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Family Law: Husband and Wife

Joseph W. McKnight

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FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight*

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FOLLOWING the decision of the Hawaiian Supreme Court\(^1\) that Hawaii's prohibition against granting persons of the same sex a license to marry may violate the equal protection provision of the Hawaiian constitution, it has been suggested that Texas should enact a statute making it plain that same-sex marriages entered into elsewhere by Texas domiciliaries (or persons who may become Texas domiciliaries) are against Texas public policy and will not be recognized here.\(^2\) About twenty other states have adopted statutes which grant recognition to marriages entered into in other American jurisdictions.\(^3\) Some states have long maintained statutes that invalidate marriage entered into by a local domiciliary in order to evade restrictions of domiciliary law.\(^4\) The formulation of such laws is difficult because their scope must be carefully limited so that prohibitions are not too broadly drawn. A Texas proposal of 1969\(^5\) was rejected because it was regarded as casting doubt on the validity of marriages entered into outside Texas by Texas domiciliaries when the place of marriage was not chosen to defeat Texas law but merely to satisfy social convention.

Although it may be appropriate for a state to limit the scope of marriage allowed for its present domiciliaries, some further conceptual and constitutional difficulties are encountered in laying down such rules for other citizens of the United States who migrate to Texas after having achieved marital status in a sister state where the rules of marriage do not conform to Texas's public policy. Although for over a century and a half Texas has maintained a conflict of laws rule\(^6\) designed to impose Texas matrimonial property law on migrant couples who establish a domicile in Texas, many have concluded that the formulation of the rule should be changed to conform to Texas's minimum-contacts-conflict-of-laws rule as

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2. The Title 1 Review Committee of the Family Law Section of the State Bar of Texas has considered such a proposal.

3. See Cox, supra note 1 at 1066-68.

4. Id.

5. See Joseph W. McKnight, Commentary to Title I of the Texas Family Code, 5 TEX. TECH. L. REV. 281, 312 (1974).

now judicially developed. Thus, drafting an appropriate conflict-of-laws rule to replace section 4.01 of the Family Code and to enunciate a limited public policy with respect to marriage presents formidable difficulties.

B. INFORMAL MARRIAGE

In 1989 the legislature responded to longstanding objection to the doctrine of informal marriage and perceived abusive reliance on it by imposing a one-year limitation on asserting the existence of such a union after the cohabital relationship had terminated. For the family lawyer the institution of informal marriage is most often encountered in the context of a marriage to be dissolved by divorce or already dissolved by death, and for the criminal defense lawyer the institution is most often asserted in relation to privileged spousal testimony. It is in these contexts that the issue was before the appellate courts during the past year.

In In re Collins the respondent had failed to answer or appear to contest the petitioner's proof of an alleged informal marriage. On appeal from the divorce decree granted in his absence, he argued that the 1989 statutory amendment created a jurisdictional bar to a court's consideration of an assertion of informal marriage in a divorce filed more than six years after cohabitation had ceased. Relying on Mossler v. Shields, the Amarillo Court of Appeals rejected the argument that the one-year rule constitutes more than a statute of limitation.

The divorce-petitioner's assertion of an informal marriage in Georgiades v. Di Ferrante was met by the respondent's motion for a declaratory judgment that no informal marriage existed. The petitioner thereupon took a non-suit to her cause of action. On appeal by the respondent, the court held that the respondent's prior assertion of a right to affirmative relief was not precluded by the petitioner's non-suit. Thus, the trial court's award of attorney's fees and sanctions against the purported wife for failure to appear for deposition, as well as an injunction based on the respondent's cause of action, were not disturbed.

7. See infra note 299 and accompanying text.
9. In a criminal case in which an informal marriage was sought to be proved in order to suppress evidence through assertion of spousal privilege, evidence to prove the informal marriage was insufficient. Durand v. State, 881 S.W.2d 569 (Tex. App.—Houston [1st Dist.] 1994, no writ). See also State v. Moore, 882 S.W.2d 253 (Mo. App. 1994), cert. denied, 1995 U.S. LEXIS 794 (1995) (a Missouri case in which a Texas informal marriage was alleged but not proved).
10. 870 S.W.2d 682 (Tex. App.—Amarillo 1994, writ denied).
12. Collins, 870 S.W.2d at 684.
14. Id. at 881-82. See Hinojosa v. Hinojosa, 866 S.W.2d 67 (Tex. App.—El Paso 1994, no writ) (succession case in which the issue of informal marriage was not resolved because the order from which the appeal was taken was not final).
C. INTERFERENCE WITH A SPOUSE'S PERSONAL RIGHTS

The view is sometimes expressed that in activities with others, a spouse is subject to the same rules (in relation to the other spouse) as someone not married to the other spouse. For example, the Texas anti-wiretapping statute\textsuperscript{15} and the federal act\textsuperscript{16} on which it is based do not exempt spouses from their terms. The point is illustrated by a divorce case. In \textit{Collins v. Collins}\textsuperscript{17} the court held that tapes of telephone conversations made in violation of those acts should not be admitted into evidence.\textsuperscript{18}

The right of privacy afforded spouses by the anti-wiretapping statutes is in a sense consistent with the objective sought to be achieved by abolition of a spouse's cause of action against a third person for alienation of the other spouse's affection or for criminal conversation\textsuperscript{19}—activities ordinarily secretly pursued.

In \textit{Stites v. Gillum}\textsuperscript{20} the husband's alleged paramour, whom the wife had unsuccessfully sued for "impairment and interference of familial relationships," sought sanctions against the plaintiff's attorney for bringing the suit. The trial court granted the plaintiff's motion for sanctions under Rule 13\textsuperscript{21} and ordered the attorney to pay $18,000 for the loss she had incurred.\textsuperscript{22} The Fort Worth Court of Appeals rejected the attorney's appeal. The appellate court concluded that the abolition of the action for alienation of affection left no independent residual action for interference with familial relations. As the trial court put it, the action filed by the attorney "was an action for 'alienation of affections' couched in other terms."\textsuperscript{23}

In \textit{Helena Laboratories Corp. v. Snyder}\textsuperscript{24} the Texas Supreme Court alluded to the statute abolishing the cause of action for alienation of affection in a suit against an allegedly negligent employer. The defendant corporation employed a man and his wife in executive positions and also employed the wife of the plaintiff as the man's secretary. The man and his secretary engaged in an extramarital affair. The man's wife and the secretary's husband brought suit against the corporation for its alleged negligence in allowing interference with their familial relations. The court concluded that there is no independent cause of action in Texas for such negligent conduct.\textsuperscript{25}

\textsuperscript{15} \textit{Tex. Penal Code Ann.} § 16.02 (Vernon 1989).
\textsuperscript{17} No. 01-91-00782-CV, 1994 WL 416442 (Tex. App.—Houston [1st Dist.], Aug. 11, 1994, no writ).
\textsuperscript{18} \textit{Id.} at *3.
\textsuperscript{20} 872 S.W.2d 786 (Tex. App.—Fort Worth 1994, writ denied).
\textsuperscript{21} \textit{Tex. R. Civ. P.} 13.
\textsuperscript{22} \textit{Stites}, 872 S.W.2d at 787.
\textsuperscript{23} \textit{Id.} at 790.
\textsuperscript{24} 886 S.W.2d 767 (Tex. 1994)(per curiam).
\textsuperscript{25} \textit{Id.} at 768-69.
As against third persons other than paramours, however, the cause of action for loss of consortium is unaffected and is not preempted by the federal act, except in the view of one dissenting appellate judge. In *Wal-Mart Stores v. Alexander* the Texas Supreme Court reiterated the elements of the right to recover for loss of consortium as defined in *Whittlesey v. Miller* and later in *Browning-Ferris Industries v. Lieck*, in which the court stressed the derivative nature of the cause of action in that the victim-spouse must suffer physical damage so that recovery for loss of consortium will lie.

D. Emotional Distress

The decision in *Helena Laboratories* restated the holding in *Boyles v. Kerr* that there is a cause of action for intentional, but not negligent, infliction of emotional distress in Texas. In remanding the divorce dispute in *Twyman v. Twyman* for retrial "in the interest of justice" and in its holding in *Massey v. Massey*, the court recognized that a recovery for intentional infliction of emotional distress may be had in a divorce case. That conclusion is consistent with the sentiment that spouses and non-spouses should be similarly treated in these regards. The Fort Worth Court of Appeals applied the rule in *Behringer v. Behringer*. The wife had told her husband that she had contracted with a third person to kill him, and she had awakened him during the night to warn him of divine punishment for his acts. On another occasion she pointed a toy pistol at him and pulled the trigger. She then said, "Since everybody thinks I'm crazy, I can kill you and they won't do nothing to me." The wife also hired several private investigators to scrutinize her husband's activities but none produced evidence of an extramarital affair. The appellate court held that the wife's conduct was sufficiently outrageous to support an award of $13,000 in damages for intentional infliction of emotional distress.

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26. In *Stites*, 872 S.W.2d at 790, the court remarked that the action for alienation of affection rests on the same general grounds as those for compensation of a spouse's loss of consortium. In this respect, therefore, spouses are not treated the same as non-spouses in relation to third persons.
29. 868 S.W.2d 322, 328 (Tex. 1993).
30. 572 S.W.2d 665, 666 (Tex. 1978).
32. 881 S.W.2d at 294-95. See also Upjohn Co. v. Freeman, 885 S.W.2d 538, 549-50 (Tex. App.—Dallas 1994, writ denied).
35. 867 S.W.2d 766 (Tex. 1993).
36. 884 S.W.2d 839 (Tex. App.—Fort Worth 1994, writ denied).
If a spouse's sexual activities with another are sufficiently ostentatious to amount to intentional infliction of emotional distress on his or her spouse, a cause of action may lie in favor of the aggrieved spouse. Prior to *Twyman* the point was broached by the facts in *Chiles v. Chiles* but the action failed.

### E. Intrafamilial Insurance

Concepts of both tort and contract law impinge on the law of status in relation to a contract of insurance to discharge a family member's liability for injury to another family member. As long as the principle of immunity from suit protected those who caused harm in such instances, the family-member-exclusion clause in automobile insurance policies was consistent with the prevailing law of tort. But with the disappearance of tortious immunity the imposition of such restrictions by insurers with the approval of the State Board of Insurance had become an anachronism. In *National County Mutual Fire Insurance Co. v. Johnson* the Supreme Court of Texas terminated what amounted to a limitation of the contractual powers of a family member to protect himself or herself from liability for actionable harm inflicted on another family member. In *Johnson* the court held that a husband’s insurer was required to defend him in a suit brought by his wife for negligent injury and that there is no rational justification for the policy endorsement approved by the State Board of Insurance to preclude liability on an insurance policy in light of the requirement of the Motor Vehicle Safety-Responsibility Act that all Texas automobile owners carry a minimum amount of liability insurance to cover potential liability. As in some other states with mandatory insurance laws where family-member-exclusion clauses are invalid, the court held that such clauses are void because such clauses violate public policy.

### F. Marital Fraud

The fraud complained of in *Oliver v. Oliver* did not directly involve property, but the damages suffered as a result of the fraud were contributed to by the amount of property accumulated but not divisible on divorce as a result of the perpetration of the fraud. The deception asserted by the ex-wife was that for several years prior to her suit for divorce her

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40. *Id.*

41. TEX. REV. CIV. STAT. ANN. art. 6791h, §§ 1(10), 1A(a) (Vernon Supp. 1995).

42. *Johnson*, 879 S.W.2d at 4-5.

43. 889 S.W.2d 271 (Tex. 1994).
ex-husband had led her to believe that they were married, while they had actually been divorced by a New Mexico court without her knowledge. In 1979 the husband had brought suit for divorce in New Mexico, where the couple was then domiciled, and procured his wife's signature to a waiver of consent to citation. The wife was so distressed by giving her consent, however, that her husband assured her that they would continue to be husband and wife. The husband, nevertheless, proceeded with the divorce without his wife's knowledge. Thereafter the couple continued to live together as husband and wife, and New Mexico law does not recognize informal marriage. In 1987 the couple moved to Texas and established an informal marriage there. In the husband's Texas suit for divorce in 1988, the wife counterclaimed for fraud in the concealment of the prior divorce. In the wife's suit, she was awarded damages, but the court held that her claim was defeated by the statute of limitation. In reviewing the judgment of the trial court, as affirmed by the Court of Appeals, the Supreme Court of Texas concluded that the counterclaim was filed timely.  

II. CHARACTERIZATION OF MARITAL PROPERTY

A. Premarital Partition

An argument based on the misreading of the second and third clauses in the 1980 amendment to Article XVI, section 15 of the Texas Constitution might have been avoided by more thoughtful draftsmanship. The second clause of the article provides that "persons about to marry and spouses . . . may . . . partition between themselves all or part of their property, then existing or to be acquired." "All" includes every kind of property that is or would be community property in the future, though it is usually only future income from future spouses' separate property which parties wish to partition. This clause in the constitution responded to the conclusion of the Texas Supreme Court that an agreement was void to the extent that the income or other property should be separate property of the party who earned [it] or whose property produced such income or acquisition. Such provisions were no more than a mere agreement between the parties to establish the character of the property prior to its acquisition during marriage in violation of the Texas Constitution and the Family Code. . . . Modeled on the proviso of the 1948 constitutional amendment that it replaced, this clause deals with bilateral transactions between spouses, that is, partitions and exchanges. The fourth clause of the 1980 amendment deals with interspousal gifts and was prompted by a series of tax cases in which the Internal Revenue Service had asserted that a gift of one spouse

44. Oliver v. Oliver, 853 S.W.2d 595 (Tex. App.—El Paso 1992), aff’d, 889 S.W.2d 271 (Tex. 1994).
45. Oliver, 889 S.W.2d at 273.
47. Williams v. Williams, 569 S.W.2d 867, 870 (Tex. 1978).
to the other did not constitute a gift of the whole amount transferred because the donor continued to receive half the income from the entire gift as community property. The intervening clause added in 1980 allows spouses to agree that the past and future income from only one spouse's separate property can be changed to the separate property of the owner. The draftsmen of the amendment were particularly concerned that spouses might so agree as to the income produced by property which had been already given by one spouse to the other.

The 1980 clause dealing with interspousal “agreements” concerning income from “the separate property of one of them” made no reference to partitions or exchanges and was not meant to deal with such transaction. This clause referred merely to spousal agreements concerning the income from separate property of “one of them.” The unilateral aspect of the provision was clarified in the 1987 amendment which amplified the phrase to refer to “only one of them.” The addition of the word “only” seemed necessary so that readers would not misinterpret the clause to apply bilaterally. The clause had been misunderstood by the draftsmen of the Fanning agreement, and it is evident that it has been misunderstood by others. In Dokmanovic v. Schwarz a misunderstanding of the clause prompted an argument that this third clause limits the application of the prior clause. It was asserted that because the third clause expressly allows spouses to agree concerning income from separate property, it thereby impliedly excluded persons about to marry from partitioning future acquisitions of income from separate property. But the transaction referred to in the latter clause (an agreement with unilateral effect between spouses) and in the former clause (a partition with bilateral effect) are not sufficiently alike to produce that logical implication. The Hous-


49. Neither the draftsmen nor anyone else closely involved in the passage of the amendment intended or anticipated that the provisions of the amendment might be construed as retrospective in effect. If that result had been anticipated, it would have been unnecessary to insert this clause as drafted.

50. See Joseph W. McKnight & Robert E. Davis, For Constitutional Amendment No. 9, 43 Tex. B.J. 921, 924 (1980). This summary of the purposes for the amendment is a shortened version of the commentary of the draftsmen presented to the Committee on Constitutional Amendments of the Texas House of Representatives in support of the amendment during the 1980 legislative session. See also Joseph W. McKnight, The Constitutional Redefinition of Texas Matrimonial Property as it Affects Antenuptial and Interspousal Transactions, 13 St. Mary's L.J. 449, 464-65 (1982).


52. Id.


54. 880 S.W.2d 272, 273 (Tex. App.—Houston [14th Dist.] 1994, no writ).
ton Fourteenth District Court of Appeals rejected this argument in sustain-
ing the validity of the premarital partition of future acquisitions of income from the future spouses' separate properties.55

B. INTERSPOUSAL GIFT

If a spouse buys property during marriage using his or her separate property to pay for it and puts title in the name of the other spouse, a presumption of gift arises in favor of the grantee-spouse.56 In In re Thur-
mond57 the spouses bought realty in the names of both spouses, which was paid for with the husband's separate cash and community credit. Thus, in the absence of rebuttal, one-half of the proportionate part of the whole property paid for with the husband's separate property is presumed to be a gift by the husband to the wife.58 To rebut the presump-
tion, the court said in Thurmond, the claimant of the separate interest need merely show the payment of his or her separate funds and need not show a lack of donative intent.59 Such a conclusion, however, confuses proof of expenditure of separate funds (which is a prerequisite to application of the presumption) with the operation of the presumption of gift itself. Nor does this statement of the quantum of proof necessary to re-
but the presumption conform to authorities on which the court relied.60 In Thurmond61 the court said that the cases relied on by the wife were decided before the 1987 amendment to section 5.01,62 which changed the burden of rebutting the community property presumption in favor of a separate acquisition during marriage from a preponderance of the evidence to clear and convincing evidence. But surely the change makes the burden of rebuttal more onerous rather than less so.

In McClure v. McClure63 the character of two bank accounts was in issue in a suit for divorce. At marriage the husband had separate property on deposit. Using separate funds, the husband opened an account in his and his wife's name as their "operating account." The husband also added the name of his wife to a money market account held at marriage so that she might draw on the account in case of his death. After ten

55. Dokmanovic, 880 S.W.2d at 273-76. In Edgington v. Maddison, 870 S.W.2d 187, 188 (Tex. App.—Houston [14th Dist.] 1994, n.w.h.), the trial court invalidated the provi-
sion of a premarital agreement that the income from the separate property of the spouses would be the separate property of the owner of the property; however, that conclusion was not appealed.
56. Cockerham v. Cockerham, 527 S.W.2d 162, 168 (Tex. 1975); Smith v. Strahan, 16 Tex. 314, 323-24 (1856).
58. Id. at 273.
59. Id. at 274-75.
60. Welder v. Welder, 794 S.W.2d 420, 424 (Tex. App.—Corpus Christi 1990, no writ); Gutierrez v. Gutierrez, 791 S.W.2d 659, 664 (Tex. App.—San Antonio 1990, no writ). Both cases were decided after the 1987 amendment to TEX. FAM. CODE ANN. § 5.01 (Vernon 1993).
61. Thurmond, 888 S.W.2d at 278.
62. TEX. FAM. CODE ANN. § 5.01 (Vernon 1993).
63. 870 S.W.2d 358 (Tex. App.—Fort Worth 1994, no writ).
weeks the couple separated, and the wife consulted a lawyer about a divorce. On filing for divorce the wife withdrew $7500 from the first account and $17,000 from the second account. The wife argued that she was entitled to keep as much of those funds as remained unspent because her husband told her to leave and "that he would pay her rent, her salary, and her expenses." The divorce court concluded that those funds were the husband's separate property and that the husband was entitled to as much of those funds that were still on hand at divorce. In sustaining this conclusion the appellate court said that the court below could have reasonably concluded that the husband intended that the accounts be available for community purposes but that a gift of the entire amount was not intended. The court held in effect that the wife was not required to account for the money already spent for community purposes but was required to return the remainder.

During the marriage the husband had also transferred $42,000 to his wife to discharge a mortgage on her separate condominium. She used $20,000 for that purpose and deposited the remaining $22,000 in her saving account. On divorce the husband claimed the $22,000 on deposit, but the wife asserted that she should be allowed to use it for the purpose for which it was provided. In sustaining her position, the court relied on an Arkansas case in which the court stated while a voluntary donor may revoke his gift at any time before the compliance by the other party with the condition upon which it is to be delivered, yet, when the donee has partially complied with such condition to the acceptance of the donor['s gift], the donor cannot then withdraw his donation without giving the donee an opportunity to fully comply. The court held that the $22,000 was therefore the wife's separate property provided that she use the funds for discharging the indebtedness on her condominium.

C. Gift of a Third Person to a Spouse

The argument was made in Roosth v. Roosth that because evidence as to whom wedding and engagement presents were given was so conflicting, the community presumption should prevail. The appellate court responded that it was nonetheless clear that the acquisitions were gifts and

64. Id. at 361.
65. Id.
66. Id. at 360.
68. McClure, 870 S.W.2d at 361.
69. Id. The trial court had also awarded the husband his attorney's fees. In light of the fact that part of the trial court's judgment was reversed, the issue of attorney's fees was remanded to the trial court.
70. 889 S.W.2d 445, 457 (Tex. App.—Houston [14th Dist. 1994, writ denied).
that a gift by a third person to the spouses constitutes a gift of an undivided interest as separate property to each.\textsuperscript{71}

In \textit{Burgess v. Easley}\textsuperscript{72} an ex-wife sought partition of land alleged to be community property but undivided on divorce. The land was conveyed to the husband by his parents and was recorded by the grantors during the marriage. It was therefore presumed that the grantors delivered the deed at the date of execution and acknowledgment,\textsuperscript{73} and the recordation thus constituted a constructive delivery.\textsuperscript{74} The grantee-husband, however, testified that he was unaware of the conveyance, and the court held that title, therefore, had not passed to him until the deed’s actual delivery, which occurred after the grantee’s divorce.\textsuperscript{75} The community presumption was therefore rebutted.\textsuperscript{76}

\section*{D. Credit Purchases and Loans}

It is a corollary of the community presumption that property acquired on credit or with money borrowed during marriage is presumed to be community property unless a spouse can prove that the seller of the property bought on credit or the lender of the money used to make the purchase looked solely to the separate credit of the buying or borrowing spouse.\textsuperscript{77} If the claimant shows that separate collateral was given for a loan, the claimant does not thereby discharge the burden of showing that separate property was borrowed unless the lender agreed that he has no recourse to other assets if the collateral is insufficient to repay the loan in full.\textsuperscript{78} These propositions are illustrated by \textit{Jones v. Jones}.\textsuperscript{79} In a divorce the husband asserted that particular treasury notes were his separate property. The notes had been purchased during marriage with money borrowed by the husband from a bank. The husband had pledged a separate certificate of deposit as collateral for the loan. The proceeds of the loan did not thereby become the husband’s separate property, however, because there was no evidence that the bank “would limit itself to satisfying the debt by only the [separate] collateral or only the separate property of [the husband].”\textsuperscript{80} The borrower’s intention to hold the property

\textsuperscript{71} Id. (citing McLemore v. McLemore, 641 S.W.2d 395, 397 (Tex. App.—Tyler 1982, no writ)).
\textsuperscript{72} 893 S.W.2d 87 (Tex. App.—Dallas 1994, n.w.h.).
\textsuperscript{74} Levy v. Winfree, 99 S.W.2d 1043, 1048 (Tex. Civ. App.—Galveston 1936, no writ).
\textsuperscript{75} Burgess, 893 S.W.2d at 91.
\textsuperscript{76} The evidence in the record was evidently insufficient to disprove the recital of consideration in the deed and thus to show that the conveyance was a gift.
\textsuperscript{78} Heidenheimer Bros. v. McKeen, 63 Tex. 229 (1885).
\textsuperscript{79} 890 S.W.2d 471 (Tex. App.—Corpus Christi 1994, writ requested).
\textsuperscript{80} Id. at 476.
to repay the loan out of separate funds "has never been controlling."\(^8\)
The court thus avoided an erroneous implication of its errant opinion in 
Welder v. Welder\(^8\) that the mere agreement of both spouses that a loan
should be for the benefit of only one of them controls the character of the 
funds borrowed. Texas law requires a written spousal partition or exchange of property to achieve that result.\(^8\)

**E. INCOME FROM SEPARATE PROPERTY**

It is a fundamental axiom of Texas matrimonial property law that in-
come from separate property is community property. That principle was
made abundantly clear by the Texas Supreme Court in 1859 in De Blane 
v. Hugh Lynch & Co.\(^8\) despite the contrary implication of statutory law at the time.\(^8\) In Yaklin v. Glusing, Sharpe & Krueger\(^8\) an ex-husband brought suit against his alleged former counsel, urging *inter alia* that but for the attorney's errors in preparing certain refinancing documents, the income from certain separate property would have been the plaintiff's separate property. Contrary to his assertion, however, the income from his separate property would have been community property, and an agreement between the ex-husband and a third person could not have changed the character of the property.

**F. BUSINESS ENTITIES**

In Cole v. Cole\(^8\) the wife asserted in her suit for divorce that her hus-
band owned a partnership interest in a business. The husband testified 
that his mother owned the business and that he was his mother's em-
ployee or agent. Although a partner is an agent for his partner, relations-
ships arising from an agency and those of a partnership are different. The 
mere fact of agency does not, without more, show a partnership.\(^8\)

**G. PARENTAL RECOVERY FOR PERSONAL INJURY OF A CHILD**

In the Matrimonial Property Act of 1967\(^8\) separate property was de-
fined to include spousal recovery for personal injury except for the loss of 
earning power. In 1972 the Texas Supreme Court decided Graham v. 
Franco,\(^9\) concerning facts that had occurred prior to the January 1, 1968, 
effective date of the statute, and prior to the adoption of the principle of

\(^8\) *Id.* at 475.
\(^9\) 794 S.W.2d 420, 427 (Tex. App.—Corpus Christi 1990, no writ).
\(^10\) 23 Tex. 25 (1859).
\(^11\) *See* Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Re- 
\(^12\) 875 S.W.2d 380 (Tex. App.—Corpus Christi 1994, no writ).
\(^13\) 880 S.W.2d 477 (Tex. App.—Fort Worth 1994, no writ).
\(^14\) In Cole there was no evidence of the husband's ownership of the business.
\(^15\) 60th Leg., R.S., ch. 309, § 16, 1967 Tex. Gen. Laws 735, 736 (codified at TEX. FAM. 
CODE ANN. § 5.01 (Vernon 1993)).
\(^16\) 488 S.W.2d 390 (Tex. 1972).
comparative negligence in 1973. The court held that the definition of recovery for a spouse's personal injury as provided by the statute of 1967 was constitutional. In the following two decades the court has added further refinements to the rules of spousal recovery. Development of rules for characterization of spousal recovery for injury to a child has proceeded slowly. Those principles were alluded to in *Enochs v. Brown*, though the facts of that case dealt with the rights of divorced parents to recover for injury to their child. The appellate court affirmed the trial court's award of unequal amounts to each parent for loss of companionship with the child. "Two factors to be considered in awarding loss of companionship are the living arrangements of the parties and the relationship between the parents and the child." Would a disparity for loss be appropriate for awards of separate property to married parents with whom the child is living in an ordinary familial relationship?

H. **Retirement Benefits Controlled by the Sovereign**

Disputes dealing with property acquired from the national sovereign in relation to the determination of a matrimonial property interest under Texas law are subject to the strictures of the federal supremacy clause. Since the United States Supreme Court decided *Hisquierdo v. Hisquierdo*, a large body of law has developed with respect to retirement benefits subject to federal law. Rules concerning benefits stemming from employment by the national sovereign itself constitute a significant amount of that law, particularly in relation to military retirement benefits. As a consequence of the Court's later decision in *McCarty v. McCarty* on June 26, 1981, Congress provided that in 1982 state law would apply to the division of benefits on divorce payable after June 25, 1981, and in 1990, state law would not apply to divorces rendered before June 25, 1981. In *Walton v. Lee* an ex-wife sought partition of her ex-husband's military retirement benefits not divided in a 1976 Texas divorce decree. The trial court rendered summary judgment for the ex-
husband and the ex-wife appealed. The court held that the 1982 congres-
sional act applied to allow partition of the benefits. In his dissent Chief
Justice Walker pointed out that the 1990 enactment was controlling. The chief justice is, of course, correct.

In Hernandez v. Igloo Products Corp. Retirement Plan the husband
and wife separated in 1957 but never divorced. Thereafter the husband
lived with the plaintiff and in 1979 named her as beneficiary of his em-
ployment benefits. The husband died in 1989 prior to retirement. In 1992
the widow began receiving benefits under the plan, though she had exe-
cuted an assignment of her rights to the named beneficiary in 1990. In
1994 the plaintiff sued the trustee of the plan and the widow for the
benefits.

The plan provided an annuity for a spouse who survived an employee
who had not retired and further provided that the survivor might elect to
waive the annuity benefit with the employee’s consent in writing. Under
the provisions of the federal statute that election is required to be
made during the lifetime of the employee. Although the surviving wife
had purported to assign her right to the designated beneficiary, the plan
itself prohibited assignment. Thus, under the plan created by applicable
federal law the designated beneficiary was barred from taking.

I. Term Life Insurance

In Estate of Cavenaugh v. Commissioner of Internal Revenue the Tax
Court considered the character of proceeds from a term life insurance
policy in an estate tax context. The husband had acquired the policy on
his life during his first marriage. The policy had no cash or loan value but
provided for an annual dividend to be credited to the policy. In her will
the first wife provided for specific dispositions of real property and a trust
of the residue of her property for her husband for life and then for their
children. An estate tax return was filed for the deceased wife’s estate, but
no tax was paid. The surviving husband, as executor, made no distribu-
tion of the decedent’s share of community property. Thereafter, the sur-
viving husband remarried and died several years later. In the settlement
of his estate between the children of the first marriage and his second
wife, it was agreed that the husband died intestate and an estate tax re-
turn was filed by the administrator of his estate. In that return the admin-
istrator included an interest in only one-half of the life insurance policy as
the decedent’s community property share and asserted that the other
one-half of the property had belonged to the estate of his deceased wife
and thus passed as part of her residuary estate. The Commissioner

104. Id. at 606.
105. Id. at 609.
109. Id. at 422.
contended that the entire value of the life insurance policy was includable in the husband's gross estate because the inception of title doctrine, which would characterize the policy as community property, did not apply to term life insurance policies, as it would apply to whole life policies.\textsuperscript{110}

Because a term life insurance policy provides pure life insurance, has no cash surrender value or loan value, and only furnishes insurance protection for a specified limited period of time (until the next renewal date), \ldots any community interest of [the first wife] in the unmatured policy lapsed on the policy's first renewal date following her death.\textsuperscript{111}

Putting that argument somewhat differently, the tax court concluded that even if the inception of title rule properly characterized the interest in the policy, the entire value of the policy was includable in the husband's estate because the first wife's interest in the policy ended during the husband's lifetime even though the wife's estate was not partitioned. "[The wife's] community interest in the policy equalled no more than one-half of any cash surrender value or interpolated terminal reserve value of the policy at her death."\textsuperscript{112} Thus, the policy had no value at her death, and no distribution of an interest was necessary to settle her estate.\textsuperscript{113}

Although a cogent argument can be made that when any term life insurance policy is renewed, a new policy is put into effect,\textsuperscript{114} it can also be argued with much reason that there are elements in many term policies that relate each renewal to the initial contract. For example, term policies frequently provide for maintenance of the initial premium regardless of the age of the insured and may also have no requirement of a physical examination of the insured on renewal. In the latter case the waiver of physical examination makes the term policy particularly valuable to the insured when ill health may have made him uninsurable at any affordable premium rate. Such elements of term policies give them real value that relates each renewal of the policy to the initial contract and thus to the inception of title doctrine. In \textit{Cavenaugh} the policy provided a right of renewal at a fixed (though increasing) rate for twenty-one years, without proof of insurability, a right to convert to whole life policy, a right to claim proceeds despite suicide of the insured after two years, and an investment feature by way of the annual dividend that is ordinarily absent from term policies.\textsuperscript{115} The Fifth Circuit Court of Appeals relied on these

\begin{itemize}
\item \textsuperscript{110} Id. at 422-23.
\item \textsuperscript{111} Id. at 423.
\item \textsuperscript{112} Id. at 424.
\item \textsuperscript{113} Id. The court relied on Mitchell v. Mitchell, 448 S.W.2d 807 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.), in which a post-divorce claim for an undivided interest in a federal group life insurance policy was denied to an ex-wife after the ex-husband's death without mention of the Texas inception of title doctrine.
\item \textsuperscript{115} \textit{Cavenaugh}, 100 T.C. at 424. There is the further point that one of the policies of life insurance in McCurdy v. McCurdy, 372 S.W.2d 381, 382 (Tex. Civ. App.—Waco 1963,
aspects of the term policy to conclude that the inception of title doctrine operated to characterize the insurance proceeds as community property under Texas law.\textsuperscript{116}

III. CONTROL AND LIABILITY OF MARITAL PROPERTY

A. Reimbursement for Fraud and Related Claims

An interspousal claim for reimbursement can be based on a number of grounds involving actual fraud, constructive fraud, and unjust enrichment; however, a claim for wrongful mismanagement by which the other spouse is deprived of a community interest may not be maintained as well as a reimbursement claim based on the same facts.\textsuperscript{117}

In \textit{Connell v. Connell}\textsuperscript{118} a wife sued her husband for divorce and alleged a number of unproved charges of fraud and constructive fraud against the husband and his paramour. The trial court granted a directed verdict in favor of the husband and his alleged accomplice. Because no actual or constructive fraud was proved, however, when the court adverted to matters of law, it was usually in the way of obiter dicta, and the concept of reimbursement was not consistently defined.\textsuperscript{119} Although the court correctly stated the general rule that the torts of conversion and conspiracy are barred by the running of the two-year statute of limitations\textsuperscript{120} for the purpose of showing marital reimbursement proof of spousal acts akin to those torts are not barred until two years after a marriage has ended.\textsuperscript{121}

In \textit{Street v. Skipper}\textsuperscript{122} the deceased husband acquired policies of life insurance on his life during marriage and paid the premiums with community funds. The proceeds of the policies (approximately $1,250,000) were made payable to the husband’s estate of which his widow took an amount well in excess of one-half the value of the insurance proceeds under the husband’s will, as well as over $200,000 of her husband’s separate property and her right of occupancy of the homestead, which was also the husband’s separate property. Considering that the widow received well over one-half of the entire community estate of almost $4,600,000 (including the insurance proceeds), the appellate court confirmed the trial court’s refusal to award the widow any claim for constructive fraud either in disposition of the insurance proceeds or for payment

\textsuperscript{116}. Estate of Cavenaugh v. Comm’r of Internal Revenue, 1995 WL 238779, at *7-8 (5th Cir. May 10, 1995).

\textsuperscript{117}. \textit{In re Moore}, 890 S.W.2d 821, 827-30 (Tex. App.—Amarillo 1994, no writ).

\textsuperscript{118}. 889 S.W.2d 534 (Tex. App.—San Antonio 1994, writ denied).

\textsuperscript{119}. The court suggests that a reimbursement claim arises exclusively in cases of improvement of one marital estate by another, \textit{id.} at 540, but also states that the wasting of community assets may also produce a right of reimbursement. \textit{id.} at 534-44.


\textsuperscript{121}. Burton v. Bell, 380 S.W.2d 561, 565 (Tex. 1964).

\textsuperscript{122}. 887 S.W.2d 78 (Tex. App.—Fort Worth 1994, n.w.h.).
of the premiums on the policies. The widow also attacked submission of the issue of the "fairness" of the testator's disposition of the insurance proceeds to the jury, which had returned an affirmative verdict. The ground for the widow's objection was that the issue was not controlling and the answer did not control the verdict. The appellate court found that the issue was controlling, and that because the verdict was supported by the evidence, it supported the judgment. One cannot contest those conclusions; however, submission of the issue of reasonableness of the donor-spouse's disposition is appropriately a matter for the judge to determine, and if submitted to the jury, the jury's verdict should be taken as merely advisory.

The reimbursement issue in Rider v. Rider was simple but nevertheless provoked a dissent. The divorce court awarded the husband reimbursement for use of his separate funds to discharge a lien on the wife's separate land in Mississippi and for his separate property which his wife had wrongfully taken and spent, and the court put a lien on the land for repayment for both amounts. The dissenting judge, curiously, read Heggen v. Pemelton as allowing a reimbursement lien only for community improvements to separate land.

The facts of Edgington v. Maddison are reminiscent of those of Spruill v. Spruill and Jones v. Jones. If the parties had been familiar with those earlier cases, the issues in Edgington might have been better framed. In 1988 the wife sued her husband for divorce and joined Truck Co., his wholly owned separate corporation, as a party. The court ordered the husband to maintain the corporation and not to transfer any of its assets. Some time before the filing of the divorce the husband had given a friend and a business associate a note for $150,000, and two months before the divorce was filed the friend sued the husband on the note. Three months after the divorce was filed the friend took a default judgment against the husband for $225,000. The friend then incorporated Dual Co., and Truck Co. was dissolved. In purported settlement of the judgment, the husband transferred all the former assets of Truck Co. to Dual Co. and became an employee of his friend under very liberal terms. Several months thereafter the wife added her husband's friend and Dual Co. as parties to the suit for divorce, alleging that they had acted with the husband to defraud her of the community income from

123. Id. at 81.
124. Id. at 82.
125. 887 S.W.2d 255 (Tex. App.—Beaumont 1994, n.w.h.).
126. The wife had also gratuitously transferred the land to her father in defiance of the divorce court order. Id. at 258-59. The trial court's erroneous imposition of the lien on foreign realty was not questioned on appeal.
127. 836 S.W.2d 145 (Tex. 1992).
128. Rider, 887 S.W.2d at 264.
129. 870 S.W.2d 187 (Tex. App.—Houston [14th Dist.] 1994, n.w.h.).
130. 624 S.W.2d 694 (Tex. App.—El Paso 1981, writ dism'd).
132. Edgington, 870 S.W.2d at 188.
At the trial of the suit the jury found that the value of assets transferred from the husband to his friend so greatly exceeded the amount of the default judgment as to constitute a fraud against his wife's rights in the community estate and awarded her a judgment of $75,000 against the friend. The appellate court made it plain that the husband's transfer of the assets of Truck Co. to his friend constituted a violation of the temporary orders of the divorce court, but did not define the nature of the wife's asserted community rights other than to say that "[h]er cause of action was directed at the fraud perpetrated on her in the transfer of her community interest in the assets." Because there was no mention of any assertion that Truck Co. was the alter ego of the husband, the court must have meant that the retained earnings of Truck Co. constituted assets for which the community was owed reimbursement. The court also held that the wife had not collaterally attacked the friend's prior judgment though such an attack under the circumstances would have been permissible. This case therefore had the potential of being a fraudulent transfer case. The case was remanded to the trial court for further proceedings.

In situations involving a spouse's separate corporate interest, the other spouse commonly seeks reimbursement from the corporate owner for the enhancement of value of the separate interest. In Southwest Livestock & Trucking Co. v. Dooley a corporation in which the husband owned a twenty-five percent interest as separate property was joined by the wife as a party-respondent in a divorce case. The wife asserted that the husband's fractional separate interest in the corporation amounted to his alter ego. Without noting that the husband did not own a controlling interest in the corporation, the appellate court held that the wife could not "avail herself of the equitable doctrine of alter ego when she participated in the very act which gave rise to her cause of action, disregarding the corporate structure." The unusual aspect of the case was that the corporation counterclaimed against both spouses for misappropriation of corporate funds. On appeal, the corporation was awarded an accounting to be achieved prior to any division of the community, a right to traceable assets, and a further right to imposition of a constructive trust on commingled funds.

133.  Id. at 188-89.
134.  Id. at 189.
135.  Id. at 190.
136.  Id. In the related context of drafting a buy-sell agreement for one of the spouses in which joinder of the other spouse is sought in order to meet a future objection that the joining spouse might raise, see Wendy L. Hunkele-Martinez, From a Spouse's Perspective, 55 Tex. Bar. J. 9323 (1992).
137.  Edgington, 870 S.W.2d at 190.
139.  Id. at 810.
140.  Id.
141.  Id.
142.  Id. at 811.
B. Spousal Liability

_Nelson v. Citizens Bank and Trust Co._\(^{143}\) illustrates continuing problems in applying the general rules of spousal liability. Joined by his wife, the husband executed two notes and deeds of trust\(^{144}\) of real property to secure a note of a separate corporation of which the husband was president. The husband alone executed a guarantee of another note for the same purpose. The corporation and both spouses defaulted on all the notes, and the deeds of trust were foreclosed. The deeds provided that the security should be applied to "any and all indebtedness created by the undersigned in favor of [the bank]."\(^{145}\) After paying the notes for which both spouses were obligated, there was money remaining which the lender-bank sought to apply to the payment of the husband's guarantee in which the wife did not join. The wife sought return of one-half of the amount remaining, leaving the other half to discharge only as part of the husband's sole (but not separate) obligation on the further note. The court held that because the wife was not liable on the further guarantee, one-half of the remaining proceeds were returnable as she claimed. Her interpretation of the form of the joint notes was very generous. A convincing argument could have been made that the deeds secured only joint obligations and that none of the security was applicable to pay the husband's personal guarantee under the terms of the joint notes. The bank, however, should have been able to reach all of the remaining collateral as jointly managed community property, subject to satisfaction of the husband's sole obligation if not under the terms of the deeds of trust.\(^{146}\)

_In re Duval County Ranch_\(^{147}\) the wife sought recovery of certain community property, rescission of a conveyance of community property, and removal of a cloud from her title to community property. Her proceeding was filed in state court against her husband's trustee in bankruptcy and was removed to the bankruptcy court. The property at issue was community property subject to the husband's sole management.\(^{148}\) The object of the wife's claim was to recover damages against the trustee for mental anguish for breach of fiduciary duty in a commercial transaction, a claim asserted as a separate property cause of action. Because all the damage claims involved property of the bankruptcy estate and acts of parties regarding that property, the bankruptcy court held that it had exclusive jurisdiction of the cause and denied the motion to proceed in state court.\(^{149}\)

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143. 881 S.W.2d 128 (Tex. App.—Houston [1st Dist.] 1994, n.w.h.).
144. It seems to have been assumed that the subject matter of the deeds of trust was subject to the joint management of the spouses.
145. _Nelson_, 881 S.W.2d at 129.
146. _Tex. Fam. Code_ Ann. § 5.61(c) (Vernon 1993).
148. _Id._ at 849.
149. _Id._ at 850.
In re Knobel involved a husband’s and wife’s joint petition for relief under Chapter 7 of the Bankruptcy Code. The question before the court was whether a joint bankruptcy filing creates one taxable entity or two for purposes of entitlement to personal exemptions and deductions for federal income tax purposes. The court first concluded that a couple’s filing of a joint petition in bankruptcy does not ipso facto constitute a consolidation of both spouses’ estates under section 302(b) of the Bankruptcy Code. In this case of apparent first impression the court went on to hold that unless the consolidation of the estates is ordered, each estate is entitled to a personal exemption and a standard deduction for federal income tax purposes.

Trust assets may in some instances be the object of satisfaction for creditors of both settlors and beneficiaries. In Soto v. First Gibraltar Bank a husband and wife had opened a revocable trust account with the defendant bank. The husband and wife were designated as trustees and their daughter, as beneficiary. Almost all of the funds were savings of the wife from her earnings, and the purpose of the fund was to defray the cost of the daughter’s education. At the time the trust account was opened, the husband and wife were having marital difficulties and each wanted to insulate the account from unilateral withdrawals by the other. Both settlors nevertheless maintained the power to make joint withdrawals from the account. When the husband’s checking account at the bank was overdrawn, the bank offset the overdraft with funds from the trust account. When the wife learned of the setoff, she sued the bank for conversion, breach of bailment, and violation of the Deceptive Trade Practices Act. The appellate court affirmed the trial court’s holding in favor of the bank. In this instance, the court concluded that, the husband and wife continued to own the trust account and had access to the funds. The gift to their daughter was therefore revocable. The court also reasoned that the funds in the account were jointly managed by virtue of the agreement of deposit and were therefore subject to the bank’s claim against either spouse.

The Texas rule for spendthrift trusts is that a settlor of a trust who is also the beneficiary of the trust cannot thereby protect the assets of the

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152. Id. § 302(b). In the course of its reasoning the court discussed some of the problems of conflicting claims of each spouse’s creditors that would repel a motion for consolidation. Knobel, 167 B.R. at 438.
154. Id. at 430. In this case no federal income tax return had been filed by the couple for 1992 because they had concluded that no tax was due for a married couple filing separately. For a discussion of choices for a debtor and non-debtor spouses with respect to income tax liability, see Ann F. Thomas, Joint Tax Return Liability and Bankruptcy, 14 Fairshare 11 (1994).
155. 868 S.W.2d 400 (Tex. App.—San Antonio 1993, writ ref’d).
156. TEX. BUS. & COM. CODE ANN. §§ 17.01-17.854 (Vernon 1987).
157. Soto, 868 S.W.2d at 402.
158. TEX. FAM. CODE ANN. § 6.61(c) (Vernon 1993).
trust from satisfaction of the settlor-beneficiary’s debts. The family trust at issue in *In re Shurley* was created in 1965. The parents contributed two-thirds of the corpus of the trust and each daughter contributed one-sixth. During the joint lives of all the settlors and until the father’s death in 1967, all the beneficiaries enjoyed income from the trust in the same fractions as their contributions to the corpus. On the death of the father each of the three remaining beneficiaries enjoyed one third of the income. After the death of the mother in 1971 the two daughters shared the income equally. The trustee, however, could limit distribution of income almost at his complete discretion and had complete control over the distribution of the corpus to the beneficiaries. The younger daughter and her husband filed for bankruptcy in 1993, and the trustee in bankruptcy claimed one-half of the trust as part of the estate in bankruptcy. The principal question before the court was what fraction of the trust would pass to the bankruptcy trustee. The bankruptcy court held that because she was a settlor, the bankrupt daughter was the settlor of one-half the trust (not merely one-sixth) to which the spendthrift provisions applied. Thus, one-half of the corpus of the trust passed to her trustee in bankruptcy. The court further stated that the fact that the bankrupt’s contribution to the corpus was still in esse in the corpus and readily identifiable was irrelevant. The principle of tracing, elsewhere widely applied in Texas family property law, was thus brushed aside.

### C. Homestead: Designation and Extent

Maintenance of a home by continued occupancy of land sold to another or on land held as a tenancy at-will from another has been the subject matter of numerous disputes. In *Resolution Trust Corp. v. Olivarez*, parents conveyed their homestead to their son but continued to make their home on the premises. The son then gave a deed of trust on the property to secure a loan. After the son’s default the trustee under the deed sought to foreclose and the parents attempted to interpose their homestead interest to preclude the foreclosure. The Fifth Cir-
Circuit Court of Appeals rejected their effort: the parents’ right of occupancy proceeded from the title holder, and with the passing of title from the son to the new owner that right ceased. Because the claimant had failed to show a property interest required for asserting a homestead claim, the court said that an assertion of estoppel against the creditor was beside the point.

In *In re Reed* the court considered the rights of the seller of a homestead under the Texas rule allowing a continuing exemption of the proceeds of sale for six months. The debtor had filed for reorganization under Chapter 11 of the Bankruptcy Code, and no objection was raised to his rural homestead claim. The homestead property was then sold. Within six months the debtor bought an adjoining property, securing the purchase-money note with the money received from the sale of the former homestead. The debtor then converted his bankruptcy to a Chapter 7 case and claimed the newly purchased property as his homestead. The trustee objected in reliance on *In re Bartlett*. There, a Chapter 13 filing preceded a conversion to Chapter 7, and the trustee was allowed to object to the homestead claimed at the time of transfer. A conversion from a Chapter 11 proceeding to one under Chapter 7 is significantly different, however, and the trustee is not allowed a new objection on the conversion. The new homestead bought with the proceeds of the initial homestead within six months of sale, therefore, “did not somehow ‘re-enter’ the bankruptcy estate.” The court went on to point out that the proceeds of the sale of the first homestead not used to purchase the new homestead lose their exempt status in bankruptcy. Furthermore, the note given by the buyer of the first homestead and used as security for the purchase of the new homestead would lose its exempt status six months after the sale.

As the tracing of funds to an exempt source preserves their exempt character for a time, tracing of funds used to purchase a homestead to a wrongfully acquired source causes them to lose their exempt status. The homestead cannot be used as a shield against a rightful owner’s claim to embezzled funds. In *Bransom v. Standard Hardware, Inc.* the wife’s employer brought suit against her and her husband for fraud and unjust enrichment for the wife’s embezzlement and sought the proceeds of the sale of a homestead on which the purchase-money lien was discharged.

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165. Id. at 204-07.
166. Id. at 205.
168. TEX. PROP. CODE, ANN. § 41.001(c) (Vernon Supp. 1995).
172. *Reed, 178 B.R. at 709*.
173. *Reed, 178 B.R. at 709-10.* If the note had been assigned to the seller, however, it would have passed from the debtor. *Id.*
174. *Reed, 178 B.R. at 709-10.* If the note had been assigned to the seller, however, it would have passed from the debtor. *Id.*
175. 874 S.W.2d 919 (Tex. App.—Fort Worth 1994, writ denied).
with the employer's embezzled funds. Thus, the employer would have been subrogated to the right of the prior lien holder. The trial court rendered judgment against both spouses for fraud, unjust enrichment, exemplary damages, and prejudgment interest. The husband appealed. Despite the court's reversal of the judgment against the husband for fraud because he was not shown to have participated in or even to have known of the wife's wrongful acts, the judgment for unjust enrichment was affirmed. The court evidently reasoned that the husband had been unjustly enriched because the debt against the community home had been paid with funds embezzled by his wife. But the husband should not have been held personally liable because he was guilty of no tort. A judgment for a community benefit need not be rendered against both spouses. If the husband was not guilty of conversion, he was not unjustly enriched. The husband's separate property is not subject to liability for the wife's tort, but the personal judgment against him makes his separate property liable. The whole community is nonetheless liable. By imposing a constructive trust on the proceeds of the sale of the homestead, the court specifically rejected the conclusion of the Dallas Court of Appeals in Curtis Sharp Custom Homes, Inc. v. Glover.

The conversion of business premises into an urban homestead with both residential and business homestead attributes was the underlying subject of In re Julian. In 1969 the husband and the wife established a rural homestead on the husband's separate property, and the husband maintained an urban business on premises that were also his separate property. In 1976 the husband mortgaged the business property to secure a loan. After the wife commenced proceedings for a divorce in 1981, the husband moved to an apartment on the urban premises. Thereafter he improved the property substantially as a home. The prior lien on the property was valid, however, because the family had maintained a rural residential homestead at the time it was given. From 1981 the business property was the ex-husband's urban home. The ex-husband had allowed his former wife to remain in the rural house with their minor children, and in 1986 she took a lease of the rural house from him. She remarried several years later and continued to live in the rural house. In 1984 the ex-husband procured another loan with the business premises as collateral and used part of the loan to discharge the prior lien on the property. The holder of the note and deed of trust securing it brought suit for its

176. See infra note 223.
177. TEx. FAM. CODE ANN. § 5.61(c) (Vernon 1993).
enforcement. Though he actually resided in his urban residence, the ex-husband had continued to claim the rural property as a homestead for ad valorem tax purposes. Although an ad valorem tax declaration is evidence of a homestead, it is not conclusive evidence in a case such as this one when actual homestead use was the best evidence of intent. The urban premises were therefore the ex-husband's homestead, and the lien on the property was consequentially unenforceable except insofar as the borrowed funds were used to discharge the prior valid lien.

Vackar v. Patterson, Boyd, Lowery, Alderholt & Paterson, P.C. was an appeal by a plaintiff from a summary judgment in favor of a judgment creditor's attorney in a suit for wrongful execution on a condominium-homestead. The debtor also sought to set aside a sheriff's deed in which the property was misdescribed. In reversing the judgment in favor of the defendant, the appellate court said that the homestead claimant's cause of action did not turn on the effectiveness of the conveyance.

In two strikingly similar Chapter 7 opinions rendered less than three weeks apart the same judge reached an unduly restrictive interpretation of the urban homestead. In In re Nerios a couple claimed an urban homestead in two contiguous lots on each of which there was one house. The first improved lot was purchased in 1968, and the second, in 1978. During the fourteen years prior to 1992, the second house was always occupied by relatives who were dependent on the property owners and thus were members of the owners' family for homestead purposes. The couple therefore were maintaining something akin to a family compound. In 1992 the husband and wife separated and the wife moved elsewhere for three months. The couple later reconciled but found that they lived more happily if the husband stayed mainly in one house and the wife moved in the other along with her dependent relatives. The couple maintained these living arrangements when they filed their petition for bankruptcy. In the other case, In re Cate, the couple purchased and


182. Julian, 163 B.R. 471, citing In re Kennard, 970 F.2d 1455, 1459 (5th Cir. 1992), citing Lifemark Corp. v. Merritt, 655 S.W.2d 310, 314 (Tex. Civ. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). Estoppel by contrary assertions of the homestead claimant was not effectively argued against him because the lender was not shown to have relied on such statements. Julian, 163 B.R. at 492-83. See also Patterson v. F.D.I.C. 918 F.2d 540 (5th Cir. 1992) (Disclaimer in deed of trust does not preclude evidence that property mortgaged is a homestead.).

183. See infra note 223.

184. 866 S.W.2d 817 (Tex. App.—Beaumont 1993, no writ).

185. The sheriff's deed described the condominium as "Unit 21" rather and "Unit 321" and therefore transferred no interest in the plaintiff's property. Id. at 818.

186. Some passages in the two decisions are identical.


188. See Henry S. Miller Co. v. Shoaf, 434 S.W.2d 243 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.) (family consisting of divorced woman and her dependent mother); Central Life Assurance Soc'y v. Gray, 32 S.W.2d 259 (Tex. Civ. App.—Waco 1930, writ ref'd) (family consisting of brother and his dependent sister).

occupied a house in 1972. In 1973 they acquired another house directly across the street, where they allowed the husband's dependant parents and sister to live. When the husband filed for bankruptcy in 1993, the husband still lived in the house, even though the wife had been in the hospital for over a year; the husband's father still lived across the street though his mother had died and his sister was in a nursing home.

In both cases the court limited the homestead exemption to the one house and lot which the couple had occupied together. In both cases, the court said that the homestead claimants had failed to discharge their burden of showing that the family home extended beyond the lot on which their principal living quarters stood. In both instances the combined two lots seem to have measured far less than one acre and no business homestead appears to have been claimed. If a single mansion and adjoining buildings on one acre had been claimed in each case there is little doubt that the court would have found the proof of homestead sufficient. In Nerios the court stated that "[the homestead] is not intended to include two separate residences located on different lots." But the court went on to say that two houses constructed on one lot may be unobjectionable.190 The Texas Constitution refers to "a lot or lots"191 occupied as the homestead of "a family."192 What justifies this discriminatory attitude toward proof of a homestead? Was it the trustee's argument in Nerios that "if [those debtors] were successful in claiming two houses as their exempt homestead, it will become common practice for spouses to claim two homesteads in bankruptcy cases"?193 In accordance with the constitutional cap194 the Legislature allows as a homestead an entire acre and its improvements used as the urban residence of a family or a single adult.195 That area seems excessive in the minds of many and could be reduced by the legislature.196 That area and use are nevertheless the present tests and the number of structures or lots or conveyances or whether the area is surrounded by a wall should be irrelevant.

In In re Osborn197 the Tenth Circuit Court of Appeals concluded that an Oklahoma couple who had initially claimed an Oklahoma homestead might amend their schedules to claim a Texas homestead. The wife, who did not initially comprehend the meaning of a homestead claim, testified that she felt she was required to assert an Oklahoma home because they had filed for a business reorganization in Oklahoma. Although the husband had repeatedly claimed Oklahoma property as his homestead, the appellate court held that he was not judicially estopped from claiming a

190. Id.(citing Tolman v. Overstreet, 590 S.W.2d 635 (Tex. Civ. App.—Tyler 1979, no writ)).
191. TEX. CONST. art. XVI, § 51.
193. Id.
194. TEX. CONST. art. XVI, § 51.
196. "[N]ot more than one acre . . . ." TEX. CONST. art. XVI, § 51.
197. 24 F.3d 1199 (10th Cir. 1994).
Texas homestead,\(^{198}\) because Texas law does not allow one spouse to change the homestead without the consent of the other.\(^{199}\) Because the Texas house had been sold by the trustee prior to its being established as the couple's homestead, on remand the Oklahoma bankruptcy court provided restitution for the loss of the homestead by a monetary award for the proceeds received by a creditor to whom the proceeds were paid, less expenses of sale, delinquent taxes, and an amount allowed to the couple for the preservation of assets during the proceeding.\(^{200}\)

### D. Liens on Homestead

In two cases a divorce court imposed unconstitutional burdens on homestead property. In *Cole v. Cole*\(^{201}\) the court ordered the husband to execute a note in favor of the wife to achieve an equitable division of the community estate, which could not be equitably divided in kind and imposed a lien on the homestead (awarded to the husband) to secure the note. The note was not solely to secure the wife for her interest in the homestead,\(^{202}\) however, and the extent of the lien was therefore improper.\(^{203}\) In *Tschirhart v. Tschirhart*\(^{204}\) the trial court ordered that the community homestead be sold to pay an unsecured promissory note and that the remainder be divided between the parties. The appellate court excised the improper order of sale from the judgment.\(^{205}\)

In two other cases a bankrupt ex-spouse sought unsuccessfully to remove a lien from a homestead under section 522(f) of the Bankruptcy Code.\(^{206}\) In *In re Bradford*\(^{207}\) the divorce court had awarded the community homestead to the wife and had granted the husband a money judgment for his community share secured by a lien on the entire property awarded to the wife, who then sought to remove the lien in her bankruptcy proceeding. The court held under *Farrey v. Sanderfoot*\(^{208}\) that because the bankrupt took her sole interest in the homestead property at

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\(^{198}\) *Id.* at 1208-09.

\(^{199}\) *Id.* TEX. CONST. art. XVI, § 51. On remand the bankruptcy court gave effect to the Texas homestead claim. *In re Osborn*, 176 B.R. 941, 949 (Bankr. E.D. Okla. 1994). The Texas homestead, however, was sold pending the appeal and it was asserted that the sale precluded the appeal. The appellate court rejected that contention. *Osborn*, F.3d at 1203-04.


\(^{201}\) 880 S.W.2d 477 (Tex. App.—Fort Worth 1994, no writ).

\(^{202}\) *Id.* at 484-85.

\(^{203}\) The appellate court therefore remanded the case for redivision of the community property and to repair a further error in the judgment. Jacobs v. Jacobs, 687 S.W.2d 731 (Tex. 1985); McKnight v. McKnight, 543 S.W.2d 863 (Tex. 1976).

\(^{204}\) 876 S.W.2d 507 (Tex. App.—Austin 1994, n.w.h.).

\(^{205}\) *Id.* at 509. In proceeding to divide the proceeds by ordering the husband to pay 60 percent of the balance due on the note and the wife to pay 40 percent, however, the appellate court exceeded its function, and the case should have been remanded to the trial court. See supra note 202 and accompanying text.


\(^{207}\) 166 B.R. 90 (Bankr. S.D. Tex. 1994).

the same time the lien attached, the lien could not be removed under section 522(f).

In In re Buffington209 the situation was somewhat different. At close of the trial the divorce court had orally awarded the husband the community homestead and had ordered him to pay all liability against the property. The court awarded the wife a judgment (with interest) for her community share of the couple’s equity in the property and put a lien on the property for the judgment and interest in favor of the wife.210 Prior to the entry of the order of divorce, however, the wife executed a special warranty deed of her interest in the homestead to her husband and he executed a note and deed of trust to her for her interest. The opinion does not relate how the order ultimately read, but the bankruptcy court interpreted the lien as being judicially imposed on the homestead before or at the same time that the debtor had acquired that interest.211 Thus, applying the rule in Farrey, which does not allow removal of a judicial lien unless fixed on homestead after acquisition, the lien protecting the interest of the ex-wife could not be removed.212

The bankruptcy court went on to say, however, that though the ex-wife would be able to enforce her lien properly acquired against the property, her lien under Texas law extended only to her undivided half-interest in the property conveyed by her to her husband.213 Because the husband already had a homestead interest in his undivided half, he was constitutionally forbidden to put a lien on his half under Texas law.214 Lenders who are accustomed to taking a lien on an entire property when a borrower seeks a loan to buy an undivided one-half of it from a divorcing spouse are alarmed by this judicial observation as though it constitutes a new revelation that totally undermines their position. Although the enforceable security of lenders has not been altered, their imagined security and thus their position for audits by federal authorities may have been detrimentally affected by this realization of their actual position. With respect to foreclosure, lenders may also encounter longer delays and some greater expense than those to which they had evidently become accustomed. In the case of all but the largest of urban residential homesteads that may be subject to partition in kind, the holder of a lien on an undivided one-half of an urban homestead property can sue for partition and for foreclosure on that one-half in anticipation that partition can be achieved only by sale of the property and partition of the proceeds.

210. The lien on the bankrupt’s share was thus in the nature of a purchase-money lien and valid under Texas law. As to the non-bankrupt, former spouse’s share, the fixing of the lien would have thus been res judicata in a subsequent dispute.
211. Buffington, 167 B.R. at 836 n.3. The court pointed out that “an equitable lien can be a judicial lien,” id., indicating that the court regarded the lien as a judicial lien. 11 U.S.C. § 522(f) (1988) (authorizing a bankruptcy court to remove “a judicial lien” impairing the homestead of a debtor).
Hence, the lender may seek to negotiate some additional compensation for the expense of foreclosure in making loans for the acquisition of a spouse's undivided interest in homestead property, but the loss of a greater apparent security in the bank's records is the real inconvenience.

Courts twice considered a lender's subrogation to a lienholder on a homestead when the lender advanced money to discharge an existing lien. In *Crowder v. Benchmark Bank* the Internal Revenue Service had fixed a lien for a husband's delinquent taxes on realty which included his urban homestead and an additional unsegregated area. The husband and his wife joined in borrowing money from a bank to discharge the lien and agreed in writing that the bank would be subrogated to the rights of the holder of the prior lien. When the loan was not repaid, the bank brought suit to foreclose its contractual lien. The appellate court held that a lien on a homestead for purposes not allowed by the Texas Constitution can be imposed only by the federal government and can be enforced only by the federal government. The court, therefore, concluded that it is contrary to public policy to allow a lender to be subrogated to the federal lienholder. The court also held that the bank was foreclosed from forcing a sale of the non-exempt, unsegregated portion of the land even though the bank's lien on that area was undisputed. The court rejected the precedents relied on by the bank because they were decided prior to the 1983 amendments to the homestead provisions of the Texas Constitution and the 1987 amendments to chapter 41 of the Property Code. The court, however, failed to identify the aspects of those provisions that had altered prior authorities.

In *In re Julian* the court held that when a third person uses borrowed money to discharge a constitutionally valid lien on homestead property with the consent of the homeowner, the lender is subrogated to the rights of the discharged lienor. In this instance, the lien extended to non-homestead property as well as the homestead, but the terms of the loan made no provision for the allocation of principal payments between the two properties. Relying on *Wingate v. People's Building & Loan Savings*

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215. 889 S.W.2d 525 (Tex. App.—Dallas 1994, n.w.h.).
216. The land was presumably community property subject to the husband's sole or joint management or possibly his separate property.
217. TEX. CONST. art XVI, § 50.
218. *Crowder*, 889 S.W.2d at 529.
219. *Id.* at 530.
221. TEX. CONST. art. XVI, § 57.
222. TEX. PROP. CODE ANN. §§ 41.001-41.004 (Vernon Supp. 1995).
Association, the court held that principal payments should be made first to extinguish the homestead lien.

The traditional view has been that a lien attempted to be imposed on a homestead for a purpose not allowed by the Texas Constitution is void. In recent years, however, it has sometimes been said that a lien fixed by compliance with the statutory requirement for abstracting a judgment against the homeowner actually puts a lien on a homestead, but it is unenforceable. In In re Henderson a couple who had been denied a discharge nevertheless moved the bankruptcy court to avoid a judicial lien on their homestead in reliance on section 522(f) of the Bankruptcy Code. The bankruptcy court followed the traditional view that there was no lien to remove and denied the motion. On appeal the district judge granted the relief sought but couched his reasoning in traditional terms of removing a cloud from the debtor's title, which the lien impaired.

On further appeal the Fifth Circuit Court of Appeals held that by its terms Property Code section 52.001 fixes a lien on all realty of the debtor, and if it thereby puts a cloud on the debtor's homestead title (as it did in the case before the court), section 522(f)(1) may be used to avoid it. In providing an amendment to section 522(f)(2) of the Bankruptcy Code to define instances when a lien impairs an exemption, legislative history indicates the situation in Henderson as one to which the amendment is meant to apply.

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226. TEX. CONST. art. XVI, § 50 states:
   The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon . . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money for, or improvements made thereon . . . .

Hence, a court cannot award the proceeds of sale of a homestead to satisfy creditors except in those instances specified. In re Banks, 887 S.W.2d 160, 164 (Tex. App.—Texarkana 1994, n.w.h.).
229. 18 F.3d 1305 (5th Cir. 1994) (per curiam).
232. Henderson, 18 F.3d at 1308. The district court explained that allowing a debtor relief in this situation furthers the objective of bankruptcy to allow the debtor to gain a fresh start in his financial life. In re Henderson, 168 B.R. 151, 158 (Bankr. W.D. Tex. 1993). The explanation seems anomalous in light of the fact that the debtors had been denied a discharge.
To protect the homestead from unauthorized mortgages the Texas Constitution provides that a transaction structured as a sale but intended as a mortgage is void. In Ketcham v. First National Bank of New Boston the appellate court reversed the adjudication on a summary judgment for a lender in a suit by a homestead claimant against the lender for fraud. According to summary judgment evidence offered by the widowed homestead claimant, her son had sought a loan from the bank. The bank had responded that more collateral than that offered by the borrower was needed and asked if the son's parents would "sell" their home to the son to be used as collateral. The bank had allegedly stated that this aspect of the transaction would not constitute a real sale but the transaction was a necessary step in achieving the loan. The bank then lent money to the son to buy the parents' home as part of the loan transaction, which had been prepared by the bank's attorney. At the closing the bank presented a check to the parents for the amount of the loan sought by the son. The parents endorsed the check to their son. The court held that the summary judgment evidence offered by the widowed parent raised a question of fact that the transaction was a sham mortgage on the homestead and that summary judgment was therefore improperly granted by the trial court.

The Texas Supreme Court held in Inwood North Homeowners' Association v. Harris that a lien for maintenance agreed to with a homeowners' association prior to homestead designation by a homeowner is constitutionally valid. In Boudreaux Civic Association v. Cox a homeowners' association had obtained a money judgment for attorney's fees in an action against a homeowner for violation of a subdivision's deed restrictions. Although the Property Code allows parties to agree that the prevailing party in an action based on violation of a deed restriction is entitled to attorney's fees, the Association's rules did not include such a provision. The proceeding against a homestead for recovery in this instance was therefore precluded. In the court's understanding of Inwood North Homeowner's Association, however, if the provision allowing enforcement of attorney's fees had been in the homeowners' association's rules prior to the member's establishing his homestead, the association might have proceeded against the homestead for recovery of attorney's fees.

237. TEX. CONST. art. XVI, § 50: "All pretended sales of the homestead involving any condition of defeasance shall be void."
238. 875 S.W.2d 753 (Tex. App.—Texarkana 1994, n.w.h.).
239. Id. at 755.
240. Id. at 756.
242. 882 S.W.2d 543 (Tex. App.—Houston [1st Dist.] 1994, n.w.h.).
244. Boudreaux Civic Ass'n, 882 S.W.2d at 551.
The Fifth Circuit Court of Appeals held in *First Gibraltar Bank v. Morales*[^245] that with respect to reverse annuity mortgages and line of credit conversion mortgages (a variant of reverse annuity mortgages) provided by federal statute and regulations[^246] Texas homestead law is preempted insofar[^247] as it prohibits liens on homestead property for other types of loans than those prescribed in the Texas Constitution[^248]. The decision constituted a serious inroad on the Texas homestead doctrine that homestead owners could not use their homestead equity as collateral for ordinary borrowing. With writ of certiorari pending before the Supreme Court of the United States, an opportunity for a congressional solution of the problem was suddenly presented. Banks throughout the country were extremely anxious to achieve passage of a banking reform act before the end of the 103d Congress, and Congressman Henry B. Gonzalez of San Antonio, the Chairman of the Committee on Banking, Financial & Urban Affairs in the House of Representatives, was particularly anxious to undo the effect of the *First Gibraltar Bank* case. Although Senator Philip Gramm supported Texas banks in attempting to ward off this result, Chairman Gonzalez was successful in his effort to amend the Homeowners' Loan Act and the Parity Act to reverse the pre-emption effects of those acts[^249]. After the United States Supreme Court had declined to review the decision[^250], the Fifth Circuit concluded that the new legislation had achieved its purpose constitutionally[^251].

**E. LIEN STRIPPING**

Over most of the last century the purchase of a home was regarded as one of the safest investments, in most times appreciating in value and secure against all creditors except those specifically enumerated in the Texas Constitution[^252]. In recent years, however, such an investment has not always been safe and many homeowners in bankruptcy have found

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[^247]: An uneasiness that this result might be reached was expressed in McKnight, 1991 Annual Survey, supra note 37.


[^251]: First Gibraltar Bank v. Morales, 42 F.3d 895 (5th Cir. 1995).

themselves with a lien on their homesteads exceeding their equity. Though some have tried to strip down their indebtedness to the value of their homestead properties at the date of discharge, their efforts have been unsuccessful.253 Another fruitless attempt at stripping down indebtedness to the value of homestead property was made in In re Doviak.254 There the bankrupt couple had been discharged from bankruptcy with undischarged federal tax liabilities imposing a lien on their homestead which exceeded its current value. The couple moved for discharge of the amount of the indebtedness that exceeded the value of the property, arguing that prior authorities applied only to consensual liens. The bankruptcy court denied their motion.255 In light of these authorities some hoped for legislative relief but none was forthcoming from the last session of Congress.256

F. PERSONAL PROPERTY EXEMPTIONS

With respect to personal property, however, federal exemptions for bankruptcy purposes were doubled by the 1994 congressional amendments to the Bankruptcy Code,257 and in some cases, that change may make the choice of federal exemptions more appealing for Texas debtors. With respect to agricultural debtors, Congress defied negative predictions258 by amending section 522(f)(3)(B)259 to preclude the removal of nonpossessory and nonpurchase-money liens on tools of trade, implements, farm animals, and crops for amounts exceeding $5000.260

The familial status of the debtor determines the extent of a personal property exemption.261 In In re Coffman262 the bankrupt debtor was a widow whose children were adults and not dependent on her. For homestead purposes the widow's standing as a family member does not change

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255. Id. at 379-80.
257. 11 U.S.C.A. § 522(d) (West Supp. 1995). Debt limits for the availability of bankruptcy under Chapter 13 of the Bankruptcy Code were also increased from a maximum of $100,000 of unsecured debt to $250,000 and from $350,000 of secured debt to $750,000. 11 U.S.C.A. § 109(e) (West Supp. 1995).
258. See McKnight, 1994 Annual Survey, supra note 33, 1180.
260. The category of items to which this amendment applies also extends to professional books, so the lawyer-farmer is put in particular jeopardy. These limitations apply only when the debtor chooses state rather than federal exemptions, and a correlative amendment to TEX. PROP. CODE ANN. §§ 42.002(b) (Vernon Supp. 1995) was enacted in 1993 in anticipation of the passage of the congressional enactment. See McKnight, 1994 Annual Survey, supra note 33, at 1180.
261. TEX. PROP. CODE ANN. § 42.001 (Vernon Supp. 1995): $60,000 a family and $30,000 for a single adult not otherwise protected.
as a result of the children’s ceasing to be dependents.\footnote{Woods v. Alvarado State Bank, 118 Tex. 586, 19 S.W.2d 35 (1929); Chisholm v. Mills, 250 S.W.2d 268, 269 (Tex. Civ. App.—Waco 1952, writ ref'd).} The court, therefore, concluded that the same test is applicable in determining familial status for the purpose of claiming personal property exemptions.\footnote{Coffman, 163 B.R. at 786.}

In In re Legg\footnote{164 B.R. 69 (Bankr. N.D. Tex. 1994).} the court traced the liberalization of legislative and judicial attitudes toward the exempt character of tools of trade over two decades. As a consequence of the enactment of broadened statutory provisions relating to tools of trade, the notion that such tools must be peculiarly adapted to a debtor’s business or used by hand\footnote{McMillan v. Dean, 174 S.W.2d 737, 738 (Tex. Civ. App.—Austin 1943, writ ref'd n.r.e.).} has been abandoned in favor of an interpretation that comprises equipment of a general nature used in a trade or profession.\footnote{Legg, 164 B.R. at 72-73. A chapter 13 debtor is entitled to possession of exempt property, but the mechanic who has repaired the debtor’s property is entitled to protection of his secured interest by order of the court. In re Deiss, 166 B.R. 92, 94 (Bankr. S.D. Tex. 1994).} The 1991 amendments to the personal property exemption law were notable in including motor vehicles as tools of trade.\footnote{Legg, 164 B.R. at 72.}

In In re Shurley\footnote{163 B.R. 286 (Bankr. W.D. Tex. 1993).} the bankrupt couple and their trustee in bankruptcy disputed the fair market value of the debtors’ furs and jewelry.\footnote{11 U.S.C. § 522(a)(2) (1988).} The trustee attacked the debtors’ valuations as too low by producing evidence of the debtors’ admissions of higher values but failed to offer evidence of expert opinion as to actual values. The trustee, therefore, failed in his burden of proof to refute the debtors’ specific valuations.\footnote{Shurley, 163 B.R. at 291. In another valuation dispute, the court held that a debtor was collaterally estopped from relitigating the valuation of inherited property in a bankruptcy case after a stipulated value of the property had been established in litigation before the Tax Court. In re Cluck, 165 B.R. 1005, 1009-10 (Bankr. W.D. Tex. 1994).}

In Shurley the debtors also claimed life insurance policies as exempt and asserted that their cash surrender value need not be included within the $60,000 personal property limitation of the Property Code\footnote{Shurley, 163 B.R. at 293-94. See McKnight, 1994 Annual Survey, supra note 33, at 1181-82.} as enacted in 1991. The court sustained the debtors’ position. Insurance Code article 21.22,\footnote{U.S. CONST. art. I, § 8, cl. 3.} also enacted in 1991, provides unlimited exemptions of life insurance policies and therefore supersedes the limitations of the Property Code.\footnote{U.S. CONST. art. I, § 8, cl. 4.} The trustee also argued that the 1991 amendment to the Insurance Code violates either the Commerce Clause\footnote{Shurley, 163 B.R. at 293-94. See McKnight, 1994 Annual Survey, supra note 33, at 1181-82.} or the Bankruptcy Clause of the United States Constitution in that these clauses establish some sort of federal preemption. The court concluded that both
arguments were inapposite. The trustee, however, might have made a more cogent argument that the Contract Clause precludes the broadening of exemptions after a debt is incurred.277

_In re Young_278 required a more extensive examination of the applicability of the 1991 amendments to the personal property exemption law. The debtor's claim for exemptions included proceeds of an insurance policy on the life of the debtor's deceased husband deposited in life insurance access accounts, as well as the accrued interest on those insurance proceeds. After making a thorough review of the history of article 21.22 of the Insurance Code279 and its overriding effect on the exemption provision of the Property Code280 relating to life insurance policies, the court rejected the contention that the insurance proceeds, once paid, became nonexempt cash. "It would be a meaningless gesture for the Legislature to grant an exemption for the proceeds only to deny the exemption once the benefit is realized by the intended beneficiary."281 The court found that the purpose underlying article 21.22 is

...to provide support. In most cases, the benefits of an insurance policy substitute for the future support that the insured would have provided to his beneficiary had the contingency giving rise to the payment of benefits not taken place. Allowing these insurance proceeds to earn interest only serves to increase the funds upon which the beneficiary can rely for support by way of natural increase and as a method to withstand inflationary pressures in the economy.282

The court, therefore, held that the insurance proceeds and the earned interest in the access account were exempt.283 With respect to the value of an insurance policy on the debtor's own life for the benefit of her children, the court in _Young_ reasoned that article 21.22284 again prevailed.285 The court followed286 the analysis of _In re Shurley_287 in preference to that of _In re Bowes_.288

The Fifth Circuit Court of Appeals also relied on article 21.22 of the Insurance Code to support an exemption in _In re Walden_.289 The debtor had been employed in a family business. The corporation, which bought

281. Young, 166 B.R. at 858.
282. Id. at 860.
283. Id.
285. Because both of her children were emancipated, self-supporting adults and thus not dependent on her for support, the debtor could not claim an exemption under TEX. PROP. CODE ANN. § 42.001(a)(12) (Vernon Supp. 1995).
286. Young, 166 B.R. at 861 n.9.
HUSBAND AND WIFE

the business, agreed to employ the debtor under terms of a non-competition agreement to extend for forty years. The following year he was put on indefinite leave and payments under the agreement ceased. After the discharged employee brought suit for breach, the parties entered into a settlement by which an annuity was provided in lieu of the contract of employment. In his bankruptcy that ensued three years later, the debtor claimed the annuity as an exempt asset under the provisions of article 21.22 that allows an exemption for benefits received "under any plan or program of annuities and benefits in use by any employer." In finding for the debtor the court rejected the trustee's reliance on a decision involving an annuity for attorney's fees received in settlement of a personal injury case.

Section 42.0021 of the Property Code provides that a debtor's rights in a variety of retirement devices are exempt "unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986." The bankrupt debtor in In re Youngblood claimed an individual retirement account as exempt property under that section. The account in question, however, had accepted a contribution from a terminated pension plan in favor of the debtor. That pension plan had been twice determined by the Internal Revenue Service (IRS) to be qualified under the Internal Revenue Code, but the plan had been terminated after being assessed sanctions by the IRS for violation of certain IRS rules. The debtor took the position that the determination of whether the plan was qualified was properly made by the IRS. The bankruptcy court, however, followed the argument of an objecting creditor that the bankruptcy court has the authority to make its own determination in that regard and denied the exemption in light of the subsequent IRS sanctions. The Fifth Circuit Court of Appeals held that the Texas Legislature intended that Texas courts should defer to the IRS in determining whether a plan is qualified under the Internal Revenue Code. Thus, the plan had been determined to be qualified and the assets on deposit in the account were exempt.

In Bergman v. Bergman an ex-wife who had been awarded alimony in the settlement of a Connecticut divorce proceeding brought suit under the Uniform Enforcement of Foreign Judgments Act and obtained a Texas judgment. Though neither party was a domiciliary of Texas, the ex-husband was served with process in Texas while here on business. Pursu-

294. 29 F.3d 225 (5th Cir. 1994).
295. Youngblood, 29 F.3d at 229.
296. 888 S.W.2d 580 (Tex. App.—El Paso 1994, n.w.h.).
ant to her Texas judgment, the ex-wife was granted an order against the ex-husband to turnover retirement benefits from his Texas employer. Although the couple’s property settlement agreement provided that Connecticut law should govern all aspects of the agreement, the court held that the Texas law of exemptions applied to enforcement of the Texas judgments and, therefore, precluded turnover of Texas exempt property. 

IV. DIVISION ON DIVORCE

A. Divorce Procedure

In Dawson-Austin v. Austin the husband and wife, who had previously been domiciliaries of Minnesota and had apparently moved to California, separated in early 1992. The wife brought suit for divorce in California but did not get service of process until six months later. In the meantime the husband, who had established a domicile in Texas and had resided here for over six months, filed suit for divorce and obtained service of process on his wife in California before she served him with notice of her California proceeding. The wife moved to abate the Texas suit. The appellate court held that the wife’s unreasonably long delay in failing to give notice of her California suit supported the trial court’s exercise of discretion in denying her motion.

The California court, nevertheless, had proceeded with the wife’s case. The wife then filed for bankruptcy in California, and the California divorce court reserved jurisdiction to divide the community estate but granted the divorce. At that time, the trial of the husband’s suit for divorce was proceeding in Texas, but the wife made no plea of res judicata to the Texas court. Thus, the Dallas Court of Appeals held that the Texas court did not err in granting a divorce.

Domicile is a jurisdictional requirement for divorce. Residence in the state or a particular county of the state is a venue requirement for bringing suit and is not jurisdictional. In Cook v. Mayfield there was a sharp difference of opinion on the evidence of residence. The wife filed suit for divorce in McLennan County, and the husband filed a plea in abatement alleging that the wife had not been a resident of the county for ninety days preceding filing as required by section 3.21. Though the

298. Bergman, 888 S.W.2d at 585.
300. Id. at *6 (citing Reed v. Reed, 311 S.W.2d 678, 631 (Tex. 1958) (delay of 15 months)) and (distinguishing Curtis v. Gibbs, 511 S.W.2d 263 (Tex. 1974) (delay of 23 days)). Though the wife had sought to appear specially under Tex. R. Civ. P. 120a to contest personal jurisdiction of the Texas court over her, the court found that her efforts failed. Dawson-Austin, 1995 WL 1680 at *4.
301. Id. at *9.
303. 886 S.W.2d 840 (Tex. App.—Waco 1994, n.w.h.).
wife had apparently grown up in McLennan County and had maintained a room in her mother's house there where her son lived, she had lived in Williamson County in 1990 and after her marriage, with her husband in apartments in Williamson and Travis Counties until they bought a home in Travis County in March 1994. The husband admitted that his wife spent fifty to seventy nights in Waco apart from him before she left for Waco in late July 1994 and filed for divorce in McLennan County twelve days later. The trial judge therefore ruled in favor of her McLennan County residence and his ruling was supported by the dissenting judge on appeal, but the majority of the appellate court regarded his conclusion as an abuse of discretion.305

Practice is still very uneven with respect to judicial willingness to order interim attorney's fees under Family Code section 3.58(c).306 At the hearing on interim fees in Post v. Garza,307 the court refused to allow the husband to cross-examine the wife's attorney or to put on evidence but ordered the husband to pay the wife's attorney interim fees of $15,000. The appellate court held that the trial court's statement that the award was subject to a later showing that the amount was unreasonable and would be subject to refund was "a meaningless acknowledgment that it is in fact an interlocutory order."308 Although section 3.58(g) states that such an order is not subject to interlocutory appeal, it is subject to a writ of mandamus.309

Temporary orders of the trial court in a Harris County divorce suit provoked two decisions on writs of habeas corpus. In Ex parte Delcourt310 the Houston First District Court of Appeals addressed the husband's complaints concerning the trial court's first commitment order. The wife had charged her husband with eighty-eight counts of contempt with cumulative penalties for non-compliance amounting to forty-four years of imprisonment. The husband was not informed of his right to jury trial, but the statute does not authorize imprisonment for more than six months, and for his contempt the husband was ordered confined for less than six months. The court held that because contempt of court is a petty offense when the penalty actually imposed does not exceed six months,311 the United States Constitution does not require allowance of trial by jury.312 The trial court had also ordered the husband to make monthly payments on a car-note as agreed by the parties. On his wife's showing that he had failed to make payments for three months, the husband had been jailed for contempt. The court held that the husband was entitled to

305. Cook, 886 S.W.2d at 842-43; cf. id. at 843-44 (Cummings, J., dissenting).
306. Tex. Fam. Code Ann. § 3.58(c) (Vernon Supp. 1995). The section specifically requires "notice and hearing" of a motion to order payment of such fees. Id.
307. 867 S.W.2d 88 (Tex. App.—Corpus Christi 1993, no writ).
308. Id. at 89 n.1.
309. Id. at 90 n.2.
310. 868 S.W.2d 373 (Tex. App.—Houston [1st Dist.] 1993), aff'd per curiam, 888 S.W.2d 811 (Tex. 1994).
be discharged because the order amounted to imprisonment for debt.\textsuperscript{313} The court noted, however, that if the payment had been designated as for temporary support, a different result might have been reached.\textsuperscript{314}

While the first petition was before the Houston Court of Appeals, the trial judge signed a second commitment order for contempt of other orders without any additional notice or hearing, and the contemnor brought a second petition for habeas corpus before the Supreme Court of Texas.\textsuperscript{315} The court declared the second order invalid on alternative grounds. If considered as a new commitment not ordered as a consequence of the first hearing, the order had been issued without notice and hearing and was void for denial of due process of law.\textsuperscript{316} Alternatively, if the second commitment order had been issued as a result of the first contempt hearing, then no written commitment order was signed sufficiently close to the time that the judge pronounced the contempt to satisfy due process requirements.\textsuperscript{317}

In granting a writ of habeas corpus in \textit{Ex parte Chunn},\textsuperscript{318} the court held that an order to provide health insurance to a wife made prior to entry of a written decree of divorce constitutes a temporary order and disobedience of the order is subject to the pressures of civil contempt and punishment by imprisonment for up to six months in jail. But commitment to jail for failure to comply with the order without assessing the period of confinement and without defining the consequences of failure to comply constituted punishment without due process of law.\textsuperscript{319}

The purpose of Rule 215.5,\textsuperscript{320} requiring identification of witnesses thirty days before trial, is to avoid ambush at trial. In \textit{Ramirez v. Ramirez}\textsuperscript{321} the trial court allowed the wife to testify although she had not identified herself as a potential fact witness. Ordinarily good cause must be shown for allowing an unidentified witness to testify. The court first observed that there is less reason to apply the rule in the case of a party to a divorce suit than with respect to other witnesses.\textsuperscript{322} In overruling the husband's point of error, the court also justified its conclusion by saying that in a suit for divorce

there is, or should be, a presumption that both husband and wife have knowledge of relevant facts pertaining to the marriage . . . . Allowing a party to a divorce suit . . . to testify despite his or her failure to identify him — or herself — as a fact witness would not

\begin{footnotesize}
315. \textit{Delcourt}, 888 S.W.2d at 811.
316. \textit{Id.} at 812.
317. \textit{Id.}
318. 881 S.W.2d 912 (Tex. App.—Houston [1st Dist.] 1994).
319. \textit{Id.} at 917.
321. 873 S.W.2d 735 (Tex. App.—El Paso 1994, n.w.h.).
322. \textit{Id.} at 739.
\end{footnotesize}
likely serve as a surprise to the other . . . and cannot be considered as a return to trial by ambush.\footnote{323}

If a defendant fails to file an answer to a plaintiff's complaint or petition, Rule 23\footnote{324} allows the plaintiff or petitioner to take judgment on his pleadings though an asserted right to unliquidated damages must be proved, and in the case of divorce or annulment, the petitioner must establish his grounds for relief under section 3.53 of the Family Code.\footnote{325} In either of the latter cases, however, the plaintiff or petitioner need not give his defaulting opponent notice of the time of the hearing. Although some of its more precise language was dropped from former section 3.64\footnote{326} when Title 1 of the Family Code was amended in 1973, the draftsmen's commentary presented to the Legislature stated that the omission does not relieve the petitioner for divorce of proving his or her grounds for divorce whether or not the respondent files a contest. This requirement implements the state's policy that a marriage should not be put aside lightly and that the petitioner must discharge the burden of proof\footnote{327}. There is, nevertheless, language about default judgments in decisions of some appellate courts that may seem to depart from this long-established requirement,\footnote{328} dating to the Divorce Act of 1841.\footnote{329} Such language re-occurs in \textit{Harmon v. Harmon},\footnote{330} but the stricture of section 3.53 were nonetheless complied with regardless of the respondent's failure to file an answer.\footnote{331}

In \textit{Harmon} the wife had filed a petition for divorce in Harris County on May 4 and on June 24 filed an amended petition. The respondent failed to file an answer, which was due on August 10. On August 14 the associate judge announced that the divorce was granted, after hearing evidence on the petition but without noting that the amended petition had not been on file for sixty days. On September 18, however, the referring court approved the judgment and signed the decree. After his motion for new trial was overruled and after he had missed the deadline for filing an appeal, the husband filed a writ of error. The appellate court rejected the appellant's argument that the sixty days waiting period prescribed by sec-

\footnote{323} \textit{Id.} at 740. \\
\footnote{324} TEX. R. CIV. P. 239. \\
\footnote{325} TEX. FAM. CODE ANN. § 3.53 (Vernon 1992). \\
\footnote{326} \textit{Id.} § 3.64. \textit{See Joseph W. McKnight, Commentary to Title 1 of the Family Code, 21 TEX. TECH L. REV.} 911, 988 (1990) [hereinafter McKnight, \textit{Commentary to Title 1 - Family Code}]. \textit{See Joseph W. McKnight, supra note 5, at 342.} \\
\footnote{327} McKnight, \textit{Commentary to Title 1 - Family Code, supra note 326, at 988.} \\
\footnote{328} \textit{See, e.g.,} Morris v. Morris, 717 S.W.2d 189, 190 (Tex. App.—Austin 1986, no writ) (grounds for divorce were not in issue, only domicile and residence requirements); cf. Considine v. Considine, 726 S.W.2d 253, 254 (Tex. App.—Austin 1987, no writ) (dictum that material allegations in a divorce petition must be proven by petition though respondent failed to answer). \\
\footnote{329} 1840-1841 \textit{Tex. Gen. Laws} 19, § 4 at 20; 2 H.P.N. GAMMEL, \textit{LAW S OF TEXAS} 483, 484 (1898). \\
\footnote{330} 879 S.W.2d 213 (Tex. App.—Houston [14th Dist.] 1994, n.w.h.). \\
\footnote{331} In professional slang this process is often referred to as a divorce "prove-up."
tion 3.60 makes a suit contested until that time has passed under Rule 245. The sixty days waiting period merely precludes judgment of divorce before that time has run. Although the associate judge had purported to grant the divorce on August 14, the associate judge did not have the power to render judgment but only to recommend judgment. Thus, the divorce was not granted until September 18, well after the sixty days had run.

The facts of Turner v. Ward are reminiscent of the New Mexico phase of Oliver v. Oliver. The husband had allegedly used fraud to procure a waiver of citation from his wife and had been granted a divorce without her appearance. Two weeks after the entry of the decree the husband was killed. After some sparring the trial court affirmed the decree, and the wife filed a motion for new trial. The judge overruled the wife’s motion, and she appealed. The appellate court held that when a party dies after the decree is entered, the cause does not abate for mootness, but the court acknowledged that an appeal may abate in such a case. Even so, the court went on to hold that an appeal is not mooted if the marital status of the parties will significantly affect their property rights. The court relied on Dunn v. Dunn, in which the Texas Supreme Court allowed the appeal to proceed. In this instance the court granted a motion for new trial but added “that on remand, the case is abated and should be dismissed” due to the husband’s death.

The dispute in Cook v. Cook also turned on the proper exercise of the judge’s plenary powers within thirty days of judgment. After rendering oral judgment for divorce and division of property, the trial court entered a written judgment that somewhat altered the terms of the oral judgment with respect to property division. The written judgment, therefore, was rendered within the trial court’s power to make such a modification.

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332. TEX. FAM. CODE ANN. § 3.60 (Vernon 1992).
333. TEX. R. Civ. P. 245 requires at least 45 days notice of a first setting for trial.
334. Harmon, 879 S.W.2d at 215. A respondent appearing specially, however, has the responsibility to make a timely request for a hearing or else he waives his special appearance. Bruneio v. Bruneio, 890 S.W.2d 150, 154 (Tex. App.— Corpus Christi 1994, n.w.h.). But having answered, the respondent is entitled to notice of the trial setting on the petitioner’s cause of action under Rule 245. Bruneio, 890 S.W.2d at 154.
335. Harmon, 879 S.W.2d at 215.
337. 889 S.W.2d 271 (Tex. 1994). See supra notes 43-45 and accompanying text.
339. Id.
340. Id. at *9. If division of property is in issue, marital status will inevitably affect those property rights. If custody of minor children is alone in issue, property rights would not be in issue. Id.
341. 439 S.W.2d 830, 834 (Tex. 1969).
342. Id.
344. Id. at *14 n. 6.
345. 888 S.W.2d 130 (Tex. App.— Corpus Christi 1994, n.w.h.).
346. Id. at 132.
B. Property Settlement Agreements

In *In re Banks* the wife had sued her husband for divorce and had joined his wholly owned corporation as a co-respondent. The parties submitted their disputes to mediation and a written settlement was reached. The wife then filed a written notice of repudiation of the agreement on the ground of fraudulent misrepresentation of facts in the inducement of the settlement. The husband and the corporation moved for summary judgment. The trial court granted their motion. On the wife's appeal, the appellate court held that granting the motion was proper in light of the wife's failure to assert facts in support of her allegation.

In *Stein v. Stein* the wife sought to withdraw her consent to a property settlement incident to divorce. The parties had agreed that their dispute would be tried before an associate judge, had announced their agreement in open court, and had dictated its terms into the record with the approval of the associate judge. Prior to the approval of the agreement by the referring divorce court, however, the wife revoked her consent. As in *Harmon*, the appellate court held the associate judge lacks power to enter judgment, and, therefore, under Family Code section 3.631 the wife might withdraw from the settlement agreement at any time before rendition of judgment by the divorce court.

C. Making the Division

An appellate court will not remand a division of community property on divorce unless the trial court has mischaracterized marital property or has abused its discretion in dividing the community estate. In *Ramirez v. Ramirez* the appellate court found that the trial court in making an award of a money judgment to the wife in lieu of certain community property in the husband's possession had included the value of two items of property in the wife's possession which the court had already awarded to her. To avoid this double recovery of property by the wife, the appellate court recomputed the value of the property in the husband's possession and corrected the judgment for the monetary award. Thus, in the court's view, the need for remand to the trial court for a redivision of the property was avoided because there was no error in characterization of

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347. 887 S.W.2d 160 (Tex. App.—Texarkana 1994, n.w.h.).
349. 886 S.W.2d 902 (Tex. App.—Houston [14th Dist.] 1994, no writ).
352. *Stein*, 868 S.W.2d at 904.
353. *Jacobs*, 687 S.W.2d at 731.
354. *Cook v. Cook*, 888 S.W.2d 130, 132 (Tex. App.—Corpus Christi 1994, n.w.h.).
355. 873 S.W.2d 735 (Tex. App.—El Paso 1994, no writ).
356. *Id.* at 742-43.
property, but merely a miscalculation of figures). The appellate court’s citations of authority justifying its conclusion were inapposite.

D. Appeals

In *Dawson-Austin v. Austin* the husband asserted that the wife was barred from taking an appeal by voluntarily accepting the benefits of the judgment. The benefits referred to by the husband were attorney’s fees (including interim fees), witnesses’s transportation expenses, and temporary alimony. The court pointed out that most of these benefits were not included in the final judgment and that the enforcement of these benefits was not at cross purposes to the wife’s appeal from the judgment. The court also pointed out that the husband’s rights would not be prejudiced by the wife’s acceptance of those benefits nor by her pursuit of an appeal.

In *Tschirhart v. Tschirhart* the husband attempted to rely on values he placed on community property in his sworn inventory and appraisal, documents filed with the district clerk but which were not introduced into evidence at the trial. The same issue and a similar one had been previously dealt with by other appellate courts. The Tyler Court of Appeals in *Poulter v. Poulter* had concluded that inventories are analogous to interrogatories and thus must be introduced into evidence to be considered as part of a record for appeal. The Houston First District Court of Appeals had held, however, that when a trial court’s conclusions refer to an inventory not in evidence, the inventory may be considered on appeal because the trial court evidently used it. The court in *Tschirhart* chose to follow the decision of the Tyler court because its decision was more to the point and more convincing. In *Tschirhart* the husband had also asked the appellate court to consider certain pre-trial statements of both parties. These were also not in evidence at trial and were not filed with the district clerk until over six months after the trial. The appellate court also refused to consider these statements not in evidence.

In *Oliver v. Oliver* the appellant had asserted that her claim for fraud was severable from the remainder of the trial court’s judgment for divorce. The Supreme Court of Texas concluded that a party may sever a

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357. Jacobs, 687 S.W.2d at 731; McKnight, 543 S.W.2d at 863.
358. Ramirez, 873 S.W.2d at 742.
362. 876 S.W.2d 507 (Tex. App.—Austin 1994, n.w.h.).
365. Tschirhart, 876 S.W.2d at 508-09. In *Vannerson* the Houston court typified its consideration of the inventory as taking judicial notice of it and the court in *Tschirhart* discussed judicial notice as a matter for its concern. In neither case was taking judicial notice properly at issue.
366. Id. at 509.
367. 889 S.W.2d 271 (Tex. 1994). *See supra* notes 43-45 and accompanying text.
HUSBAND AND WIFE

claim or aspect of a dispute for the purpose of a limited appeal even though the claim arose from a situation that the trial court interpreted in a manner with which the appellant does not wholly dispute. A strict rule against limited appeals would preclude an appeal concerning the property division on divorce without taking an appeal on the divorce itself.

E. Enforcement

In Ex parte Minns an ex-husband had been sentenced to six months in jail and ordered to pay a $500 fine for refusing to answer each of fifty questions asked in a deposition hearing held for the purpose of discovery of assets. Because the contemnor had not been afforded the protection of a jury trial for a punishment of six months in jail, he was entitled to be released on a writ of habeas corpus. The condemning court's reduction of the penalty over thirty days after the judgment was signed was beyond the court's power.

In another case the Dallas Court of Appeals granted a writ of habeas corpus on the ground that the ex-wife had been invalidly imprisoned for debt under the Texas Constitution. The contemnor had been committed to jail to compel her to discharge unpaid fees of an attorney ad litem and other court costs incurred in connection with a child visitation dispute. In releasing her the court made it clear that the charges addressed were not for child support but merely for debt.

Englert v. Englert addressed a point of pleading and raised some unresolved issues of fraudulent transfer. An ex-husband was indebted to his former wife by a Tennessee decree for alimony, medical expenses, and child support. The ex-wife got a Texas judgment on the arrears owed on her Tennessee decree under the Uniform Foreign Judgments Act. Anticipating that his creditor's ex-wife might serve him with a writ of garnishment for a debt owed but not yet due, the ex-husband's debtor thereupon prepaid the obligation. As anticipated, the ex-wife then served her writ, and the garnishee answered that he owed no debt to the ex-husband. The trial court held that the debtor's prepayment of the debt constituted a fraudulent transfer, and the former debtor appealed. The

368. Id. at 273.
369. The wife was not barred from asserting her right to relief, Tex. Civ. Prac. & Rem. Code Ann. § 16.069 (Vernon 1986), because she had limited her appeal to the issue of fraud and thus excluded other matters arising from the same occurrence or transaction. Tex. R. Civ. P. 40(a)(4). In so concluding the court relied, inter alia, on Penick v. Penick, 750 S.W.2d 247, 250 (Tex. App.—Houston [1st Dist.] 1981, rev'd on other grounds, 783 S.W.2d 194 (Tex. 1990)(community reimbursement claim severable from child support issue in divorce case).
370. 889 S.W.2d 16 (Tex. App.—Houston [1st Dist.] 1994).
371. The court's power to modify its judgment extends for only thirty days under Tex. R. Civ. P. 329b(d).
372. Ex parte Hightower, 877 S.W. 2d 17 (Tex. App.—Dallas 1994, writ dism'd w.o.j.).
374. 881 S.W.2d 517 (Tex. App.—Amarillo 1994, n.w.h.).
appellate court held that the ex-wife had not pled the fraudulent transfer and therefore the judgment should be reversed because the judgment did not conform to the pleadings. But even with the foresight in pleading called for by the appellate court, should the ex-wife have prevailed? Did the debtor really make a fraudulent transfer? The trial court’s conclusion seems faulty as a matter of law. If a fraudulent grantee’s return of property to a fraudulent grantor is not wrongful as the Texas Supreme Court held it was not in *Biccochi v. Casey-Swasey Co.*, prepayment of a valid indebtedness can scarcely be fraudulent and the provisions of the Uniform Fraudulent Transfer Act enacted in 1987 do not appear to have changed that conclusion.

In *Pearcy v. Pearcy* an ex-wife brought suit for clarification and enforcement of a 1984 divorce decree that she would receive a specific percentage of her husband’s military benefits he would receive on retirement. As an initial showing for enforcement of such an order, the appellate court said that the movant must demonstrate that the order was not specific enough to be enforced by contempt. In the absence of a finding of ambiguity under section 3.71, the appellate court held that there is no authority to clarify the judgment.

In *Pate v. Pate* the ex-wife sought an order to clarify a 1992 agreed judgment for division of property on divorce. Pursuant to a settlement agreement, the wife was awarded an interest in the husband’s pension benefits at retirement. The divorce decree gave the wife one half of a fraction of the husband’s retirement benefits: the number of months of the husband’s accrued benefits during marriage divided by the total number of months of his past and future months of employment. In response to the ex-wife’s motion for clarification, the trial court concluded that it was the parties’ intent merely to make an equal division of the value of their community interest between them. The appellate court held, however, that the ex-wife had failed to discharge her burden of proof that there had been a mutual mistake and, therefore, that the trial court had erred in changing the express terms of the prior decree. The appellate court also held the agreement provided that the ex-wife be paid when the ex-husband would be paid on retirement and that she was not allowed to choose to be paid at his earliest retirement date. Thus, retirement would be determined as the ex-husband and the company would decide. At trial the ex-wife had not been the successful party and attor-

376. Englert, 881 S.W.2d at 520.
377. 42 S.W. 963 (Tex. 1897).
379. 884 S.W.2d 512 (Tex. App.—San Antonio 1994, n.w.h.).
380. Id.
382. Pearcy, 884 S.W.2d at 514.
384. Id. at 288.
385. Id.
ney's fees were denied. As she was successful on appeal, the trial court was directed to consider an award of attorney's fees under section 3.77.386.

F. OTHER POST DIVORCE DISPUTES

In a 1968 divorce decree that provided the impetus for the dispute in Jeffcoat v. Jeffcoat,387 the court made no division of the husband's interest in a non-military pension plan. In 1992 the ex-wife sought a partition388 of the undivided community portion of the retirement benefits already distributed since 1978 and the benefits to be distributed. There was no dispute as to those amounts. The trial court awarded the ex-wife a money judgment for her community share of the benefits already paid, ordered the ex-husband to acquire a life insurance policy with the ex-wife as beneficiary as security for payment, partitioned future benefits between the ex-spouses, and termed the ex-husband a constructive trustee of the ex-wife's portion of benefits to be received on her behalf. On appeal the principal issue in dispute was the trial court's sua sponte requirement of security for payment of the judgment. Without commenting on the propriety of such a requirement for this or other purposes, the appellate court held that the order was improper when unsupported by any evidence of the insurability of the ex-husband or the amount of the premium required for such a policy.389

Walton v. Johnson390 also turned on a dispute concerning property undivided on divorce. Because the property at issue had not been before the divorce court for division, the doctrines of res judicata and collateral estoppel were inapplicable and a summary judgment awarded to the ex-husband on those grounds was improper.391

In seeking damages for breach of a property settlement agreement in In re Brown,392 the ex-husband asserted that by the agreement his ex-wife had barred her right to seek a partition of Oklahoma realty owned by the parties. But the agreement had not so specified, and even if it had, the court said such an agreement would have been contrary to the policy-rule that the right of partition should be maintained "as an absolute right."393 At the time of the ex-husband's action, the property had been partitioned by a final judgment of an Oklahoma court and appealed by the ex-hus-

386. Id.
388. Although the appellate court referred to this as an equitable proceeding under TEX. FAM. CODE ANN. § 3.91 (Vernon 1992), the time had long passed since the court might have made a "just and right" division of the benefits.
389. Jeffcoat, 886 S.W.2d at 569.
390. 879 S.W.2d 942 (Tex. App.—Tyler 1994, n.w.h.).
391. Id. at 945-46. Although the ex-wife was successful in showing that her proof at trial justified the summary judgment granted in her favor as to the separate nature of certain mineral interests, id. at 947, she was unsuccessful in showing that her summary judgment proof demonstrated the separate character of particular bank accounts by tracing them from the asserted source of her father's estate. Id. at 946-47.
392. 870 S.W.2d 600 (Tex. App.—Amarillo 1993, no writ).
393. Id. at 604 (citing Spires v. Hoover, 466 S.W.2d 344, 347 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.)).
band to the Supreme Court of Oklahoma. Any dispute with respect to
the partition was, therefore, before the Oklahoma court and was res
judicata.394

_Scalfani v. Scalfani_395 was a procedural skirmish in a post divorce effort
to sell realty apparently before the court but left undivided in a 1979 di-

vorce decree. In 1986 the ex-wife petitioned for appointment of a re-
ceiver to sell the property with the result that the ex-spouses agreed to
sell the property, but no sale resulted. A year later the ex-wife again
sought the appointment of a receiver and one was appointed to sell the
property. Again no sale resulted. In 1990 a substitute receiver was ap-
pointed in response to the ex-wife’s motion. In 1991 the ex-wife sought a
replacement of the receiver without success. In 1993 the ex-husband
moved to set aside the receivership on the ground that appointment of
the receiver changed the terms of the 1979 decree concerning sale of the
property. When his motion was overruled, the ex-husband promptly ap-
pealed. The majority of the appellate court held that an appeal of the
appointment of a receiver must be taken within twenty days of the origi-
nal order of appointment396 and thus that any right to appeal had expired
over five years before.397 The court pointed out that the ex-husband had
not sought to terminate the receivership but to set aside the appoint-
ment.398 In her dissent, Justice Mirabal saw the ex-husband’s motion as
one “to vacate the receivership” by which she presumably meant to ter-
minate it.399

_In re Group Life Insurance Proceeds of Mallory_400 dealt with a benefi-
ciary designation of a life insurance policy of a deceased ex-husband.
During marriage, the husband named his wife as primary beneficiary and
two of her daughters by a prior marriage as alternate beneficiaries. After
his divorce, the insured did not change the beneficiary designations.
Although the designation of the primary beneficiary did not survive the
divorce,401 the designations of the alternate beneficiaries were unaffected
by the provisions of Family Code section 3.623.402 Whether the statute
should be amended to provide otherwise with respect to insurance desig-
nations in favor of relatives of a divorced spouse should be carefully
considered.

_Stephens v. Stephens_403 concerned a joint, contractual will made by a
married couple in 1986 in favor of the survivor. After both parties had
filed for divorce in 1990, the husband with his wife’s knowledge made a
new will of his separate property and his share of the community estate

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394. _Brown_, 870 S.W.2d at 604-05.
395. 870 S.W.2d 608 (Tex. App.—Houston [1st Dist.] 1993, no writ).
397. _Scalfani_, 870 S.W.2d at 611.
398. _Id._ at 613 (Mirabel, J., dissenting).
399. _Id._ at 801.
401. 877 S.W.2d 801 (Tex. App.—Dallas 1994, no writ).
for the benefit of his children. The husband died several months later and no divorce was granted. In a contest between the beneficiaries of the two wills, the probate court admitted the second will to probate and refused to impose a constructive trust on the beneficiaries of the second will in favor of the beneficiary under the first will. The parties stipulated that the divorce would have been granted if the husband had lived a little longer. Section 59A(b) of the Probate Code provides that "a joint or reciprocal will does not by itself suffice as evidence of the existence of a contract," but such a will may nonetheless be contractual, as this will evidently was. Either party may revoke a will shown to be contractual but may be answerable for any loss suffered by the other party. The court responded to this rule by saying that the consideration for the 1986 contract had failed and that the wife had not changed her position in reliance on the 1986 will. Hence, the revocation of the will did not constitute a breach of the couple's contract or amount to fraud on the wife's interest under the contractual will in these circumstances. Had the results been otherwise, the court seems to conclude that imposition of a constructive trust is the survivor's sole remedy in such a situation. The court went on to say that its judgment in this case is limited to its facts: that but for the death of the husband, the divorce would have been granted with the result that all provisions of the first will in favor of the wife would have been avoided. The court nevertheless concluded (as it may be asserted in comparable situations) that a divorcing spouse loses all benefits of a contractual will made with the other spouse unless detrimental reliance on the terms of the will can be proved.

Following a divorce, the ex-husband brought suit against his ex-wife's attorney for causes that were adjudged groundless and merely for the purpose of harassment. The attorney represented herself in the proceeding and was awarded attorney's fees as sanctions against the plaintiff for the time she expended in defending herself. In Beasley v. Peters the Amarillo Court of Appeals reversed the award and remanded the case for the imposition of an appropriate sanction. In ruling against the award of the attorney's fees to an attorney pro se the court said that in using the term "attorney's fees" in Rule 215(2)(b)(8) the rulemaker likely contemplated "an attorney-client relationship;" therefore, a pro se litigant is not entitled to fees under the rule.

404. TEX. PROB. CODE ANN. § 59A(b) (Vernon 1980).
405. Id.
406. Stephens, 877 S.W.2d at 804.
407. Id. at 805.
408. Id. citing TEX. PROB. CODE ANN. § 69 (Vernon 1980).
410. 870 S.W.2d 191 (Tex. App.—Amarillo 1994, no writ).
412. Beasley, 870 S.W.2d at 196.
413. Id.
Section 523(a)(5) of the Bankruptcy Code\textsuperscript{414} exempts alimony for an ex-spouse and child support from the discharge of the payor.\textsuperscript{415} In his bankruptcy in \textit{In re Johnson}\textsuperscript{416} the ex-husband asserted that monthly payments for his ex-wife providing for alimony and support in an agreement incorporated in their divorce decree actually constituted repayment of debts and therefore were dischargeable. The ex-wife admitted that in reaching the agreement to be paid $400,000 over a period of ten years, she took into account a loan for $85,000 secured by her separate property (or what the court called \textit{bienes separados} under the law of the parties’ Mexican domicile) and expended for their living expenses during the marriage.\textsuperscript{417} The court nevertheless gave great weight to the intention of the parties at divorce in characterizing their agreement as for “alimony”, thus avoiding for the court what it described as “a parol evidence problem.”\textsuperscript{418} Hence, the ex-wife had discharged her burden of proving that the payments were for “alimony” and nondischargeable. In concluding that the agreement was indeed for alimony, the court also relied on the fact that the parties had little community property to divide but failed to note that a right of reimbursement was in issue.\textsuperscript{419} The court, however, denied an award of the ex-wife’s attorney’s fees as not an obligation of the bankrupt’s estate and not anticipated by the agreement.\textsuperscript{420}

A different issue with respect to attorney’s fees was before the Fifth Circuit Court of Appeals in \textit{In re Joseph}.\textsuperscript{421} In this case the wife’s attorney had received a judgment for his fees against the husband and the wife for his representation of the wife to enforce a temporary support award. In the ex-husband’s subsequent bankruptcy the attorney sought a declaration that the bankrupt’s obligation to pay the judgment was not dischargeable. The appellate court affirmed the district court’s affirmation of the bankruptcy court’s opinion that the judgment for attorney’s fees actually “formed part of an overall economic arrangement to provide [the wife] with needed support” and was therefore nondischargeable.\textsuperscript{422}

\begin{footnotesize}
\textsuperscript{415} To give greater protection to alimony and child-support provisions in bankruptcy, 11 U.S.C. § 507(a) was amended in 1994 to give a seventh priority to such provisions. On the other hand, the 1994 amendments also provided an exception to the rule against discharge of alimony and child support obligations when the debtor lacks the ability to pay and “discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences” to the payee. It is not clear when this provision will apply. \textit{See Act of Oct. 22, 1994, Pub. L. No. 103-394, tit. I, § 108(c), tit. II, § 207, tit. III, § 304(o), tit. V, § 501(b)(3), (d)(11), 108 Stat. 4112, 4123, 4142, 4145.}
\textsuperscript{416} 162 B.R. 130 (Bankr. S.D. Tex. 1993).
\textsuperscript{417} \textit{Id.} at 136.
\textsuperscript{418} \textit{Id.} at 134.
\textsuperscript{419} Even more dubiously, of course, the Fifth Circuit Court of Appeals treated a right of reimbursement as an element of “alimony substitute” for bankruptcy purposes in \textit{In re Nunnally}, 506 F.2d 1024 (5th Cir. 1975).
\textsuperscript{420} \textit{Id.}
\textsuperscript{421} 16 F.3d 86 (5th Cir. 1994).
\textsuperscript{422} \textit{Id.} at 87.
\end{footnotesize}
In *Farrey v. Sanderfoot* and *Owen v. Owen* the United States Supreme Court drew a nice line between the situations when liens may or may not be removed from a homestead and exempt personalty under section 522(f) of the Bankruptcy Code. In the 1994 Bankruptcy Code amendments, Congress left the language of the Code in place that supported the prior judicial distinction but Congress excluded judicial liens securing alimony and child-support from the scope of the bankrupt's right of avoidance "to supplement the reach of *Farrey v. Sanderfoot*." In a Texas context it is difficult to see how *Farrey* will be supplemented by the amendment.

Section 522(c)(1) of the Bankruptcy Code, which was not amended in 1994, provides that property claimed by a bankrupt debtor as exempt is not liable for pre-petition debts except for certain nondischargeable tax and family support obligations. The ex-wife of the debtor in *In re Davis* sought to turn this essentially defensive provision to an offensive purpose by arguing that by way of federal preemption a creditor with a claim for family support may achieve access to exempt property in bankruptcy. In her ex-husband's bankruptcy proceeding, the ex-wife moved for an order that the federal marshal seize and sell the debtor's homestead under the Texas turnover statute in order to satisfy support obligations under state law. In brief, her argument seems to have been that the Texas statute is designed to reach property that "cannot readily be attached or levied on by ordinary legal process" and that the bankruptcy process affords the means. Her effort failed. The bankruptcy court held that section 522(c)(1) does not create liability:

While it does not impose an injunction against liability on exempt property for [section] 523(a)(1) or (a)(5) debts, it also does not prevent non-bankruptcy law from imposing such an injunction. Indeed, Texas has done so. Rather than affirmatively subjecting exempt property to liability for family support obligations, Congress did not extend the injunction against liability for family support obligation. This permits states like Texas to enact broader injunctions of liability of exempt property, protecting exempt property even from non-discharged family support obligation.

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425. See *Farrey*, 500 U.S. at 291; *Owen*, 500 U.S. at 305, discussed in McKnight, 1992 Annual Survey, supra note 11, at 1854-55.
433. Id.
434. Id. at 898.
Prior to her husband’s bankruptcy filings for himself and his two wholly-owned separate corporations that may be referred to collectively as *In re Share International, Inc.*, the wife filed for divorce and joined as parties the corporations as his alter egos. The divorce court divided the community estate, awarded the wife money judgments against the husband and one of the corporations, and fixed liens on realty and personalty of the husband and both corporations as security for the judgments. Unable to file a bond in the amounts necessary to supersede the judgment for appeal, two weeks after the rendition of the final judgment the husband and the two corporations filed for reorganization under Chapter 11 of the Bankruptcy Code. On motions by the ex-wife and the United States Trustee, the bankruptcy court suspended the three reorganization cases with the observation that court would not sit as a court of appeals in a divorce case. The ex-husband was ordered to pay all fees of the proceedings.

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438. *Id.* at 248.