consent to adoption is within the discretion of the court,<sup>169</sup> it was virtually inevitable that the exercise of the court's discretion would be said to apply to judging the unfitness of the parent to continue in that capacity as well as the desirability of the adoption in spite of the parent's past acts. On several occasions the appellate courts seemed to fall back on this refrain as though it supplied added weight to the trial court's conclusion that a child might be adopted over the objection of a non-supporting parent.<sup>170</sup> The two-year period of non-support did not need to be immediately prior to the judgment in order to supply grounds for adoption in the absence of the consent of the non-supporting parent. The fact that the non-consenting parent had resumed some support during the six months immediately preceding and subsequent to the filing of a petition for adoption and the fact that those benefits were accepted by the other parent (and the petitioning adoptive parent) did not affect the ground for adoption based on non-support for two years.<sup>171</sup> But if the non-consenting parent resumed support within the two-year period in a manner commensurate with his ability, the ground of non-support failed.<sup>172</sup> In *Alexander v. Clower*<sup>173</sup> the non-consenting father asserted that he had not supported his children because of an agreement that he should not be obligated to do so. He derived this contention from language in the mother's petition for divorce that she desired to support the children if she remarried (which she had done), but the divorce court ordered the father to make weekly child support payments which he paid for several months and then stopped. The appellate court concluded that the father was not justified in relying on any asserted representation made at the time of the divorce.

Voluntary consent for private adoption can be withdrawn within the statutory time and the petition for adoption will be dismissed.<sup>174</sup> The adoption court cannot, however, on its own motion then proceed to declare the parent unfit and terminate parental rights.<sup>175</sup> If a child is relinquished to an authorized agency to be placed for adoption, the agency's consent must be obtained, even in such unusual circumstances as those giving rise to *Lutheran*

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167. TEX. FAM. CODE ANN. § 15.05(c)(2) (Supp. 1973).

168. Act of June 17, 1967, ch. 700, § 3, [1967] Tex. Laws 1819 (repealed 1973).

169. *Rubey v. Kuehn*, 440 S.W.2d 95 (Tex. Civ. App.—Houston [1st Dist.] 1969), noted in *McKnight*, *supra* note 77, at 58.

170. *Jackson v. Cole*, 498 S.W.2d 15 (Tex. Civ. App.—Austin 1973); *Alexander v. Clower*, 486 S.W.2d 189 (Tex. Civ. App.—Tyler 1972).

171. *Homfeld v. Pence*, 487 S.W.2d 224 (Tex. Civ. App.—El Paso 1972).

172. *In re Davis*, 494 S.W.2d 277 (Tex. Civ. App.—Eastland 1973).

173. 486 S.W.2d 189 (Tex. Civ. App.—Tyler 1972).

174. TEX. FAM. CODE ANN. § 16.06 (Supp. 1973). Under prior law withdrawal of consent could be at any time before entry of the decree of adoption. *Colwell v. Blume*, 456 S.W.2d 174 (Tex. Civ. App.—San Antonio 1970), *error ref. n.r.e.*

175. *Rodriguez v. Vella*, 488 S.W.2d 872 (Tex. Civ. App.—San Antonio 1972).

*Social Service, Inc v. Ferris*.<sup>176</sup> The mother of a child born out of wedlock relinquished the child to an authorized agency which placed the child for adoption. Shortly afterwards the mother and her parents were killed, and a substantial estate was left to the child. The grandfather's brother, named as executor of his brother's will, procured an order from the district judge directing the agency and the adoptive parents to show cause why they should not be enjoined from proceeding with the adoption. The supreme court affirmed the power of the district court to issue the order. At a subsequent hearing, the issue was whether the granduncle's petition to adopt the child stated a cause of action. Since the petition did not state that the petitioner had obtained the consent of the adoption agency, the appellate court concluded that there was no proper petition for adoption. The couple with whom the licensed agency had placed the child for adoption filed a plea of privilege to be sued in their county of residence which the trial court properly overruled, since the suit was pending in the county of residence of the child-placing institution as provided in the adoption act.

In the latest dispute between Leithold and Plass, the father brought suit to set aside a judgment of adoption by his former wife's second husband. The appellate court concluded that the citation of the father by publication was faulty.<sup>177</sup> Under the circumstances the remedy of the non-consenting, unserved father was to institute a suit in the nature of a bill of review which would entitle him to a hearing on the issue of whether sufficient facts existed to authorize the adoption. On a new trial the burden is upon the person petitioning for adoption to prove his case.<sup>178</sup> In this he ultimately failed.<sup>179</sup>

Two cases involved rather curious situations following adoptions. In *Rodgers v. Williamson*<sup>180</sup> the actual father of the child had been given a right of visitation by a sister-state decree of adoption in favor of the mother's second husband. The Supreme Court of Texas held that the foreign decree was entitled to full faith and credit. The court went on to hold, however, that on remand to the trial court for consideration of the petitioning father's prayer for a new schedule of visitation the court need not look to either party for a showing of change of circumstances as required for a change of custody. The trial court might therefore modify the original order for the best interest of the child. In *Avila v. Hill*<sup>181</sup> the actual mother of a child relinquished by her for adoption sought custody of the child after

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176. 483 S.W.2d 693 (Tex. Civ. App.—Austin 1972), the sequel to *Lutheran Social Serv., Inc. v. Meyers*, 460 S.W.2d 887 (Tex. 1970), discussed in *McKnight & Raggio*, supra note 26, at 55-56.

177. *Leithold v. Plass*, 488 S.W.2d 159 (Tex. Civ. App.—Houston [14th Dist.] 1972). For earlier developments, see *Smith, Family Law, Annual Survey of Texas Law*, 22 Sw. L.J. 115, 121-23 (1968).

178. With respect to the burden of proof in a federal case to establish equitable adoption for purposes of entitlement to Social Security benefits, the court held that a very liberal standard of proof would be applied for such purposes when, as was the case, the alleged adoptive parents were still living, as is usually not the case with respect to equitable adoption. *Hall v. Richardson*, 362 F. Supp. 662 (S.D. Tex. 1973).

179. *Leithold v. Plass*, 505 S.W.2d 376 (Tex. Civ. App.—Houston [14th Dist.] 1974).

180. 489 S.W.2d 558 (Tex. 1973), noted in *Thomas, Conflict of Laws, Annual Survey of Texas Law*, 27 Sw. L.J. 165, 171 (1973).

181. 497 S.W.2d 541 (Tex. Civ. App.—Amarillo 1973).

the death of the adoptive parent. By her will the adoptive parent requested that a particular unrelated couple take custody of the child. The trial court concluded that granting custody to that couple was in the best interest of the child. The Amarillo court of civil appeals affirmed this finding as within the discretion of the trial court. The actual parent did not have any paramount right to custody under these circumstances.

Though the Family Code provisions enacted in 1973 clearly contemplate both private placement and licensed agency adoptions,<sup>182</sup> the same session of the legislature also enacted an obscure bill applying criminal sanctions to private placement activities of lawyers, doctors, ministers, and others.<sup>183</sup> The attorney general has concluded<sup>184</sup> that in spite of the apparent intent of the Family Code, the criminal statute should be literally construed. Though lawyers and others face no risk of prosecution for engaging in placement activities after termination of parental rights, their involvement prior to that point is within the purview of the statute. It will be interesting to see whether a way around the penal act will be found and, if not, whether the legislature will be called upon to repeal it at its next session.<sup>185</sup>

### B. *Custody and Support*

There was a spate of cases during the past year involving the interest of grandparents in custody matters. Without alleging unfitness for custody on the part of both parents, grandparents were allowed to intervene as parties in the discretion of the court.<sup>186</sup> Two cases involved voluntary relinquishment of custody by a parent, in one instance to grandparents and in another to strangers.<sup>187</sup> In both cases the parents sought to regain custody, and in each the court awarded custody to the non-parent on the basis of the best interest of the child. The best interest rule was also applied in *Alfaro v. Cabrera*<sup>188</sup> in favor of a parent as against grandparents who had been awarded custody upon the parents' divorce at a time when the parent later seeking custody was outside the country in military service. There was no unfitness as to the grandparents demonstrated, but there was a change in the parent's circumstances as well as a finding that it was in the best interest of the children to be in the custody of the parent. But in another case when grandparents sought a change of custody from a parent, the court denied relief to the grandparents, even to the extent of a right of visitation, and

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182. TEX. FAM. CODE ANN. § 16.03 (Supp. 1973).

183. TEX. REV. CIV. STAT. ANN. art. 695c, § 8 (a)12 (Supp. 1973).

184. TEX. ATT'Y GEN. OP. No. H-221 (1974).

185. The attorney general has also been asked to interpret TEX. PEN. CODE ANN. art. 606a (1952), now TEX. REV. CIV. STAT. ANN. art. 695a, §§ 6, 7 (Supp. 1973) with respect to bringing a child into the state for the purpose of placing him for adoption. 10 TEX. LAW. WEEKLY LETTER, Nov. 21, 1973, at 45-4.

186. *Perkins v. Freeman*, 501 S.W.2d 424 (Tex. Civ. App.—Beaumont 1973), *error granted*. Over a dissent of Keith, J., *id.* at 430, the court also concluded the grandparents were permitted six peremptory challenges rather than three, though their interests were in many respects the same as that of their son, the father.

187. *Pace v. Curtis*, 496 S.W.2d 931 (Tex. Civ. App.—Houston [14th Dist.] 1973); *Cravens v. Eisenbach*, 487 S.W.2d 254 (Tex. Civ. App.—Austin 1972).

188. Civ. Case No. 15253 (Tex. Civ. App.—San Antonio 1973), *discussed in* 10 TEX. LAW. WEEKLY LETTER, Sept. 19, 1973, at 36-3.

even when the jury had found that visitation rights in the grandparents would be in the best interest of the child.<sup>189</sup> Though not recommended by the Family Law Section of the state bar, provisions allowing visitation rights to grandparents were specifically provided in the Family Code in section 14.03(d).<sup>190</sup>

In *Davis v. Davis*<sup>191</sup> relinquishment by the mother of custody to paternal grandparents for a number of years was in itself treated as a significant factor in materially changed conditions to support the father's suit for a change of custody. In that case the court's discretion was exercised along the lines of the finding of the jury. In *Brunson v. Brunson*<sup>192</sup> a clear cut case of the constitutional validity of the binding quality of jury verdicts in custody cases<sup>193</sup> was finally presented. There the jury found a material change in living conditions of the children adversely affecting their welfare to a degree that custody should be changed from the mother to the father. The trial court nevertheless exercised its discretion in favor of custody of the mother, notwithstanding the verdict.<sup>194</sup> The Fort Worth court of civil appeals held that there was sufficient evidence of probative force to support the verdict and that the jury verdict was binding under the statute. The issue of constitutionality of the jury verdict statute was reserved by the Texas Supreme Court in *Cook v. Wofford*<sup>195</sup> and might have been presented to it in this case. But the right of jury trial in all suits affecting the parent-child relationship except adoption is provided as of January 1, 1974,<sup>196</sup> and hence under the Uniform Reciprocal Enforcement of Support Act with respect to matters to which section 11.13 of the Family Code is applicable.<sup>197</sup>

A significant group of cases occurring during the last year also dealt with various other questions involving rights of visitation. A proceeding for re-adjudication of visitation rights was a separate and independent proceeding under the old law<sup>198</sup> and will continue to be so with respect to suits adjudicated before January 1, 1974.<sup>199</sup> In a contempt motion for failure to pay

189. *Green v. Green*, 485 S.W.2d 941 (Tex. Civ. App.—Eastland 1972), *error ref. n.r.e.* The court purported to follow *Smith v. Painter*, 412 S.W.2d 28 (Tex. 1967), where maternal grandparents were denied rights of visitation of deceased daughter's child adopted by another.

190. TEX. FAM. CODE ANN. § 14.03(d) (Supp. 1973). For further discussion of this provision see Gault, *Statutory Grandchild Visitation*, 5 ST. MARYS L.J. 474 (1973); Gault, *Grandparent-Grandchild Visitation*, 37 TEX. B.J. 433 (1974).

191. 499 S.W.2d 922 (Tex. Civ. App.—Houston [14th Dist.] 1973).

192. 502 S.W.2d 578 (Tex. Civ. App.—Fort Worth 1973).

193. TEX. FAM. CODE ANN. § 11.13 (Supp. 1973).

194. In *Erwin v. Erwin*, 505 S.W.2d 370 (Tex. Civ. App.—Houston [14th Dist.] 1974), the court repeated the rubric that if all factors are equal, a mother shall be awarded custody of children of tender years. Cf. *New York ex rel. Watts v. Watts*, 350 N.Y.S.2d 285 (Fam. Ct. N.Y. Co. 1973).

195. 458 S.W.2d 653 (Tex. 1970); see McKnight & Raggio, *supra* note 26, at 58-59.

196. TEX. FAM. CODE ANN. § 11.13 (Supp. 1973). *Walker v. Showalter*, 503 S.W.2d 624 (Tex. Civ. App.—Houston [1st Dist.] 1973), decided under prior law, reached a contrary result with respect to a trial on visitation rights.

197. TEX. ATTY GEN. OP. No. H-270 (1974). But the same is not true with respect to other matters. TEX. ATTY GEN. OP. No. H-218 (1974).

198. *Viola v. McDougal*, 498 S.W.2d 24 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.*

199. Act of June 15, 1973, ch. 543, § 4, [1973] Tex. Laws 1459; see *Shoemate v. Winkley*, 505 S.W.2d 357 (Tex. Civ. App.—El Paso 1974).

child support the trial court cannot sua sponte undertake to change rights of visitation.<sup>200</sup> A court may not condition a parent's right of visitation on payment of child support.<sup>201</sup> The Supreme Court of Texas reiterated the rule that it is not necessary for either party to show the changed circumstances required for a change of custody in matters of visitation.<sup>202</sup>

Under the rules applicable to custody proceedings, venue has been at the county of residence of the respondent,<sup>203</sup> and in determining which venue rule applies the best evidence of the nature of suit is the petition praying relief.<sup>204</sup> If a suit for change of custody is filed by one parent against another and the respondent dies, the suit abates, leaving no suit in which the testamentary guardian named in the deceased parent's will may defend.<sup>205</sup> A suit for change of custody may also abate at the discretion of the trial court on grounds of *forum non conveniens* when the foreign domiciliary forum of the parents and child is available (and indeed petitioned by the parties) even though the child and the petitioner were living in Texas.<sup>206</sup>

In two habeas corpus proceedings the issue was whether the child support order was sufficiently definite for enforcement by contempt. In *Ex parte Lindeman*<sup>207</sup> the petitioner was ordered to pay a particular amount each week for the support of the minor children of the parties until each attained the age of eighteen years. When the eldest of the four children became eighteen, the petitioner reduced the amount of his child support payment by one-quarter. The Fort Worth court of civil appeals found the order "definite and certain." In *Ex parte Lewis*<sup>208</sup> the Supreme Court of Texas had before it an order to pay a fixed amount on the first and fifteenth days of each month until the minor children of the parties reached the age of eighteen years. When the first of four children attained eighteen, the relator reduced his payments by one-fourth, and thereafter when the second attained that age, he paid only one-half of the amount originally ordered. The supreme court said that this order was so vague and ambiguous that it did not meet the requirements of *Ex parte Slavin*.<sup>209</sup> One is hard put to distinguish the orders in *Lindeman* and *Lewis* except to say that the order in *Lindeman* was perhaps more ambiguous than that in *Lewis*. In another proceeding it was concluded that if a trial court assesses a single cumulative penalty for the commission of several acts asserted to be contemptuous and any one of those acts will not support the order, the judgment is void.<sup>210</sup>

200. *Johnson v. Maxwell*, 493 S.W.2d 648 (Tex. Civ. App.—Waco 1973).

201. *Gani v. Gani*, 500 S.W.2d 254 (Tex. Civ. App.—Texarkana 1973).

202. *Rodgers v. Williamson*, 489 S.W.2d 558 (Tex. 1973).

203. *Shoemate v. Winkley*, 505 S.W.2d 357 (Tex. Civ. App.—El Paso 1974), which nicely illustrates the improvements that will be affected by TEX. FAM. CODE ANN. §§ 11.04-.06 (Supp. 1973); *Box v. Fleming*, 484 S.W.2d 617 (Tex. Civ. App.—Eastland 1972).

204. *Welty v. Welty*, 496 S.W.2d 666 (Tex. Civ. App.—Amarillo 1973).

205. *Zemke v. Stevens*, 494 S.W.2d 227 (Tex. Civ. App.—Eastland 1973); cf. *Calbeck v. Bowen*, 475 S.W.2d 607 (Tex. Civ. App.—Tyler 1971), discussed in Smith, *supra* note 41, at 50.

206. *Hinds v. Hinds*, 491 S.W.2d 448 (Tex. Civ. App.—San Antonio 1973).

207. 492 S.W.2d 599 (Tex. Civ. App.—Fort Worth 1973).

208. 501 S.W.2d 294 (Tex. 1973).

209. 412 S.W.2d 43 (Tex. 1967).

210. *Ex parte Werner*, 496 S.W.2d 121 (Tex. Civ. App.—San Antonio 1973).

The relator had been cited for contempt for failure to pay attorney's fees, *inter alia*, and it was conceded that the court had exceeded its power in this regard.<sup>211</sup>

In *Perkins v. Freeman*<sup>212</sup> the mother brought suit for change of custody against the father. The court allowed the successful father his attorney's fees against the mother on the basis of his duty to support the children and the argument that if the parties had been reversed, the mother as the parent responsible for her children's necessities would have been entitled to attorney's fees from the father.<sup>213</sup> The court relied on the mutual responsibility of parents to support their children as provided in section 4.02 of the Family Code<sup>214</sup> and went on to say that its conclusion was bolstered by section 3a of the Texas Bill of Rights.<sup>215</sup>

Two courts of civil appeals issued conflicting decisions with respect to the jurisdiction of the trial court to enforce payment of arrears for child support once the child reaches the age of eighteen. A Houston court concluded that there is such judicial power,<sup>216</sup> whereas the Tyler court reached the contrary conclusion.<sup>217</sup> Under the amended statute, arrears for child support, presumably including that for children who have already reached the age of eighteen, may be reduced to a judgment debt.<sup>218</sup> Arrears under a final, foreign decree would seem to be enforceable in this manner, if so enforceable by the court rendering judgment.<sup>219</sup> The power of the court to order an increase in child support payments was not contingent on the filing of reports accounting for past payments.<sup>220</sup> In *Clark v. Clark*<sup>221</sup> the court reiterated the conclusion in *Alford v. Alford*<sup>222</sup> that a reduction of child support payments for purposes of judicial enforcement will not affect the contractual rights of a promisee-spouse under a divorce settlement.

211. See *Ex parte Myrick*, 474 S.W.2d 767, 772 (Tex. Civ. App.—Houston [1st Dist.] 1972).

212. 501 S.W.2d 424 (Tex. Civ. App.—Beaumont 1973), *error granted*.

213. Cf. *Walter v. Showalter*, 503 S.W.2d 624 (Tex. Civ. App.—Houston [1st Dist.] 1973), where the petitioning parent was *successful* in achieving a change.

214. TEX. FAM. CODE ANN. § 4.02 (Supp. 1973).

215. TEX. CONST. art. I, § 3a; see Comment, *Is the Texas Equal Rights Amendment the Answer*, 15 SO. TEX. L.J. 111 (1974); cf. *Symposium: The New Mexico Equal Rights Amendment—Assessing Its Impact*, 3 N.M.L. REV. 1 (1973). See also *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Alexander v. Louisiana*, 405 U.S. 625, 634 (1972) (Douglas, J., concurring); TEX. ATT'Y GEN. OP. Nos. H-251, H-254 (1974); cf. *Friedrich v. Katz*, 341 N.Y.S.2d 932 (Sup. Ct. 1973).

216. *Davidson v. Davidson*, 501 S.W.2d 758 (Tex. Civ. App.—Houston [1st Dist.] 1973).

217. *McCullough v. McCullough*, 483 S.W.2d 869 (Tex. Civ. App.—Tyler 1972).

218. TEX. FAM. CODE ANN. § 14.09(c) (Supp. 1973).

219. For a discussion of a related question under the pre-January 1, 1974, law, see *Brazeal v. Renner*, 493 S.W.2d 541 (Tex. Civ. App.—Dallas 1973). See also *Padfield v. McIntosh*, 267 S.W.2d 224 (Tex. Civ. App.—Fort Worth 1954), *error dismissed*.

220. Act of March 19, 1935, ch. 39, § 1a, [1935] Tex. Laws 111 (repealed 1973), empowered the court to require a sworn, itemized report of expenditures for child support.

221. 496 S.W.2d 659 (Tex. Civ. App.—Waco 1973).

222. 487 S.W.2d 429 (Tex. Civ. App.—Beaumont 1972), *error dismissed*; see *McKnight*, *supra* note 41, at 37.