1980

Family Law: Husband and Wife

Joseph W. McKnight

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation


https://scholar.smu.edu/smulr/vol34/iss1/4

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
FAMILY LAW: HUSBAND AND WIFE

by

Joseph W. McKnight*

I. Status

Entering into Marriage. In Claveria v. Estate of Claveria the husband contested the validity of his wife's will. His contest was met by an assertion that he had previously entered into an informal marriage that was undisolved at the date of his ceremonial marriage to the testatrix and the later marriage was therefore invalid. In spite of the “vehement assertions” of both principals to the informal marriage that they had not agreed to be married, the trial court decided that an informal marriage had been contracted between them. Apparently, this conclusion was arrived at by ignoring the lack of evidence of any marital agreement and by relying instead on the evidence of their living together and holding themselves out as husband and wife. The trial court, therefore, must have put its ultimate reliance on the provision of section 1.91(b) of the Family Code that the agreement to marry “may be inferred if it is proved that they lived together as husband and wife and represented to others that they were married.” But this provision must mean that the court may infer the fact of agreement in the absence of evidence on the matter. If either or both parties testify concerning their agreement to marry, the court should not entertain an inference but should merely make a finding on the basis of the evidence presented. If the evidence offered tends to disprove the existence of the agreement, there is no room to infer it. Claveria appears to have been a situation that would have justified reversal on that ground alone. The appellate court, however, evaluated the evidence in relation to the statutory text in a somewhat more subtle way to achieve the same result. Both witnesses testified that they had “lived together,” that is, that they had cohabitated under the same roof. But living together as husband and wife, as required by the statute, is especially difficult to demonstrate in the absence of any agreement to be married. Thus, the court concluded that the evidence was not sufficient as a matter of law to comply with the terms of the statute.

The only Texas legislative development during 1979 concerning entry into the marital relationship was the statutory expansion of the list of authorized celebrants to include retired judges, including retired justices of the peace. Hence the only group of judicial officers lacking authority to

---

* B.A., The University of Texas; B.C.L., M.A., Oxford University; LL.M., Columbia University. Professor of Law and Associate Dean, Southern Methodist University.
2. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1975).
3. Id. § 1.83 (Vernon Supp. 1980).
marry are municipal judges, whose authority to perform marriages has been generally opposed by justices of the peace.

It has sometimes been suggested that there should be some sort of legislative restraint on the right to remarry when children of a prior marriage are unprovided for. Following the lead of the United States Supreme Court, the Supreme Court of Indiana held that a statute denying the right to marry to anyone who is unable to prove that dependent children have been adequately supported is unconstitutional.

Section 2.44 of the Family Code provides that a marriage is voidable and subject to annulment if the petitioner was fraudulently induced to enter into the marriage. The Supreme Court of Illinois recently interpreted a similar statute and found that fraud existed when a divorced woman induced a man to marry her by falsely representing herself as a widow, knowing that the man's religious beliefs would have prevented him from marrying her if he had known she was divorced. Over fifty years ago, however, the Amarillo court of civil appeals in an obiter dictum seemed to cast some doubt on concealed divorce as a ground for annulment. Nevertheless, concealment made with the deliberate intention of deceiving a person with strong religious convictions against remarriage after civil divorce would seem to be the sort of fraud with which section 2.44 was designed to deal.

Privileged Testimony. There were several cases decided in other jurisdictions in which one spouse sought to invoke the marital privilege to bar testimony of the other spouse in a suit in which the first spouse was involved. Overruling earlier cases that would have allowed invocation of the privilege, the Missouri Supreme Court held that the testimony of an ex-

---

8. ILL. ANN. STAT. ch. 40, § 301(1) (Smith-Hurd Supp. 1979) provides:
   The court shall enter its judgment declaring the invalidity of a marriage (formerly known as annulment) entered into under the following circumstances:
   (1) a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs or other incapacitating substances, or a party was induced to enter into a marriage by force or duress or by fraud involving the essentials of marriage . . . .
11. The limited scope of TEX. FAM. CODE ANN. § 2.46 (Vernon 1975) (concealment of a divorce granted within 30 days of subsequent marriage) was not meant to suggest that concealment of a more venerable divorce is condoned. The object of § 2.46, as well as § 1.03(b)(4), is to support the principle underlying § 3.66. See McKnight, Commentary to the Texas Family Code, Title 1, 5 TEX. TECH L. REV. 281, 318-19, 343 (1974).
spouse, not involving a confidential communication, was admissible in a criminal prosecution. Although California has recently recognized the enforceability of property contracts between unmarried cohabitants, it has shown no inclination to extend the marital privilege to them.

**Alienation of Affection.** In 1975 section 4.05 was added to the Family Code. The text of the section abolished the tort of criminal conversation, while its title referred to abolition of the action for alienation of affection as well. In spite of renewed attempts to abolish recovery for alienation of affection in 1979, the Texas Legislature merely removed the misleading reference to alienation of affection in the title. At about the same time, the Texarkana court of civil appeals turned back an attempt to curtail a recovery for alienation of affection.

In *Williford v. Sharpe* a wife had sued another woman for alienation of the husband's affection. The jury rendered a verdict for actual damages of $25,000 and exemplary damages of $10,000. The trial court overruled the defendant's motion for a new trial, conditioned on a remittitur of $10,000 of actual damages by the plaintiff. The defendant appealed on the basis of an excessive award of damages, and the plaintiff complained of the remittitur. The appellate court restored the jury's award and set aside the remittitur. "[T]he law requires that mortals determine the amount of damages suffered for the loss of a spouse's affection when those affections have been alienated by another person. . . . [T]he loss of the attendant benefits of a good marriage in this case is worth $25,000.00."

**Spousal Support.** On the advice of the Family Law Section of the State Bar of Texas the legislature enacted amendments equalizing the standard of mutual support between the spouses.

---

13. State v. Euell, 583 S.W.2d 173 (Mo. 1979) (en banc).
17. 1979 Tex. Gen. Laws, ch. 193, § 4, at 422. As recommended by the Family Law Section of the State Bar of Texas, S.B. 131 proposed removal of the reference to alienation of affection in the title of Family Code § 4.05. The Senate adopted an amendment to retain the title as enacted in 1975 and to amend the text to abolish the tort of alienation of affection in conformity with the title. In the House of Representatives, however, an amendment was adopted to limit the abolition of the tort of criminal conversation to instances of voluntary intercourse, thereby authorizing suit for criminal conversation in instances of rape. As finally passed, S.B. 131 gave effect to the recommendation of the Family Law Section. See TEX. FAM. CODE ANN. § 4.05 (Vernon Supp. 1980).
19. Id. at 500-01. In Turner v. Unification Church, 473 F. Supp. 367, 378 (D.R.I. 1978), the court held that the cause of action for alienation of affection was inapplicable to the parent-child relationship.
Interspousal Immunity. In 1977 Texas recognized that the doctrine of interspousal immunity as applied to intentional torts had lost its validity. In both Nebraska and Iowa the courts have gone a step further to abolish the doctrine in wrongful death actions founded on negligence. In the ordinary negligence situation, however, both Texas and Ohio have resisted the argument to carry abolition further. Although Texas has been unwilling to allow a cause of action in interspousal negligence, the 1979 Texas Legislature implemented a procedure to protect family members from the infliction of intentional torts within the household. Despite its non-compensatory purpose, the passage of title 4 of the Family Code is a modest start toward dealing with family violence.

II. Characterization of Marital Property

Antenuptial Agreements. Most states other than Texas have had a long experience with premarital agreements that affect marital property interests. One of the lessons that can be drawn from the cases in those jurisdictions with respect to the validity of such agreements is that a full disclosure of the extent of the property of a prospective spouse should be made to one who would renounce a claim to that property or to income or other property that might be generated by it. This point is well illustrated by a recent decision of the Supreme Court of Arkansas.

The Dallas court of civil appeals recently addressed a novel point with respect to an antenuptial agreement. The agreement had provided that in case of divorce the wife would not seek temporary alimony. In his appeal from a decree of divorce, the husband took a number of points of error. In one of these he asserted that the trial court had erred in failing to credit him in the final settlement for the amount of temporary alimony that he had actually paid. The appellate court upheld the trial court, reasoning that since the trial court had recognized the validity of the agreement, it was deemed to have considered the amount of temporary alimony.


27. Title 4 defines family violence as "the intentional use or threat of physical force by a member of a family or household against another member of the family or household, but does not include the reasonable discipline of a child by a person having that duty." TEX. FAM. CODE ANN. § 71.01(b)(2) (Vernon Supp. 1980). See Solender, Family Law: Parent and Child, infra, p. 159.


paid in making its division, especially since the husband was awarded the larger share of the community.\textsuperscript{30} Although it seems that the court regarded the agreement as valid in making the ultimate property division, the terms of the agreement did not preclude the trial court's allowance to the wife in the nature of temporary alimony.

The amended version of section 59A of the Probate Code\textsuperscript{31} requires a new formality that must be complied with before a marriage contract constitutes a valid contract to make a will. A contract to make a will, or not to revoke a will, entered into after September 1, 1979, must have all the formal attributes of a will.\textsuperscript{32}

Proposed Constitutional Amendment Affecting Premarital Agreements and Marital Partitions. On November 4, 1980, a constitutional amendment will be submitted to the people of Texas, which, if adopted, will clarify some murky points of law with respect to premarital agreements.\textsuperscript{33} The immediate occasion for the amendment is a need to provide that no part of the gift made by one spouse to the other will be included in the donor's estate for federal estate tax purposes.\textsuperscript{34} Since an amendment of article XVI, section 15 of the Texas Constitution was deemed advisable, it seemed appropriate to offer other provisions long needed to clarify the law concerning premarital agreements and marital partitions.

The amendment would clarify the law of premarital agreements in two important respects. First, it provides that

\begin{quote}
[P]ersons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument . . . partition between themselves all or part of their property, then existing or to be acquired or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired . . . .\textsuperscript{35}
\end{quote}

This provision would thus allow prospective spouses to partition prospective community property prior to marriage so that an agreed \textit{undertaking} to make future partitions of such interests would be unnecessary and the future execution of the undertaking would also be unnecessary.\textsuperscript{36} Secondly, the proposed amendment clarifies the standing of preexisting creditors with respect to premarital agreements. Their position would be the same as in other instances with respect to transfers made without an intention to defraud them.\textsuperscript{37} Upon the adoption of the amendment, modest

\begin{itemize}
\item \textsuperscript{30} \textit{Id.} at 506.
\item \textsuperscript{31} \textsc{Tex. Prob. Code Ann.} § 59A (Vernon Supp. 1980).
\item \textsuperscript{32} \textit{See id.} § 59 for the requisites of a will.
\item \textsuperscript{33} 1979 Tex. Sess. Law Serv., H.J.R. 54, at A-55 (Vernon).
\item \textsuperscript{34} \textit{See} notes 86-94 \textit{infra} and accompanying text.
\item \textsuperscript{35} 1979 Tex. Sess. Law Serv., H.J.R. 54, at A-55 (Vernon).
\item \textsuperscript{36} \textit{See McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law, 33 Sw. L.J. 99, 105-08 (1979).}
\item \textsuperscript{37} \textit{See McKnight, Management, Control and Liability of Marital Property, in Texas Family Law & Community Property 159, 180-82 (J. McKnight ed. 1975).}
\end{itemize}
revisions of section 5.413 would be required to conform it to the constitutional language. Thus, the proposed amendments would significantly clarify the law with respect to premarital agreements. The present rule that premarital agreements cannot cause separate property to take on community character during marriage would not be altered, however.

The proposed amendment would also clarify the law of marital partitions, both as to the position of preexisting creditors and as to the longstanding split in judicial decisions regarding the validity of partitions of future acquisitions, most commonly encountered in property settlement agreements made in anticipation of divorce. As in the case of premarital agreements, a present partition could validly include future acquisitions. The breadth of the language of the amendment would also supply authority, if authority is needed, for spouses to partition their joint tenancies as well as the income from joint tenancies. But the amendment does not provide a new mode of creating joint tenancies or a means of creating rights of survivorship in community property. Finally, the proposed amendment would dispose of the present language of the constitution, added in 1948, that did not authorize a partition between spouses of unequal, undivided shares.

Reconciliation Following Partition in Anticipation of Divorce. Texas normally does not look to Anglo-American law for guidance in determining the incidents of our legal institutions rooted in Spanish law. But the old Spanish commentators are silent on the effects of reconciliation on partitions made on separation (divorcio). Hence Texas courts have looked to

39. Tittle v. Tittle, 148 Tex. 102, 220 S.W.2d 637 (1949); Kellett v. Trice, 95 Tex. 160, 66 S.W. 51 (1902).
40. See McKnight, Division of Texas Marital Property on Divorce, 8 ST. MARY'S L.J. 413, 418-20 (1976).
41. "[S]purposes . . . may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired . . . ." 1979 Tex. Sess. Law Serv., H.J.R. 54, at A-55 (Vernon) (emphasis added).
43. Williams v. McKnight, 402 S.W.2d 505 (Tex. 1966); Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565 (1961); see McKnight, Matrimonial Property, Annual Survey of Texas Law, 21 SW. L.J. 39, 42-45 (1967).
44. In creating or seeking to create joint tenancies, most spouses attempt to achieve a right of survivorship in community property. This result is easily accomplished by will, but it cannot be achieved by agreement or contract except by creation of a joint tenancy, which involves a present estate unwanted in most instances. See J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 98-102 (2d ed. 1975).
45. TEX. CONST. art. XVI, § 15: "husband and wife . . . may . . . partition between themselves in severality or into equal undivided interests . . . ." (Emphasis added.)
46. For the effects of separation itself, see J. MATIENZO, COMMENTARIA IN LIBRUM QUINTUM RECOLLECTIONIS LEGUM HISPANIAE V.9.2, gl.1, nos. 47-57 (2d ed. 1597); A. AZEVEDO, COMMENTARIORUM JURIS CIVILIS IN HISPANIAE REGIAS CONSTITUTIONES V.9.2, no. 14 (1583-1598). A brief summary of these points is given in Pugh, The Spanish Community of Gains in 1803: Sociedad de Ganancias, 30 LA. L. REV. 1, 34-37 (1969).
Anglo-American decisions on this point.

Prior to the 1948 constitutional amendment allowing partitions of existing community property, partitions in anticipation of divorce had long been recognized.47 Following Anglo-American precedent, Texas courts had also concluded that reconciliation nullified such agreed divisions of property48 unless the parties agreed otherwise.49 The opposite rule applies in cases of remarriage after divorce, however, as recently illustrated in Spencer v. Spencer.50

Neither present law nor the proposed constitutional amendment precludes a couple from contracting to undo a partition or a premarital agreement. Prior to 1968 the terms of a premarital agreement were not subject to alteration once the marriage had been entered into. Now such an agreement or contract may be undone by a contract entered into any time during marriage51 or on reconciliation following divorce.

Separate Incidents of Employment Contract. Several recent cases involve instances in which a contract of employment entered into during marriage may produce separate property. It has been established that property rights arising from pension provisions of an employment contract are characterized as separate or community in proportion to the time that the benefits were earned while the employee was single or married within the period of employment.52 This characterization results regardless of whether the contract of employment was entered into prior to, or during, marriage. For example, an employment contract providing for retirement after twenty years of service is entered into while the employee is single, and he is employed for three years prior to his marriage. The employee’s marriage ends in divorce after five years. Thereafter, as a single man, he completes the twenty-year term of the contract and retires. The employee was single during fifteen of the total number of years worked, three before his marriage and twelve after it was dissolved. Hence, for purposes of division on divorce, only one-fourth of the pension is characterized as community property, with three-fourths as separate property. The retirement pay is treated as a form of deferred compensation for services previously rendered and as such, is apportioned according to the marital status when earned. In Sprott v. Sprott53 the court concluded that statutory cost-of-living increases attributable to such fractional interests should be similarly

47. Rains v. Wheeler, 76 Tex. 390, 13 S.W. 324 (1890); Callicoatte v. Callicoatte, 417 S.W.2d 618 (Tex. Civ. App.—Waco 1967, writ ref’d n.r.e.).
51. See McKnight, Commentary to the Texas Family Code, Title I, 5 TEX. TECH L. REV. 281, 376 (1974).
On the other hand, Fleet Reserve pay, which is received for the rendering of current services, is the separate property of the seaman insofar as it is received for services rendered after dissolution of the marriage. This compensation is no more related to employment during marriage than any other type of employment compensation extending over a period of years when the employee is single. The same conclusion had been reached by the Corpus Christi court of civil appeals in Taggart v. Taggart, but the Texas Supreme Court's handling of that case may have been somewhat misleading.

The decision of the United States Supreme Court in Hisquierdo v. Hisquierdo received immediate application in Eichelberger v. Eichelberger, which also involved disposition of federal Railroad Retirement benefits on divorce. The Supreme Court of Texas concluded that it had implied authority to correct the decision of a court of civil appeals when contrary to a decision of the United States Supreme Court even though the Texas Constitution and statutes do not provide any express power to do so. Although the trial court had awarded the wife forty percent of the benefits in issue, the Texas Supreme Court concluded that to remand the case for a complete redistribution of the estate of the parties would accomplish nothing because the United States Supreme Court forbade state courts from awarding other property to compensate for the Railroad Retirement benefits, which are not to be considered in making a division. Such federal benefits must therefore be characterized by the divorce court not as separate property, which should be considered in making a division, but as something that the court must put out of its consideration entirely.

The impact of Hisquierdo was felt again in Ex parte Johnson, in which the Supreme Court of Texas concluded that Veterans' Administration disability benefits, for the receipt of which a retired serviceman waived his military retirement benefits, was not an earned property right and therefore was not subject to division by a divorce court. The court reached

---


55. 576 S.W.2d at 655.


59. 582 S.W.2d 395 (Tex. 1979).

60. Id. at 400.

61. Id. at 401.


63. For a general overview of the availability of pension and retirement benefits for division on divorce, see Marvel, Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement of Property Rights Between Spouses, 94 A.L.R.3d 176 (1979).

64. 591 S.W.2d 453 (Tex. 1979).

65. Id. at 455-56.
the same conclusion with respect to “military readjustment pay.” Depending on length of service as to amount, a federal military reservist is entitled to a sum, not to exceed $15,000, as readjustment pay on release from the military service. The San Antonio court of civil appeals concluded that this readjustment pay is community property because “the right [to receive it] rests on services rendered during coverture.”66 But the Texas Supreme Court, relying on Hisquierdo and the legislative history of the act, concluded that readjustment pay is an unearned gratuity and hence separate property.67

In Lack v. Lack68 a Dallas court of civil appeals construed the Texas statute69 which provides that the widow of a fireman receives benefits in case of the fireman’s death. In this instance, the court concluded that the “widow,” as designated by statute, should receive the entire award despite the fact that her status to receive it is a partial consequence of the fireman’s employment during a prior marriage.70 The court specifically limited its holding to the situation before it and expressed no view with respect to a private plan with like provisions or the nature of the fireman’s pension rights on retirement.71 All considered, a better conclusion would have been an apportionment of the death benefits between the fireman’s wives, unless recourse is had to the principle of sovereign largesse, which tended to contaminate the reasoning of Spanish commentators and the Supreme Court of the United States.72 The reasoning of the Texas Supreme Court in Valdez v. Ramirez,73 however, is inapplicable to this situation. In that case, emphasis was put on the management powers of the employee-spouse and, alternatively, on the federal supremacy doctrine. In Lack the decision turned on the legislative intent underlying the Texas statute.

The reasoning of the Texas Supreme Court in Valdez v. Ramirez,73 however, is inapplicable to this situation. In that case, emphasis was put on the management powers of the employee-spouse and, alternatively, on the federal supremacy doctrine. In Lack the decision turned on the legislative intent underlying the Texas statute.

Commingling and Tracing. A lump sum award for loss of earning power during marriage and during a period after a marriage has been dissolved presents an entirely different problem. Whether the award is made by judgment74 or by the settlement of a worker’s compensation claim,75 the

68. 584 S.W.2d 896 (Tex. Civ. App.—Dallas 1979, no writ).
70. 584 S.W.2d at 898.
71. Id. at 900.
situation is one of commingled community and separate elements. Unless these can be unmixed by tracing, the community presumption with respect to acquisitions during marriage must prevail. The technique of tracing is similar to that applied in segregating separate elements from community elements in a commingled bank account. The persistence of that problem, however, has allowed the courts to fashion guidelines for extricating separate funds from the commingled mass. In *Harris v. Ventura*, for example, the husband's heirs were able to trace a specific amount of the husband's separate funds into a bank account containing community funds. Applying the rule that community property is deemed to be withdrawn prior to separate property when the withdrawal is made for the purpose of meeting family needs, the court concluded that the separate deposit could be recovered from the residue of the account. With respect to an inactive savings account in which nothing more than the wife's separate property had been deposited to draw interest, in the absence of a showing of how much interest had accumulated, the appellate court remanded the case to the trial court for a finding on this fact so that the separate and community elements in the account could be distinguished.

In *Harris* the court also applied tracing techniques to another transaction involving the husband's separate property. Prior to marriage the husband sold certain land and took in payment therefor a promissory note with a deed of trust lien to secure its repayment. Subsequently, but still prior to the marriage, the husband assigned the note and lien to a bank. Though the assignment was absolute in form, it was made as collateral for a loan. During the marriage the bank reassigned the note and lien to the husband, presumably on repayment of the loan. Thereafter the husband foreclosed the lien through a trustee's sale. Repurchase of the land was achieved by cancellation of part of the outstanding separate note without any addition of community funds. Hence the land was the husband's separate property and the proceeds of its later sale were traced to a certificate of deposit and a promissory note that were therefore also the husband's separate property. The link in this tracing chain that most concerned the court was the absolute assignment of the note and lien to the bank. The court was satisfied, however, that the transaction was not meant as anything more than a security device. As such, which the assignment clearly was, even if the separate indebtedness had been paid with community funds, the redemption of the security would not take the character of the debt, repayment of which the assignment secured. Therefore, if the debt

77. 582 S.W.2d 853 (Tex. Civ. App.—Beaumont 1979, no writ).
79. 582 S.W.2d at 855-56.
80. *Id.* at 856.
81. *Id.* at 857.
had been paid with community funds, the community was entitled to a 
claim for reimbursement.

Acquisitions Related to Separate Property Interests. In Goodridge v. Good-
ridge\(^2\) the husband had established a business proprietorship prior to 
mariage, which he continued to use as a vehicle for making real estate 
acquisitions during marriage. Title to the realty was taken in the name of 
the proprietorship-company and purchase money was paid from the pro-
prietorship account. The unpaid balance due on the purchases was repre-
sented by assumption of existing indebtedness of the seller and notes 
executed by the company. The husband argued that particular realty 
purchased by the company was separate property because in the year in 
which it was purchased costs of maintaining the company's properties had 
exceeded rents collected by the company. Hence the company account 
from which purchase money had been paid represented separate funds. In 
the previous year, however, the rents had substantially exceeded company 
costs. But the husband's showing that company costs consistently ex-
ceeded profits during the marriage would not have discharged the hus-
bond's burden of tracing separate funds into the real estate investment. 
The proprietorship was merely the alter ego of the husband and not a sep-
arate entity. Furthermore, a substantial share of the purchase price of the 
realty was rooted in a community indebtedness, and no effort was made to 
segregate separate funds in the company account at the date of marriage or 
to trace their subsequent disposition.

A spouse's lending his credit to a corporation not owned by either 
spouse\(^3\) (that is, when the spouse is signatory on a note to borrow funds 
for corporate use) does not cause the community to acquire any interest in 
the corporate enterprise. This conclusion is not altered by the fact that 
both spouses are employed by the corporation as salaried employees, or by 
the further fact that one of the spouses later acquires some of the shares of 
the corporation.\(^4\) On the other hand, a court recently concluded that the 
joinder of a nonowner spouse in leasing separate realty owned by the other 
spouse does not cause the joining spouse to have a "property interest" in 
the leased premises, but nonetheless causes a protective covenant in the 
lease to violate the Texas antitrust statutes.\(^5\) Such arguments as these 
would go unnoted except for the considerable attention given them by the 
appellate courts. It is nonetheless useful for the courts to put such argu-

\(^2\) 591 S.W.2d 571 (Tex. Civ. App.—Dallas 1979, no writ).
\(^3\) For an analysis of the situation of a business entity owned by a spouse as separate 
property, see Comment, Community Property Rights and the Business Partnership, 57 Texas 
\(^5\) See Berman v. City Prods. Corp., 579 S.W.2d 313, 318 (Tex. Civ. App.—Eastland 
1979, writ granted). One is reminded of Ryan v. Fort Worth Nat'l Bank, 433 S.W.2d 2 (Tex. 
Civ. App.—Austin 1968, no writ), in which the court rejected the argument that a spouse of 
an owner of land acquired an interest therein when she joined in the conveyance of the land 
held in her husband's name and a reversion of a mineral interest was retained in the names of 
both spouses.
ments to rest so that they will not be made again. But when the Internal Revenue Service rules that a donor-spouse retains an interest in property given to the other spouse because community income may be produced therefrom, there is a characterization problem that must be given serious attention. To meet the resulting estate tax impact of this situation the Sixty-sixth Legislature has proposed an amendment to the Texas Constitution. The proposed amendment provides that a donor-spouse is deemed to give the donee-spouse the right to all income from the property given to that spouse. Whereas it has long been understood that a donor-spouse or other donor may make such an express or implied gift to include all future income from the donated property, the proposed amendment puts the burden of showing a contrary intent upon the person who would make that assertion. As to the other community property states, only in Louisiana and Idaho is all income from separate property normally community property in accordance with the model of old Spanish law. In Louisiana a legislative provision similar to the proposed constitutional amendment has already been enacted to meet the ruling of the Internal Revenue Service, but no such legislation has been passed in Idaho.

Names of Grantee and Recitals in Deeds. It is fundamental that acquisitions made prior to marriage are separate property, whereas those made during marriage are presumed to be community. If one spouse during
marriage uses separate property to purchase property to which title is taken in the name of the other spouse, it is presumed that a gift to the grantee is intended.\(^9\) If separate property is conveyed by one spouse to the other, a gift is also presumed.\(^8\) In Johnson v. Johnson\(^9\) the husband contracted prior to marriage to buy land, which was then conveyed to both spouses during marriage. The entire purchase price was paid with the husband’s separate funds. The transaction could be thus analogized to a purchase with separate property or to a conveyance of an undivided one-half interest in separate property. The evidence offered by both spouses nonetheless supported the trial court’s conclusion that no gift was intended.\(^10\) Similarly, when a third person conveys land to both spouses, the absence of valuable consideration will rebut the presumption of community character of the property conveyed, and other facts may demonstrate that no beneficial interest was intended to pass to one of the spouses. In Cedotal v. Cedotal\(^1\) the wife’s parents made such a grant to both spouses, reciting a valuable consideration that was subsequently proved to be fictitious. Further facts demonstrated that the donors did not intend the husband to take any beneficial interest.\(^2\) The gift was, therefore, the wife’s separate property. If the donors had intended that both spouses take a beneficial interest, each would have a one-half interest in the tenancy in common as his or her separate property.\(^3\)

Acquisition of property by a spouse with a recital of separate ownership presents a different situation.\(^4\) In Holcemback v. Holcemback\(^5\) a conveyance was made to the husband “as his separate property and estate” by his mother, with the recital that the consideration was paid from “his separate funds and estate.”\(^6\) The wife was in no sense a party to the transaction. There was evidence of part-payment of the purchase price with the husband’s separate funds, with payment of the rest of the purchase price with other separate property of the husband shortly after the convey-

---

98. Powell v. Jackson, 320 S.W.2d 20, 23 (Tex. Civ. App.—Amarillo 1958, writ ref’d n.r.e.).
100. Id. at 309. Similar characterization cases are discussed in McKnight, Family Law, Annual Survey of Texas Law, 27 Sw. L.J. 27, 33 (1973); McKnight, Matrimonial Property, Annual Survey of Texas Law, 23 Sw. L.J. 44, 48 (1969). The court in Brock v. Brock, 586 S.W.2d 927, 931 (Tex. Civ. App.—El Paso 1979, no writ), stated that acquisition of property in the names of both spouses established prima facie that the property is community. Rather, the presumption of community arises from acquisition during marriage, regardless of the name of the spouse in which title is taken. See also Cedotal v. Cedotal, 586 S.W.2d 159, 161 (Tex. Civ. App.—Waco 1979, no writ) (homestead property).
102. Id. at 160-61.
104. For a recent foreign example, see In re Gaites, 466 F. Supp. 248 (M.D. Ga. 1979).
106. Id. at 878.
There was also evidence that the property was purchased with community funds. The appellate court sustained the trial court's conclusion that the presumption of community acquisition had not been factually rebutted. In Contreras v. Contreras, on the other hand, a conveyance was made to the wife "as her separate property." The property had been previously owned by tenants in common, one of whom had recently died. The other tenant in common, joined by the husband as executor of the estate of the decedent, made the conveyance to the wife. Because of the husband's involvement in the conveyance, the husband and his heirs were barred from contesting the validity of the recital of the wife's separate interest.

Marital Debts and Credit Acquisitions. Debts incurred by either spouse during marriage are recoverable from community property subject to the debtor-spouse's sole or joint management. Such a debt is not recoverable from community property subject to the sole management of the other spouse unless the spouses acted jointly in incurring the debt, or the spouse incurring the debt acted as agent of the other spouse, or some other rule of law, such as a provision of the Internal Revenue Code, so provides. In short, a creditor's inquiry as to the nature of a debt contracted by a spouse usually concerns its collection, that is, what property may be reached for its satisfaction. Therefore, from the creditor's point of view such debts are both "community" and "separate," although it is customary to describe them as "community debts" since the creditors will normally look to community property for their satisfaction; they are not precluded from doing so even if the debtor-spouse has substantial separate assets. A creditor may agree with a debtor-spouse, however, to look only to that spouse's separate property for satisfaction. If such an arrangement is made, the debt is termed a "separate debt." Such agreements rarely occur. On the other hand, if he wishes to do so, the creditor may bind himself to look only to community assets for satisfaction.

108. 580 S.W.2d at 879.
110. Id. at 222; see Messer v. Johnson, 422 S.W.2d 908, 912 (Tex. 1968); Hodge v. Ellis, 154 Tex. 341, 348, 277 S.W.2d 900, 904 (1955). In Contreras the immediate purpose for the conveyance was to give the wife sufficient collateral to borrow money to pay for the decedent's funeral expenses. That purpose, however, was irrelevant in establishing the character of the property conveyed.
112. See McKnight, Matrimonial Property, Annual Survey of Texas Law, 26 Sw. L.J. 31, 42 (1972).
114. The nondebtor spouse, however, may interpose the provisions of TEX. FAM. CODE ANN. § 5.62 (1975).
The concept of "community debts" and "separate debts" is used in computing the net worth of marital assets for purposes of division on divorce and in determining the extent of the estates of decedents. The use of these notions in a credit context also assists us in characterizing property bought on credit. Hence, unless the seller agrees to look only to separate property for payment, a purchase on credit during marriage is construed as being made on "community credit," and the property is therefore characterized as community property. If the indebtedness is subsequently paid with separate property, the character of the property is not thereby altered.

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

Interspousal Gifts and Agreements. The law concerning the taxation of interspousal gifts in Texas has been in a confused state for several years. Section 2036 of the Internal Revenue Code provides that the value of all property transferred by a decedent in which he has "retained . . . the right to the income" therefrom for his lifetime will be included in the decedent's estate. In a series of Texas and Louisiana cases the Internal Revenue Service has argued that a gift from one spouse to another is only partially effective for estate tax purposes because the separate property of the donee produces community income in which the donor shares. Having achieved success at the trial level in three cases before the Tax Court, the Service went on to rule that a decedent retained a one-half interest in community insurance policies on his life, which he had transferred absolutely to his wife. In Castleberry v. Commissioner the Tax Court had held that a husband-donor had retained a one-fourth interest in income producing community securities that he had given his wife. The Service's ruling,

119. Id. at 220-21.
125. The husband-donor had given his wife his one-half community interest in the securities. Since the income from that one-half interest was community property, the husband was entitle to one-half of the income from the one-half interest transferred, i.e., one-quarter of the income from the whole property. Hence, one-quarter of the value of the securities was included in the donor's gross estate.
however, asserted that one-half of the entire value of the policies, rather than one-half of the transferred half, was the retained interest. This conclusion harks back to *Estate of Bomash v. Commissioner*,126 in which the court concluded that one-half of a gift of community property was includable in the donor's estate, since the transfer did not alter the donor spouse's position as regards community income from what previously had been community property. Under section 2036, however, we are concerned with only the subject matter of the gift, *i.e.*, the donor's community half and *its* income. The income from the donee's one-half community interest is irrelevant, much like that of a decedent's life estate that terminates on the death of the life tenant and has no consequences with respect to his taxable estate.127 With respect to the circumstance that the property in *Castleberry* was not in fact income producing, the Service took the view, sustained in *Estate of McKee v. Commissioner*,128 that actual income production is not essential to the retention of an income interest.129

In *Estate of Wyly v. Commissioner*130 the Fifth Circuit Court of Appeals reversed two of the decisions of the Tax Court favoring the position of the Service. The court concluded that the donor-spouse's community participation in the income produced from the property given to the other spouse does not constitute a "right to the income" under section 2036(a)(1),131 since the donee "may dispose of the principal in any way he or she sees fit, or convert it to uses which do not produce income."132 Although the court somewhat understated the remedies of the donor-spouse for the sole manager's disposition of such community income as should be produced,133 the court's focus was on the "right to income," which the court characterized as "neither 'significant', [n]or 'substantial'."134 It is nonetheless appropriate for a donor-spouse to make a specific provision for the inclusion of all income in future gifts of principal.

In response to the decisions sustaining the position of the Internal Revenue Service the Texas Legislature has proposed a constitutional amendment135 to be submitted to the people on November 4, 1980. The

---

126. 432 F.2d 308 (9th Cir. 1970).
127. If the Service's argument is applied to a gift of separate property from one spouse to the other, there is no gift for estate tax purposes, because the income status of the property is not altered.
128. 1978 T.C.M. (P-H) 484.
129. Id. at 489.
130. 610 F.2d 1282 (5th Cir. 1980). *Wyly, Castleberry*, and Frankel v. United States, No. 75-H-1806 (S.D. Tex. Apr. 7, 1977), were all consolidated for appeal.
131. I.R.C. § 2036(a)(1). The majority of the court also held that the donor-spouse's interest created by operation of law was not "retained" within the meaning of the statute. 601 F.2d at 1294. One judge dissented on this point.
132. 610 F.2d at 1292.
133. Id. at 1291; see note 141 infra.
134. Id. at 1294.
amendment restates article XVI, section 15 of the Texas Constitution to provide, in part: "if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property." The amendment also allows spouses to provide, by an agreement in writing, that future income from any separate property shall be the separate property of the owner of the property producing it. Hence that income would be subject to the sole management of the owner as any other separate property.

An interspousal renunciation or disclaimer was attempted in Campbell v. Campbell. There the court was called upon to construe an instrument executed by the wife in favor of the husband, purporting to disclaim any interest in a joint venture in which the husband participated. This disclaimer, which was admittedly made without consideration, also stated that it was not a gift. The court was therefore left with no other recourse than to treat the instrument as a nullity. Instead of the disclaimer, the wife's sworn statement that she had never had any property interest in the venture would have been prima facie evidence to that effect. The couple might then have proceeded to partition any community interest that there might have been and the wife could then have given the husband whatever interest was partitioned to her. These instruments might then have been put aside for whatever use the future might suggest.

Disposition of Solely Managed Community Property. On two significant occasions the legislature of Texas has rejected proposals to define powers of gratuitous disposition of community property. In its first effort to define marital property and its incidents, the Senate rejected the rule that if the husband had disposed of community property "with the intention to defraud his wife," he or his heirs would reimburse her for one-half the disposition on dissolution of the marriage. In 1967 the only section of the proposed Matrimonial Property Act that was wholly deleted by the legislature was the provision for joinder of the spouses in making gifts. Meanwhile, however, the rule had been clearly enunciated by the courts that if

Kirchberg v. Feenstra, 609 F.2d 727, 735 (5th Cir. 1979), Louisiana's old rule by which the husband was "head and master of the community" was said to constitute an impermissible gender-based discrimination under the fourteenth amendment to the United States Constitution.

136. 1979 Tex. Sess. Law Serv., H.J.R. No. 54, at A-55 (Vernon). By using the language "income or property" in the amendment, the draftsmen were evidently adverting to the old dispute as to whether, for example, stock dividends are income or part of the property interest from which the dividends were generated.

137. 587 S.W.2d 513 (Tex. Civ. App.—Dallas 1979, no writ).

138. Id. at 514.


140. Proposed section 4623 of S.B. 33 (60th Legislature, 1967) provided:

Gifts to third persons.
The spouses shall join in, or the non-joining spouse shall consent to, disposition of community property to a third person when the disposition is without substantial consideration and is not in discharge of a legal, moral or civic obligation.
the husband made a gift of community property with actual intent to defraud his wife, she would be allowed relief.\textsuperscript{141} The mere deprivation of the wife of her community share as a result of a gratuitous transfer did not constitute fraud, however. Actual subjective intent to defraud had to be proved. In the last decade, however, the courts have developed and refined the principle of constructive fraud. The burden of proof is put upon the person, either the donor-spouse or the donee, who seeks to sustain the gift to show that a gratuitous transfer of community property by either spouse was reasonable under the circumstances in which it was made.\textsuperscript{142}

The better approach for handling the final disposition of assets of a deceased donor is to allow the gift to stand and to allow the defrauded spouse reimbursement if there are other assets from which reimbursement may be made.\textsuperscript{143} This approach honors the capacity of the donor to make the transfer within the management powers defined by statute,\textsuperscript{144} which causes the transfer to be valid when made.\textsuperscript{145} But the subject matter of the transfer is frequently such a significant part of the community estate that reimbursement from other assets is not possible. Hence disposition of the non-donor-spouse's community share is treated as constructively fraudulent and therefore presumptively void as to the other spouse.\textsuperscript{146} The subject matter of such gratuitous dispositions is often a community life insurance policy in which someone other than the surviving spouse is named as a beneficiary.\textsuperscript{147} In the most recent instance\textsuperscript{148} of asserted constructive fraud, the donor's widow complained of the decedent's naming their six-year-old son as the beneficiary of the lion's share of the community assets, which consisted almost wholly of life insurance policies. Several months before the husband's death, the wife abandoned her husband and the child to live with another man. The husband promptly changed the beneficiary

of the community life insurance policies in the amount of $73,000 from his wife to his son, while leaving his wife as beneficiary of the remaining community policies totaling $25,000. The appellate court affirmed the decree of the probate court in favor of the son on the grounds that the widow was healthy and capable of supporting herself, in spite of her lacking any significant education or skills, and that the widow was relieved of providing for the child, who was adequately provided for by the insurance proceeds. This is the only Texas appellate case in which a court has found that a gift of considerably more than half the community estate was reasonable under the circumstances.

Another striking instance of community management and its consequences is exemplified by a pair of Louisiana tax cases considered together by the Fifth Circuit Court of Appeals. As "innocent spouses," two wives had appealed from decisions of the Tax Court holding them responsible for their share of their husbands' community earnings during years when the couples filed no federal income tax returns. In both instances the wives were living apart from their husbands and had no control of the husbands' income nor knowledge of its amount or disposition. Both cases were remanded to the trial court to determine whether the wives were entitled to theft-loss deductions, although the husbands might not be subject to prosecution for theft under Louisiana law. In the court's view, "a taxpayer-wife who owns income that is appropriated by her husband-manager for his own use should be permitted to claim" a theft loss just as victims of embezzlement have in several instances.

And just as this state "exemption" of the owner-wife from liability out of her separate income for community debts does not defeat the federal collector in his suit for the taxes on her share of the community income, the state "exemption" of the manager-husband from prosecution for theft should not defeat the federal taxpayer's claim for a theft loss deduction. An intent to deprive a wife permanently of her share of the community income may be inferred from a husband's wanton appropriation of community assets in pursuit of his own pleasure or needs.

If Judge Wisdom's approach is allowed to stand, the severe injustice of federal tax law in its application to innocent spouses in community property states will be somewhat alleviated.

Since the enactment of the first divorce act in 1841, Texas law has

---

149. Bagur v. Commissioner, 603 F.2d 491 (5th Cir. 1979).
150. See also Johnson v. Commissioner, 1979 T.C.M. (P-H) 1337, 1341.
151. I.R.C. § 165(c)(3). Theft losses are deductible in the year in which the theft is discovered.
152. 603 F.2d at 501. The court cited Vincent v. Commissioner, 219 F.2d 228, 231 (9th Cir. 1955); Earle v. Commissioner, 72 F.2d 366 (2d Cir. 1934); Weingarten v. Commissioner, 38 T.C. 75 (1962). For a discussion of whether ill-gotten gains of a Texas couple are community or separate property for income tax purposes, see Johnson v. Commissioner, 72 T.C. 340 (1979).
153. 603 F.2d at 502.
included a provision allowing the court to restrain transfers of community property and prevent the incurring of debts in anticipation of divorce. Because the 1969 recodification of the 1841 statute as section 3.57\textsuperscript{155} of the Family Code was not altogether clear, that section was recodified in 1979.\textsuperscript{156} With an abundance of caution the legislature specifically provided: "In an action to void any transfer or debt the spouse seeking to void said transfer or debt shall have the burden of proving that the person dealing with the transferor or debtor spouse had notice of the intent to injure the rights of the other spouse."

The earnings of an unemancipated child are solely or jointly managed depending on whether a managing conservator has been appointed for the child. As enacted in 1969\textsuperscript{157} section 5.23 of the Family Code provided that "the parent or parents having custody of the minor" were vested with management of the minor's earnings. In 1975\textsuperscript{158} that provision was repealed as inharmonious with the terminology of title 2 of the Code. In 1979\textsuperscript{159} the section was restored with new language. Under present law\textsuperscript{160} if no managing conservator has been appointed for the child and its parents are married, the child's earnings are subject to the parents' joint management unless "otherwise provided by agreement of the parents or by judicial order."\textsuperscript{161} If a managing conservator has been appointed, however, that person has "the right to the . . . earnings of the child,"\textsuperscript{162} which carries with it the right of management. The child's earnings, however, are not to be confused with the profits of the child's estate, which are nonetheless subject to the management of the child's parents or parental managing conservator, "except when a guardian of the [child's] estate has been appointed."\textsuperscript{163} But distinguishing between what is the parents' and what is the child's property in cases of judicial recovery for injuries to the child presents significant problems.\textsuperscript{164}

**Spousal Support.** In order to achieve complete parity of the duty of support between the marital partners, sections 3.59 and 4.02 of the Family Code were amended in 1979 to remove the double standard of spousal support that had earlier prevailed.\textsuperscript{165} Section 3.59\textsuperscript{166} deals with temporary

\begin{itemize}

\item \textsuperscript{155} 1969 Tex. Gen. Laws, ch. 888, § 3.57, at 2724.
\item \textsuperscript{156} 1979 Tex. Gen. Laws, ch. 193, § 1, at 421.
\item \textsuperscript{157} 1969 Tex. Gen. Laws, ch. 888, § 1, at 2727.
\item \textsuperscript{158} 1975 Tex. Gen. Laws, ch. 254, § 12, at 624; see McKnight, *Supplemental Commentary to the Texas Family Code, Title 1*, 8 Tex. Tech L. Rev. 1, 17 (1976), in which the author recommends new language for the section.
\item \textsuperscript{159} 1979 Tex. Gen. Laws, ch. 193, § 5, at 422.
\item \textsuperscript{160} Tex. Fam. Code Ann. § 5.23 (Vernon Supp. 1980).
\item \textsuperscript{161} *Id.*
\item \textsuperscript{162} The rights of a parent as a managing conservator are defined by Tex. Fam. Code Ann. §§ 12.04(4), 14.02(a) (Vernon Supp. 1980), whereas a nonparent's rights are defined by Tex. Fam. Code Ann. § 14.02(b)(4) (Vernon Supp. 1980).
\item \textsuperscript{163} Tex. Fam. Code Ann. § 12.04(4) (Vernon Supp. 1980).
\item \textsuperscript{165} 1979 Tex. Gen. Laws, ch. 193, §§ 2-3, at 421.
\item \textsuperscript{166} As amended, the statute reads: "After a petition for divorce or annulment is filed, the judge, after notice may order payments for the support of the wife, or for the support

\end{itemize}
spousal support pending divorce or annulment. Although the section still
does not specifically mention attorney’s fees, its terms are broad enough to
allow an order for the payment of the attorney’s fees for either spouse,
pending divorce or annulment, as an element of support. An obstacle to
that end is the 1961 opinion of the Texas Supreme Court in Wallace v.
Briggs. That case is distinguishable, however, because the court was
there interpreting the provisions of what is now section 3.58 on tempo-
rary orders respecting property. Furthermore, other developments and
modifications of the law of spousal capacity have so changed the general
setting of the subject that the underlying rationale of that holding is now
inapplicable to a proper interpretation of section 3.59, if indeed it was ever
applicable to that section. In 1969 the legislature replaced the term “tem-
porary alimony” with “temporary support.” This modernization of the
statute comports with the principles of the 1963 legislative reform by which
married women were given full contractual capacity. Prior to that en-
actment the wife had no contractual capacity except in those few instances
specifically authorized by statutes or judicial interpretation; in con-
tracting for necessaries she acted merely as her husband’s agent. There-
after, the wife’s contract was her own. In the pre-1963 context the wife’s
contract for an attorney’s services was one for necessaries and hence the
husband’s contract. Thus, in the pre-1963 context in which Wallace v.
Briggs was decided, the husband’s contractual liability to the wife’s attor-
ey was not a current expense of the wife but simply a factor to be consid-
ered in making a division of property under what is now section 3.63.
Wallace v. Briggs was solely concerned with former article 4638, the pre-
decessor of section 3.58. The court viewed that statute as authorizing the
trial court to make temporary orders concerning the use, possession, and
preservation of property, but not as authorizing an interlocutory partial
division of the estate of the parties. Because the husband’s contractual
liability for the wife’s attorney’s fees was a factor to be considered in the
final division of the estate, it was premature and hence impermissible to

(1925)).
173. Tolbert v. Standard Accident Ins. Co., 148 Tex. 235, 223 S.W.2d 617 (1949); Red
174. Wailing v. Hannig, 73 Tex. 580, 11 S.W. 547 (1889); Davenport v. Rutledge, 187
175. Wallace v. Briggs, 162 Tex. 485, 491, 348 S.W.2d 523, 527 (1961); Moore v. Moore,
192 S.W.2d 929, 933-34 (Tex. Civ. App.—Fort Worth 1946, no writ).
4638 (1925)); see Carle v. Carle, 149 Tex. 469, 234 S.W.2d 1002 (1950).
177. 162 Tex. at 488, 348 S.W.2d at 525.
deal with that liability prior to the final decree. The court clearly distin-
quished between a permissible interlocutory allowance of temporary sup-
port and an impermissible interlocutory division of property. The court
viewed an interim award of attorney's fees as an improper interlocutory
property division in the context of pre-1963 law. The 1963 statute giving
married women full contractual capacity and the 1969 enactment of sec-
tion 3.59 in terms of temporary spousal support completely changes the
factors underlying the Wallace decision and leaves that decision without
any rational underpinning. Today, attorney's fees pendente lite are com-
monly looked upon as an incident of support. As the supreme court
recognized in Bounds v. Caudle in a closely related context: major statu-
tory changes have invalidated the rationale for the old doctrine.

With respect to the general provisions concerning spousal support in
section 4.02, the 1979 amendment removes the double standard, but the
provision with respect to necessaries is unchanged. A recent federal deci-
sion applying Pennsylvania law points the way to a significant reinter-
pretation of that section with respect to necessaries. There the court
interprets the equal rights amendment to the Pennsylvania constitution as
effectively redefining the concept of necessaries to include the wife's duty
to provide for the husband. The Pennsylvania amendment is substan-
tially identical to that of Texas, and this approach would achieve com-
plete parity in all aspects of section 4.02.

Spousal Liabilities. In Cooper v. Dalton a husband and wife were jointly
indebted to a department store. In their property settlement prior to di-
vorce it was agreed that the husband would discharge this obligation. On
his failure to do so, the store recovered a judgment against the ex-wife,
who subsequently brought suit against the husband for his breach of the
agreement. Judgment was entered for the ex-wife, and the husband ap-
pealed. The husband argued that if the wife's judgment against him were
allowed to stand, he might thereby be required to pay twice, since he was
still liable to the store. The appellate court concluded that the ex-husband
could protect himself against any double obligation by making the ex-wife
and the department store joint payees of his check to satisfy the judg-

---

178. Id. at 489, 348 S.W.2d at 526. The court cited Hendry v. Hendry, 238 S.W.2d 821
(Tex. Civ. App.—Austin 1951, no writ), a case involving an award in the nature of tempo-
rary alimony for both spouses.
179. See, e.g., Robertson v. Robertson, 217 S.W.2d 132 (Tex. Civ. App.—Fort Worth
1949, no writ).
180. 560 S.W.2d 925, 927 (Tex. 1978).
181. Section 4.02 now reads:
Each spouse has the duty to support the other spouse, and each parent has
the duty to support his or her minor child. A spouse or parent who fails to dis-
charge the duty of support is liable to any person who provides necessaries to
those to whom support is owed.
183. Id. at 854.
184. TEX. CONST. art. 1, § 3a.
Exempt Property. In In re Sisemore the Fort Worth Bankruptcy Court construed the personal property exemption statute liberally to include a jeep as well as an ordinary passenger automobile in favor of a bankrupt. This decision was sustained by the federal district court and the Fifth Circuit Court of Appeals. Taking this cue, the legislature amended article 3836(a)(3) to exempt all passenger cars and light trucks, provided that these vehicles "are not held or used for production of income." The amendment then provides that the debtor may alternatively select any two of the exempt categories of means of travel previously provided in article 3836(a)(3), "whether held or used for production of income or not." This legislative interjection of the concept of tools of trade into the alternative available under article 3836(a)(3) may preclude a claim of an additional vehicle as a tool of trade under article 3836(a)(2), as draftsmen of that article originally intended.

In individual bankruptcy proceedings under the former bankruptcy law a Colorado husband and wife were each allowed to claim exempt personal property up to the maximum value allowed for "the head of a family." Although the same reasoning is inapplicable to the provisions of article 3836(a), some of the same results are available to a Texas husband and wife in bankruptcy. Each might claim up to $30,000 of solely managed community personalty "for a family." Although the Colorado Constitution and the Colorado Supreme Court require liberal construction of exemption statutes, the Texas judicial tradition is equally strong in this regard.

In spite of the liberality of Texas law in favor of a homestead claimant, it is a fundamental principle that a homestead claim cannot be first asserted

186. Id. at 221-22.
188. TEX. REV. CIV. STAT. ANN. art. 3836(a)(3) (Vernon Supp. 1980).
189. The definition of "light trucks" and "passenger cars" in id. art. 6701d, §§ 2(b), (h), (j), 4(a) (Vernon 1977) is controlling.
190. Id. art. 3836(a)(3) (Vernon Supp. 1980).
193. See McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law, 33 Sw. L.J. 99, 152-53 (1979). In Sun Ltd. v. Casey, 96 Cal. App. 3d 38, 157 Cal. Rptr. 576 (1979), the court held that an automobile used by a real estate agent to transport herself and prospective buyers was an exempt "tool or an implement."
195. TEX. REV. CIV. STAT. ANN. art. 3836(a) (Vernon Supp. 1980).
on appeal in a dispute concerning wrongful seizure. Further, although the federal Bankruptcy Act recognizes state homestead exemptions for bankruptcy purposes, it is equally fundamental that a state exemption law, homestead or otherwise, will not protect the owner from enforcement of debts owed to the federal sovereign. In *Sears v. United States*, after a debtor's discharge in bankruptcy, a federal tax lien was fixed on his homestead in mid-1976 for pre-bankruptcy taxes. Since neither the bankruptcy nor the discharge affects exempt property, the bankruptcy was irrelevant to the validity of the tax lien on the homestead.

The constitutional prohibition against mortgaging a homestead to borrow money is often circumvented by selling the homestead to a controlled corporation, which, in turn, will mortgage the property but will allow the seller to occupy the premises at little or no expense. When the property is about to be foreclosed, the seller sometimes seeks the protection of the further constitutional provision which provides that "pretended sales of the homestead involving any condition of defeasance shall be void." But no success can be expected from this argument unless there is some showing of a "condition of defeasance." Further, a third party creditor who seeks to avoid a purported sale by his debtor by asserting that it was an invalid mortgage and not a sale of the homestead has an equally difficult case. It may also occasionally happen that the mortgagor of his home will attempt to enforce his mortgage contract without asserting any pretense of sale though the transaction was made as an apparent *absolute conveyance*. In *Scott v. Bishop* a homeowner was successful in proving an oral option to repurchase property upon repayment of an alleged loan and argued, *inter alia*, that this method of borrowing money on a homestead had been prevalent since the early days of the Republic. He thereby turned historical reality to good account.

**IV. Divorce Proceedings**

*Jurisdiction and Venue.* Both the courts and the legislature focused

203. TEX. CONST. art. XVI, § 50.
204. *Id.*
207. 581 S.W.2d 206 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).
208. *Id.* at 207.
210. During the 1979 session the Texas Legislature passed three amendments to TEX.
attention on solving jurisdictional problems affecting disputes within the parent-child relationship. No dispute at the appellate level called for judicial analysis of the similar jurisdictional problems regarding adjudication of title to, or division of, property that was subject to the control of a spouse but not subject to the personal jurisdiction of a Texas divorce court. In *Fox v. Fox* it was said that a court without in personam jurisdiction has the power to divide property of a nondomiciliary within, but not outside, Texas. Furthermore, judicial seizure of property within the state will not subject the nondomiciliary to jurisdiction so that property located elsewhere is also subject to the court's power. It has always been assumed that seizure of property within the state is unnecessary to adjudication of its character or to its division. Without seizing the property, however, the court would seem powerless to restrain the removal or disposition of moveables, if the person having control of the property is beyond the power of the court.

The appeal in *Skubal v. Skuba* appears to stem from a misapprehension of the distinction between domicile and residence in relation to divorce and the application of either concept to the situation of a serviceman. Residence is a question of fact. Domicile, on the other hand, is a conclusion of law with respect to one's permanent home. There are many Texans around the world who regard Texas as their domicile and who have maintained ties that demonstrate their intention to maintain it. There are also many foreign nationals who now reside in Texas and regard Texas as their domicile. There are still others whose stay here is one of indefinite duration even though there is a very reasonable apprehension, as in the case of servicemen, that the present situation is not permanent. A serviceman may nevertheless maintain a domicile in Texas if he intends to make Texas his home indefinitely or permanently. Therefore, if he sues in Texas for divorce, he need not rely on section 3.23 of the Family Code.


212. California's long-arm statute is broad enough to reach certain nonresident third persons holding property of the spouses so that such property is effectively put within the power of the California courts. *See In re Bastian, 94 Cal. App. 3d 483, 156 Cal. Rptr. 524, 526-27 (1979).* But see *World-Wide Volkswagen Corp. v. Woodson, 1000 S. Ct. 559, 62 L. Ed. 2d 490 (1980).*


in order to lay the jurisdictional basis for his suit.

Receivers and Masters. In 1965 the Texas legislature enacted art. 2338-2b\(^{216}\) empowering district and juvenile courts in Wichita County to appoint referees to whom the courts might refer matters concerning failure to pay "child support, temporary alimony, or separate maintenance"\(^{217}\) and related matters. In 1975 a similar act\(^{218}\) authorized the appointment of a "full-time master" for such purposes in Dallas County, and in 1977 the legislature authorized masters for like purposes in Harris County.\(^{219}\) During the legislative session of 1979 a further act\(^{220}\) was passed that seems to supplement and limit these earlier enactments and to authorize such appointments elsewhere as the county commissioners court may direct.\(^{221}\) But since the prior acts were not specifically referred to in the 1979 legislation, the appointment of masters under the earlier acts may be independent of the 1979 act.\(^{222}\) In any event, the act does not affect the appointment and authority of masters in chancery under rule 171.\(^{223}\) The appointment of either sort of master is not authorized in a jury case.\(^{224}\)

The appointment of a receiver is a drastic measure\(^{225}\) in a divorce proceeding, and the receiver's activities are carefully circumscribed by law. In *Wood and Pullman, Inc. v. Wood*\(^{226}\) the husband's employer was ordered to pay the husband's wages to a receiver for disbursement as temporary alimony. Since this interlocutory order granted injunctive relief, it was appealable.\(^{227}\) Since its effect was tantamount to garnishment of wages, in violation of the Texas Constitution\(^{228}\) and statute,\(^{229}\) the order was set aside.

In *North Side Bank v. Wachendorfer*\(^{230}\) the husband held record title to

---


217. Id. § 2.


219. Id. art. 2338-1d. The act does not refer to Harris County specifically, but rather to "a county of more than 1,500,000 population." Id. § 1(a).


221. Id. §§ 1(a), (b), (c).

222. There is only an oblique hint of interrelation between the most recent and the earlier acts. Section 13 of the 1979 act provides that if a certain bill concerning Dallas County should pass, the provision of the 1979 act would apply to the district courts in Dallas County. The bill referred to was vetoed. The implication is that if that bill did not become law, as was the case, the 1979 act would not apply to Dallas County.


227. Id. at 762; see Tex. R. Civ. P. 385(d). A similar order in which the employer was merely ordered to accumulate the wages of the employee was not appealed in Hopkins v. Hopkins, 539 S.W.2d 242 (Tex. Civ. App.— Fort Worth 1976, no writ).


certain realty that he had mortgaged to a bank by a deed of trust. In a
property settlement pursuant to a divorce, the court awarded a one-half
undivided interest in the land to the wife. Since the husband had de-
faulted on his note prior to the divorce, four days after entry of the divorce
decree the bank posted a notice for a trustee's sale under the deed of trust.
Asserting that she had not had proper notice of the sale, the ex-wife
promptly filed a motion for the appointment of a receiver of the property.
The court granted the motion at an ex parte hearing without notice to the
ex-husband, who then appealed. The appellate court held that the trial
court had violated the notice provisions of rule 695\textsuperscript{231} and had overlook-
red the more appropriate and less drastic remedy of a temporary restraining
order.\textsuperscript{232} The appellate court further noted that article 2318\textsuperscript{233} specifically
provides that a receivership of property is not available to an owner of the
property against a creditor.

**Finality of Judgment.** The court's rendition of judgment is made either
orally or by filing a memorandum. The court thereby "pronounces its de-
cision and conclusions upon the matter submitted to it for adjudication."
The entry of judgment is the ministerial act that furnishes enduring ev-
idence of the judicial act of rendition.\textsuperscript{234} If the court does not determine all
the matters before it, however, the rendition or entry is merely interlocu-
tory. Appellate courts have discussed a number of troublesome applica-
tions of these principles in the last few years.\textsuperscript{235}

Although the court's handling of the peculiar sequence of events that
occurred in *Austin v. Austin*\textsuperscript{236} is instructive, the case is unlikely to have

\textsuperscript{231} Tex. R. Civ. P. 695.

\textsuperscript{232} In this instance the trial court's order amounted to a temporary injunction, and Tex.
R. Civ. P. 681 had not been complied with since no notice had been given. The movant's
attorney had also overlooked the bond requirement in Tex. R. Civ. P. 684 that arises when a
third person is sought to be enjoined in a divorce proceeding. See Goodwin v. Goodwin,
456 S.W.2d 885 (Tex. 1970), discussed in McKnight & Raggio, *Family Law, Annual Survey of
Texas Law*, 25 Sw. L.J. 34, 41 n.53 (1971). See also Couch Mortgage Co. v. Hughes, 536
S.W. 2d 70, 72 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

If a motion for continuance is granted to either party, that party must bear in mind that he
is not entitled to additional notice of trial under Tex. R. Civ. P. 245. Magana v. Magana,


\textsuperscript{234} Eastin v. Eastin, 588 S.W.2d 812, 812 (Tex. Civ. App.—San Antonio 1979, writ
dism'd). The principal difficulty with this formulation is that the term "rendition of judg-
ment" in Tex. R. Civ. P. 329b.5 has been sometimes thought to mean entry of judgment.
This confusion stems in part from the provision of Tex. R. Civ. P. 306a that "[i]n determin-
ing the periods within which the various steps of an appeal must be taken, the date of rendi-
tion of a judgment or order shall be deemed to be the date upon which the written draft
thereof was signed by the trial judge as stated therein." That rule goes on to provide, how-
ever, that "this rule shall not be construed as determining what constitutes rendition of a
judgment or order in any other situation or for any other purpose."

\textsuperscript{235} See McKnight, *Family Law: Husband and Wife Annual Survey of Texas Law*, 33
Sw. L.J. 99, 122-24 (1979); McKnight, *Family Law: Husband and Wife, Annual Survey of
Texas Law*, 32 Sw. L.J. 109, 111, 122-23 (1978); McKnight, *Family Law: Husband and Wife,

\textsuperscript{236} 586 S.W.2d 937 (Tex. Civ. App.—Austin 1979, writ granted), on prior appeal, 553
S.W.2d 9 (Tex. Civ. App.—Eastland 1977, writ dism'd), commented on in McKnight, *Family
great precedential impact because of its unusual facts. At the first trial the court considered the grounds for divorce and division of property and made a brief docket entry. After the death of the wife three weeks later, the trial court abated the proceeding. On the husband's appeal the appellate court held that, if the divorce was granted and if property division was made, the wife's death was not a proper ground for abatement. The case was therefore remanded to the trial court for a determination of the meaning of the docket entry so that the trial court might enter a judgment granting or denying the divorce. In the meantime the trial judge had retired. On remand to the trial court the new judge could not discover the meaning of the docket entry. He therefore retried the case and granted a divorce. On the second appeal, the court of civil appeals held that the evidence addressed at the second trial was insufficient on which to ground a divorce and reversed the trial court's judgment. It should be noted that after the first trial the judge could have vacated or modified his original order for cause within thirty days under rule 329b.5; cause, however, cannot be the death of a party. The cause must relate to the grounds for divorce or another circumstance arising prior to rendition of judgment.

In Kocman v. Kocman a vast lapse of time rather than a brief one posed a problem of finality of judgment. The divorce court awarded a house to the wife in its decree of divorce, and the husband filed a motion for new trial four days later. Seven weeks later an agreed motion for continuance was filed and thereafter a hearing was had and a new trial ordered. Nothing further occurred until the wife filed her writ of possession for the house four years later. The court concluded that rule 329b.3 and .4 caused the divorce judgment to become final forty-five days after the husband's filing of his motion for new trial. Hence, the judgment had already become final before the motion for continuance, and the subsequent order of the court was therefore irrelevant.

As a general rule, when a court fails to adjudicate all matters submitted to it, its order is merely interlocutory and not final. This situation has arisen in a number of instances when a court has purported to sever the issues of divorce and property division. With respect to issues within the parent-child relationship, a reservation of judgment on matters of conservatorship causes an order of divorce, initially rendered, to be interlocu-

---


237. There is no indication that either party attempted to subpoena the retired judge in order to enquire of him what the docket entry meant.

238. 586 S.W.2d at 942.

239. TEX. R. Civ. P. 329b.5.


In reaching the same conclusion in a recent case the court added that "no order of severance was entered." The implication is that the court might sever the suit affecting the parent-child relationship joined with the divorce suit for trial under section 3.55.

It was also recently concluded that a court order providing for sale of a couple's property, for subsequent division of the proceeds by the court is an interlocutory order and therefore not subject to appeal. If this reasoning is sound, it would also support an order to sell the homestead subject to the court's disposition of the proceeds, which might include the payment of general debts and costs. The better course in a situation of this type would be for the appellate court to consider the merits of the division, including the purpose of the sale.

**Motion for New Trial.** In Brown v. Brown the Eastland court of civil appeals reiterated the point that a defaulting party who fails to set up a meritorious defense is not entitled to a new trial. More significantly, the court also added its interpretation of new rule 324:

A motion for new trial shall not be a prerequisite to the right to complain on appeal . . . and the omission of a point in such motion . . . shall be necessary to file a motion for new trial in order to present a complaint which has not otherwise been ruled upon.

The court disagreed with the conclusion of the El Paso court of civil appeals that a complaint that a judgment is supported by insufficient evidence or is against the overwhelming preponderance of the evidence must be assigned as error in a motion for new trial in a nonjury case.

When the court renders judgment it has "otherwise ruled upon" the sufficiency of the evidence to support the controlling facts sustaining the judgment. An appellant, however, must file a motion for new trial in order to present a complaint which the record fails to disclose was ruled upon by the court.

In applying its interpretation of the rule, the Eastland court observed that, in a default judgment case, the appellant cannot raise issues on appeal not specified in the motion for new trial because those issues were not objected to.

---

246. Id. at 673.
249. See Foster v. Foster, 583 S.W.2d 868, 870 (Tex. Civ. App.—Tyler 1979, no writ) (final order to sell homestead was not superseded and hence had become moot on appeal).
251. In Brown the husband had answered but failed to appear at the trial.
254. 590 S.W.2d at 811.
to at the trial and were hence not ruled upon. 255
In Griffith v. Griffith 256 the most the appellant-husband could have expected was a new trial, since he had specifically waived the presence of a court reporter and therefore came to the appellate court without an adequate statement of facts. After entry of the judgment the appellant had requested findings of facts and conclusions of law, which were filed. The husband then sought further findings, but the trial court did not respond to this request. On appeal the husband asserted that the refusal of his request constituted error. The appellate court was unsympathetic to his plea. Justice Keith added some advice to cover this sort of dilemma, 257 but the judge's citations 258 do not suggest a solution. What the justice may have been suggesting obliquely was greater diligence and diplomacy in the endeavor. But neither course can rectify the initial foolhardiness of declining the presence of the court reporter.

Appeal. An appeal bond must be filed within thirty days of the judgment. 259 The delay in ruling on a pauper's affidavit in lieu of a bond does not extend the time for filing the bond. 260 If it is shown that the ruling contesting the affidavit constituted an abuse of discretion, the appeal may proceed. 261

An appeal may be precluded if the appellant disobeys the court's order. 262 In Goodridge v. Goodridge 263 the husband-appellant had violated the trial court's order by selling property awarded to the wife. The wife's motion to dismiss the husband's appeal was nevertheless denied. It was pointed out that the wife had conceded she had adequate remedies to protect her property or to recover its value. 264 Although the husband should have had an opportunity to explain his flouting of the court's award, the doors of the appellate court should not be open to one who deliberately disregards a judicial order without good cause.

As a general proposition, the acceptance of benefits of a decree is a bar to an appeal from that decree. 265 There are certain exceptions to this rule,
however. The use of benefits to satisfy financial needs is one exception. In Kidd v. Kidd the homestead had been sold by order of the court, and after payment of debts due on the property the proceeds were ordered divided equally between the spouses. The appellee asserted that the appellant was barred from his appeal by acceptance of this benefit. Since that aspect of division was independent of others in issue on appeal, however, the court treated the case as falling within the exception of a conceded benefit. Yet another exception may be labelled with the maxim de minimis non curat lex.

Equitable Bill of Review. In Turner v. Turner the ex-husband filed his bill of review to set aside a property settlement agreement that had been incorporated into a decree of divorce. The respondent countered by the unusual ploy of praying that the petitioner show cause why his bill of review should not be denied. The court accordingly ordered the ex-husband to appear for that purpose and at the end of the hearing entered a judgment on the merits. The appellate court turned aside this irregular form of proceeding and remanded the cause to the trial court.

Other bills of review proceedings were more prosaic in that essential elements for granting the bill either went unalleged or unproved. In Hamborsky v. Hamborsky, however, the ex-wife's bill of review turned on an alleged fraudulent conveyance of community realty by the ex-husband prior to the filing of the petition for divorce. Such fraud, however, is intrinsic, whereas proof of extrinsic fraud is necessary to sustain a bill of review. In a recent California case the court held that a corporate director-husband was under no duty, in either his capacity as director or husband, to inform his wife during divorce proceedings that the corporation, whose stock was held by the community, contemplated a public offer-
ing that might greatly increase the stock's value. Such withholding of information was therefore not fraudulent; but even if fraudulent, it would have been intrinsically fraudulent and hence not of the sort that would ground a bill of review.

V. DIVISION ON DIVORCE

Property Settlement Agreements. In addition to the immediate objective of the division of property, two further goals are of utmost importance in drafting property settlement agreements. The instrument must not only provide for favorable tax treatment but must also be developed so that the terms of the agreement will not be adversely affected by the rules of state law. Although a settlement agreement need not be incorporated in the divorce decree to be enforceable, the agreement may be so incorporated. If the agreement is made a part of the decree, it stands as an agreed judgment and “is accorded the same degree of finality and binding force as a final judgment rendered at the conclusion of adversary proceeding.” Thus the terms of the settlement are merged in the judgment and

---

278. 591 P.2d at 916, 153 Cal. Rptr. at 428.
279. See Boyd v. Ghent, 93 Tex. 543 547, 57 S.W. 5, 6-7 (1900); Dean v. First Nat'l Bank, 494 S.W.2d 222, 226 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e); First Nat'l Bank v. Hickman, 89 S.W.2d 838, 842 (Tex. Civ. App.—Austin 1935, writ ref'd); Grandjean v. Runke, 39 S.W. 945, 946 (Tex. Civ. App. 1897, no writ). The husband was successful, however, in arguing that a bank-overdraft that he negotiated shortly before the divorce in order to purchase an annuity for the wife was a community liability. 72 T.C. at 336.
280. Francis v. Francis, 412 S.W.2d 29 (Tex. 1967). In Damstra v. Starr, 585 S.W.2d 817 (Tex. Civ. App.—Texarkana 1979, no writ), the ex-husband was dissatisfied with a bargain he and his wife had struck in their property settlement on divorce. In order to buy the wife's community interest in his accounts receivable and assets on hand, the husband executed a note to her and, following the divorce, made payments on the note. When he discovered that his accounts receivable were not as valuable as he had earlier believed and that his payments on the note were not deductible under the federal income tax laws, he attempted to cancel the note and to recover payments made. The court determined that neither an error in predicting a future fact nor a mistake of law will relieve a party from his contract. Id. at 820.
281. A court should not, of course, enter judgment on the basis of a property agreement if the arrangement has not been assented to by both spouses. Eastin v. Eastin, 588 S.W.2d 812, 814 (Tex. Civ. App.—San Antonio 1979, no writ).
282. Ex parte Gorena, 23 Tex. Sup. Ct. J. 32, 33 (Oct. 17, 1979) (quoting McCray v. McCray, 584 S.W.2d 279, 281 (Tex. 1979)). Gorena did not, however, involve an agreement to pay contractual alimony. The court's general conclusion in Gorena and McCray seems to
any contractual defenses that might have been raised concerning enforce-
ability are no longer available. If the settlement agreement contains
contractual alimony provisions, however, its approval by the court or its
incorporation in the decree does not change its contractual quality, be-
cause it is beyond the court's power to order the payment of permanent
alimony.

A property settlement agreement may furnish a contractual basis for en-
forcement by a third party beneficiary. In Stegall v. Stegall an adult son
recovered the amount of college tuition and fees that the father had failed
to provide pursuant to a separation agreement. The property settlement
agreement at issue in Pitts v. Ashcraft contained a noncompetition
agreement providing that the former wife would not engage, nor en-
courage anyone to engage, in the funeral business. Alleging third party
beneficiary status, the husband's family's funeral corporation failed to es-
tablish a breach of the covenant even though the wife had made cash gifts
to her son, who subsequently entered that business.

Power to Divide Separate Personality. While the Texarkana court of civil
appeals has asserted that title to community property cannot be divested
from parents to their children, eight courts of civil appeals have now
held that Eggemeyer v. Eggemeyer is to be read as applying to separate
realty only and that divorce courts may divest the separate personality
from one spouse in favor of the other. During the past year six new holdings
and one hearty dictum were added to the catalogue of authorities sup-
porting this proposition.

In one of these cases, Spencer v. Spencer, the husband had begun to
accumulate retirement rights when he entered military service in 1935.

abrogate the rule that a consent judgment may not be modified except by consent. Mikeska
v. Mikeska, 584 S.W.2d 565, 566 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (citing
Boyd v. Boyd, 545 S.W.2d 520, 523 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ)).
App.—Beaumont 1975, no writ).
284. McCray v. McCray, 584 S.W.2d 279, 281 (Tex. 1979).
286. 586 S.W.2d 685 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).
287. Id. at 693-94.
288. Treadway v. Treadway, 576 S.W.2d 121, 122-23 (Tex. Civ. App.—Texarkana 1978,
no writ) (dictum).
289. The courts in Fort Worth, Dallas, Texarkana, El Paso, Beaumont, Waco, Eastland,
and Tyler support this proposition, and none oppose it. There has not been a dissenting
judge in any of these cases.
290. 554 S.W.2d 137 (Tex. 1977).
291. Brown v. Brown, 590 S.W.2d 808, 812 (Tex. Civ. App.—Eastland 1979, no writ);
Spencer v. Spencer, 589 S.W.2d 174, 176 (Tex. Civ. App.—El Paso 1979, no writ); Campbell
v. Campbell, 586 S.W.2d 162, 166-69 (Tex. Civ. App.—Fort Worth 1979, writ granted); In re
Trujillo, 580 S.W.2d 873, 875 (Tex. Civ. App.—Texarkana 1979, no writ); York v. York, 579
S.W.2d 24, 25-26 (Tex. Civ. App.—Beaumont 1976, no writ); Crowell v. Crowell, 578
S.W.2d 562, 564-65 (Tex. Civ. App.—Fort Worth 1979, no writ).
293. For a discussion of previous reactions to Eggemeyer, see McKnight, Family Law:
The couple was married in 1948. On his retirement in 1957 the husband began receiving retirement benefits that would have been then characterized as fractionally divisible in community and separate shares. When the couple was divorced in 1959 the judgment was silent as to the pension benefits, and each thereafter held the community share of benefits as tenants in common of separate property. The ownership interest in the benefits was unaffected by the couple's remarriage in 1960. As a result of their subsequent divorce in 1978, the trial court awarded the wife's separate interest in the husband's retirement benefits to the husband. On appeal, the division was held to be an abuse of the trial court's discretion.

Although separate personalty of the wife might be awarded to the husband under some circumstances, it was not appropriate in this situation in which the equities very much favored the wife. In attempting to refute the wife's separate interest, the husband asserted that the wife's claim had been barred by the statute of limitation because of her failure to exercise her right for nearly twenty years. The court, however, found no indication of repudiation of the wife's right by the husband, and the statute of limitation can only begin to run against one cotenant when the other cotenant gives notice of a repudiation of the cotenancy.

Reimbursement. In Swearingen v. Swearingen the doctrine of reimbursement appears to have been used inappropriately to circumvent the rule against divestiture of separate realty enunciated in Eggemeyer. The facts in Swearingen reveal only that a down payment of $6,000 on a home purchased during the marriage was made from the husband's separate property. The divorce judgment allowed the husband reimbursement for his down payment. On appeal, he claimed unsuccessfully that the court wrongly divested him of his separate realty. If the purchase was made wholly on credit or by giving a community note, and if a first payment was made on the indebtedness with the husband's $6,000, there can be no criticism of the court's conclusion. If, on the other hand, the home was purchased with a down payment of part of the purchase price and the remainder was supplied by a community note, the separate estate of the husband and the community would own the home as tenants in common in proportionate shares under the inception of title doctrine. Hence reimbursement of a part of the purchase price would constitute divestiture of separate title to realty.

295. Id. at 176.
296. Id. Indeed, it would be very difficult to make a factual showing of sufficient repudiation of a separate claim to either personalty or realty by either spouse while the couple is living together.
297. For a general analysis of the law of reimbursement, see McKnight, Is There a Right of Reimbursement in Texas?, in MARRIAGE DISSOLUTION IN TEXAS ch. C (State Bar of Texas 1979); McKnight, Reimbursement Between Marital Estates on Marriage Dissolution and Partition in ADVANCED FAMILY LAW COURSE ch. D (State Bar of Texas 1979).
299. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881 (1937); Love v. Robertson, 7 Tex. 6 (1851).
It is asserted from time to time that the expenditure of community funds to pay ad valorem taxes on separate property should be reimbursed to the community. The assertion is misdirected if the property is productive of community income or other community enjoyment. If income exceeds expenses, including taxes, those expenses properly fall on the community.

In *Schecter v. Schecter* principles of reimbursement were utilized in several contexts. Evaluating the property division very broadly, the appellate court saw reimbursement claims of the community against the wife’s separate estate and those of the wife’s separate estate against the community as cancelling each other out. The court also applied the rationale of *Schmidt v. Huffman* to restore to the wife the value of the inventory of her separate mercantile business as of the time of marriage. In *Schmidt* the husband’s business inventory at the time of marriage had been restored to his estate at his death. Less evidence of disposition of the separate property was required in *Schecter* than in *Schmidt*, but the equitable standards of division on divorce allow a greater breadth of discretion than do the standards used in cases of succession.

In the general context of reimbursement, *Schmidt* and *Schecter* are examples of restitution of separate property in return for capital contributions to the well-being of the family. This concept may be used by courts with increased frequency.

**Exercise of Discretion.** Because the divorce court is granted wide discretion in dividing the marital property, a claimant often finds it difficult to show any abuse of discretion on appeal. Trial courts may apply a vari-

---

303. 73 Tex. 112, 11 S.W. 175 (1889). *See also* Blumer v. Kallison, 297 S.W.2d 898 (Tex. Civ. App.—San Antonio 1956, writ ref’d n.r.e.).
304. In *Schecter* the husband asserted that the wife did not trace the inventory from the beginning of the marriage to the end. The court indicated that the requirement of strict tracing is more appropriate in instances involving debtor-creditor relations. If, for example, a community creditor of the other spouse levies execution on a stock of merchandise of what has been a jointly operated separate proprietorship, the owner-spouse must prove that the assets in question are separate by applying strict tracing principles. Hardee v. Vincent, 136 Tex. 99, 147 S.W.2d 1072 (1914); Middlebrook v. Zapp, 73 Tex. 29, 10 S.W. 732 (1889); Jones v. Epperson, 69 Tex. 586, 7 S.W. 488 (1889). The court properly distinguishes the facts in *Schecter* from the debtor-creditor cases, because reimbursement does not reflect ownership tracing principles but rather those of indebtedness.
306. *See, e.g.*, Campbell v. Campbell, 587 S.W.2d 513, 514-15 (Tex. Civ. App.—Dallas 1979, no writ) (testimony as to the value of significant properties was insufficient to show an abuse of discretion); Foster v. Foster, 583 S.W.2d 868, 870-71 (Tex. Civ. App.—Tyler 1979, no writ) (although the total amount of assets awarded to the husband greatly exceeded the amount awarded to the wife, the disparity resulted from the award to the husband of the community homestead that he was ordered to sell in order to pay community debts; there-
ety of standards, but the circumstances of particular cases are so diverse that an objective analysis of results would be very difficult to formulate. 307 There are, however, some recurring themes. If partition in kind is not possible, the court will usually order sale of community property in order to achieve a division. 308 If there are minor children for whom a home must be provided, however, the court will not ordinarily order sale of the family home. 309 If a sale of the home is ordered and the objecting spouse fails to supersede the judgment pending appeal, the appeal may be for naught. 310 Rather than ordering a sale of a going business, a divorce court may award the spouses undivided shares, but such a resolution is extremely rare. 311 It is sometimes stated as a justification for rejecting an appeal for abuse of discretion that the appellant received more than one-half of the community estate. 312 Although this may be classified as an objective standard, its application does not constitute a sufficient review of the exercise of judicial discretion.

Foreign Realty. Texas courts do not assert the power to divide foreign realty in a divorce context. 313 California courts, on the other hand, assert the power both to characterize and to dispose of foreign realty when those issues are submitted by the parties. 314 Relying upon the fact that a Florida divorce court had conclusively determined the husband's ownership of Pennsylvania realty, a Florida appellate court has concluded that the ex-wife could not pursue her claims to the realty in a Pennsylvania court. 315 A federal court sitting in Pennsylvania has agreed that the petitioning wife is now precluded from asserting claims to the Pennsylvania land that could have been maintained in the Florida court. 316 Heretofore only one Texas appellate case 317 (and that one unreported) 318 stood for the proposition

307. See McKnight, Division of Texas Marital Property on Divorce, 8 St. Mary's L.J. 413, 433-44 (1976), for a discussion of criteria and standards. See also Karnezis, Fault as Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce, 86 A.L.R. 3d 1116 (1978).


314. See Braselton v. Clearfield State Bank, 606 F.2d 285, 288-89 (10th Cir. 1979).


318. It is nonetheless available on LEXIS.
that a divorce court might order a party to convey foreign realty acquired with community funds in order to achieve an equitable division of the marital estate. In quick succession two appellate cases have dealt with the courts' power to order a party subject to its in personam jurisdiction to dispose of foreign realty. In one the property had been acquired with community funds. In the other the wife had purported to convey a partial interest in her separate property to her husband. In another instance a Texas court upheld the disposition of a note secured by a mortgage of foreign realty.

Attorney's Fees. An award of attorney's fees is in the discretion of the trial court in dividing the marital estate and making an equitable apportionment of the responsibility for their liabilities. The court may assess an attorney's fee even when a jury advises against doing so. A court may also award attorney's fees pursuant to an agreement providing for attorney's fees when either party has to seek judicial enforcement of the agreement. In In re Neidert the trial court ordered that both parties execute the documents necessary for the sale of certain realty. Four months later the ex-wife brought a motion to have the husband found in contempt for failure to execute the required instruments. The husband thereupon executed the documents and was therefore not found in contempt, but the attorney's fee and costs incurred in bringing the contempt proceeding were assessed against his share of the proceeds. On appeal, the order to pay attorney's fees and costs was reversed as constituting a penalty.

In Paugh v. Paugh the appellate court pointed out that "attorney's fees should be reasonable under the circumstances of [each] case on its own merits, and should bear some reasonable relationship to the amount

---

320. Brown v. Brown, 590 S.W.2d 808, 812-13 (Tex. Civ. App.—Eastland 1979, no writ). Purporting to apply Texas law to the transaction before it, the appellate court erroneously affirmed the trial court's conclusion that the wife could not transform her California separate realty into a joint tenancy between her and her husband. See Davis v. East Tex. Sav. & Loan Ass'n, 163 Tex. 361, 354 S.W.2d 926 (1962). In affirming the trial court's order requiring the husband to execute a conveyance of his interest in the property to his wife, the appellate court deleted that part of the court's order divesting the husband's title to the California land. 590 S.W.2d at 813.
322. For a general discussion of attorney's fees, see McKnight, Division of Texas Marital Property on Divorce, 8 St. Mary's L.J. 413, 455-61 (1976). See also McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law, 31 Sw. L.J. 105, 121 (1977).
in controversy."327 The circumstances of this case revealed that the husband had a net monthly income of $1,580, owned one car, and was the conservator of two minor sons by a previous marriage. He had no income producing property and no savings. The wife was, at that time, not able to work. The home awarded to the wife was subject to a lien requiring payment of $464 a month, and her monthly car payments were $204. The trial court had ordered the husband to pay child support in the amount of $500 a month and attorney's fees of $2,500. Because the appellate court concluded that the attorney's fees were excessive, a remittitur of $1,000 was ordered. Although the appellate court did not indicate either the amount of time required to prepare the case or the difficulty of the issues involved, the results illustrate the adage that small cases with big problems are unremunerative to counsel involved.328

Division After Divorce. If the trial court commits judicial error by wrongly characterizing marital property and dividing it accordingly, a litigant's recourse is to attack the decree directly.329 It is sometimes difficult, however, to determine whether the court made a final division of particular property.330 If community property is not divided, it becomes a tenancy in common upon divorce.331 In Yeo v. Yeo332 the spouses' property settlement agreement was incorporated in the decree divorcing them in 1964.333 The agreement provided that the wife released to the husband "all other property of whatever nature, separate or community, in his possession or claimed by him, and wherever located."334 Although there was conflicting testimony as to whether the husband's military retirement benefits were in the contemplation of the parties when they entered into the agreement, the court held on the basis of prior judicial precedents that the language of possession and claim did not refer to the retirement interest.335 The court went on to conclude that "unless the property involved is specifically identified and described, comprehensive release clauses are not effective to

327. Id. at 40.
328. This is a paraphrase of Justice Keith's remarks in Smith v. Smith, 535 S.W.2d 380, 381 (Tex. Civ. App.—Beaumont), rev'd, 544 S.W.2d 121 (Tex. 1976).
329. See, e.g., Bray v. Bray, 576 S.W.2d 664, 665-66 (Tex. Civ. App.—Beaumont 1978, no writ). The substantive question in this case was whether renewal commissions from the sale of life insurance policies during marriage were community property even though the commissions were received by the husband after the divorce.
330. See, e.g., Constance v. Constance, 544 S.W.2d 659 (Tex. 1976) (statement in court order of fact that the husband received $220 a month in retirement benefits and that none of these benefits were being awarded to the wife was sufficient to decree ownership in the husband).
333. The settlement was entered into long before either Busby v. Busby, 457 S.W.2d 551 (Tex. 1970), or Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976), was decided. In Busby the court concluded that an accrued (vested) pension interest constituted community property. The court admonished counsel to so advise trial judges. 457 S.W.2d at 555. In Cearley the court held that unaccrued pension interests were subject to division on divorce. 544 S.W.2d at 663-66.
334. Id. at 737.
335. 581 S.W.2d at 738-39.
transfer or release property . . . ."336 This statement seems too broad. If parties make an informed and intended release of unknown or unidentified property and that release is not actuated by the fraud of one of them, it should operate effectively to include all property not specifically identified.

In Matthews v. Houtchens337 the divorce decree had stated that there was no community property to divide. Although this was clearly an erroneous conclusion of the trial court, the appellate court held that this recital did not stand as an adjudication that the retirement benefits at issue were the separate property of the husband.338 Because the retirement benefits were not included in the divorce decree, title to them did not vest solely in either husband or wife. Instead, the two became co-tenants of the property.339

When a direct attack to challenge the existence of a tenancy in common cannot be mounted by appeal or writ of error, an ex-spouse may attempt to set aside the judgment by bill of review so that a discretionary division can be achieved. If that approach is also unavailable, a partition of the co-tenancy should be sought.340 The ultimate barrier to partition is a statute of limitation, but the limitation period will not begin to run with respect to the co-tenancy of retirement benefits until there is a repudiation of the cotenant's rights after the payments have begun to be received.341

In the aftermath of divorce, necessary changes in the fire insurance policy on the home occupied by the still-united family constituents may be overlooked with disastrous results. In Duren v. U.S. Fire Insurance Co.342 the policy provided the company would not be liable for loss following a change of ownership of the insured property unless the company was notified of the change in writing. In the divorce decree the community home was awarded to the husband, and several years later he conveyed it to his ex-wife who had lived in it with their children. After the home was severely damaged by fire, the insurance policy was unenforceable because its terms had not been complied with.

Enforcement. When a court awards a money judgment or orders one ex-spouse to pay the other a monetary amount over a period of time but the ex-spouse falls into arrears, execution may be had on a judgment in de-
fault or arrears may be reduced to judgment followed by execution. If the parties merely enter into a contractual undertaking that one will pay the other a monetary amount, the breach must be reduced to judgment. The doctrine of anticipatory breach is applicable to such a contractual breach. There is some authority for the proposition that this doctrine is applicable even if the contract is incorporated in, and hence merged into, the judgment. In those instances when the funds of the delinquent party are in the hands of a third person, garnishment may be sought. For purpose of garnishment, military retirement benefits are not exempt from seizure as current wages, but garnishment of the United States is not likely to be available to satisfy awards that a Texas divorce court might make other than for child support. When ex-spouses have sought to reach retirement benefits in the hands of various third persons, they have been met with the argument that the federal Employee Retirement Income Security Act of 1974 (ERISA) preempts recovery. The Waco court of civil appeals has followed the great weight of authority in rejecting this argument.

The most commonly sought remedy for the enforcement of judicial orders is the exercise of the court's contempt powers. Although reliance is usually had on a written order to do or refrain from doing an act pendente lite or after judgment, an oral order of which an alleged contemnor has specific knowledge may be subject to enforcement by contempt. Recent instances in which contempt powers have been invoked include the violation of an order to sign documents and deliver them personally to the other party.

343. TEX. REV. CIV. STAT. ANN. art. 5069—1.05 (Vernon Supp. 1979) provides that all judgments bear interest at 9% from the date of judgment. A judgment for attorney's fees bears the same interest. Poston v. Poston, 572 S.W.2d 800, 803-04 (Tex. Civ. App.-Houston [14th Dist.] 1978, no writ).
346. See McKnight, Family Law, Annual Survey of Texas Law, 29 SW. L.J. 67, 107-08 (1975), for a discussion of cases dealing with contractual child support.
352. For a general, current treatment of the subject, see Rasor & Koons, Drafting and Enforcement by Contempt of Divorce Decrees, in Marriage Dissolution in Texas ch. D (State Bar of Texas 1979).
party, the failure to obey orders prohibiting the contemnor from interfering with a receiver’s collecting money, and noncompliance with a direction to pay a portion of retirement benefits to the ex-spouse as they were received. The principal barrier to enforcement of citations for contempt is the lack of specificity in the orders. All too often the alleged contemnor had not been told precisely what to do or not to do. When challenged by writs of habeas corpus, the orders frequently fall short of the high standard of particularity required under the circumstances.

There has been a great variety of opinion with respect to the constitutionality of civil contempt orders issued for failure to pay a monetary amount. Some have condemned all such orders (apart from those made for the support of children), whether payment is ordered to third persons or to the other spouse to achieve an equitable property division. The Supreme Court of Texas, however, has condoned the use of the contempt power to enforce the division of a community interest from a particular fund of money or from retirement benefits as they are paid. In the former instance, payment was to be made directly to the former spouse; in the latter, to the registry of the court, but on similar facts a court of civil appeals has enforced coercion to pay the former spouse directly. Permissibility of contempt orders in these instances is said to rest on the penor’s status as a constructive trustee.

Within the last few years, a number of courts of civil appeals have developed the concept that if money is ordered to be paid over a period of time from a fund not in existence when the order was made, disobedience of the order is not contemtible. This view stems in large measure from the

---

354. Ex parte Choate, 582 S.W.2d 625 (Tex. Civ. App.—Beaumont 1979) (order to sign instruments); Ex parte McKinley, 578 S.W.2d 437 (Tex. Civ. App.—Houston, [1st Dist.] 1979) (order to execute promissory note and deed of trust); Ex parte Trick, 576 S.W.2d 437 (Tex. Civ. App.—San Antonio 1978, no writ) (order to sign listing agreement for sale of home and to deliver coin collection). Because some attorneys have occasionally erred in filing a writ of error in response to an unsuccessful writ of habeas corpus in a court of civil appeals, and there are, therefore, a few habeas corpus cases marked “writ of error dismissed,” it is perhaps worth commenting that habeas corpus cases do not properly have writ of error histories and hence do not require such notations.

355. Ex parte Benitez, 590 S.W.2d 704 (Tex. 1979).


357. Ex parte Slavin, 412 S.W.2d 43 (Tex. 1967). There the court stated: It is an accepted rule of law that for a person to be held in contempt for disobeying a court decree, the decree must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him. Id. at 44 (citations omitted).

358. TEX. CONST. art. I, § 18 forbids imprisonment for debt.


360. Ex parte Preston, 162 Tex. 379, 384, 347 S.W.2d 938, 940-41 (1961) (husband ordered to turn over money received from sale of property).

361. Ex parte Sutherland, 526 S.W.2d 536, 539 (Tex. 1975).


363. The unstated rationale of this approach seems to be that the consequences of an equitable relationship permit an equitable remedy.

364. See, e.g., Ex parte Jackson, 590 S.W.2d 775, 776 (Tex. Civ. App.—El Paso 1979) (payment to be made to the other spouse for liabilities discharged and to be discharged “in
supreme court's opinion in *Ex parte Yates.* There the husband held a promissory note that evidenced a substantial debt from a third person. The divorce court awarded the wife one-half of the amount owed, ordered the husband to pay her $500 a month to redeem the note, and further ordered the husband to deliver the note to the wife as security for his payment to her. The Texas Supreme Court held that because the wife was, in effect, awarded a money judgment that the husband was to pay from his future “earnings,” the order could not be enforced by contempt. To do so would be to imprison the husband for debt in violation of the Texas Constitution. The language of the order was also imprecise and ambiguous. This holding should not be generalized to mean that any order to make periodic payments of money, except in a constructive trust situation, is thereby rendered unenforceable by contempt. Even if one accepts the argument that it is improper to order payment from a fund not yet in hand because it lacks a tangible referent, it does not follow that all orders to make periodic, monetary payments to achieve an equitable division of the marital estate on divorce are invalid. If the fund to be divided is amply identified and a spouse is ordered to pay a total amount that does not exceed the amount of the other spouse's share of the fund, the source of the actual dollars paid should be irrelevant. A significant rationalization of principles and results would be accomplished if that much of the argument is accepted. Although only a few more converts can be expected beyond this point, the argument will be carried a step further. An order to pay particular debts to third persons from this identified fund should also be enforceable by contempt. Because a division of the fund is the object of the court, whether the debts are owed for an attorney's fee or for a liability to the other spouse should be irrelevant. Although it has been consistently held that contempt will not lie for the enforcement of an attorney's fee in matters of divorce, except for fees incurred in connection with child support and conservatorship, enforcement by citation for contempt should be available for an order to pay such debts as an integral part of the division of an identified fund.

The Supreme Court of Texas and the courts of civil appeals have concurrent jurisdiction to issue writs of habeas corpus to dissolve restraints on

order to balance the equities"; the source of payments was not identified); *Ex parte Neff,* 542 S.W.2d 268 (Tex. Civ. App.—Fort Worth 1976) (payment to be made from unspecific funds to the other spouse); *Ex parte Duncan,* 462 S.W.2d 336, 338 (Tex. Civ. App.—Houston [1st Dist.] 1970) (dictum concerning a hypothetical order to pay a third person a debt owed). 365. 387 S.W.2d 377 (Tex. 1965).

366. Id. at 380.

367. *See, e.g., Kidd v. Kidd,* 584 S.W.2d 552, 555 (Tex. Civ. App.—Austin 1979, no writ). There the discussion centered on the refutation of the argument that periodic payments ordered by the court were alimony. There was no discussion of contempt. But the situation is one in which the payments were closely tied to a division of community property, clearly identified, on which a lien was placed for the discharge of the payments.


liberty arising from divorce, spousal and child support, and child conservatorship cases.\textsuperscript{370} Ordinarily, the supreme court will refuse to entertain such writs unless the jurisdiction of a court of civil appeals has been unsuccessfully sought.\textsuperscript{371} Because orders of the supreme court will be treated by courts of civil appeals as dispositive in a particular matter, if relief is first sought in the supreme court, attorneys for parties to a related matter should provide a court of civil appeals with information on action previously taken by the supreme court so that the court of civil appeals will know what grounds for relief were considered by the supreme court, whether the supreme court evaluated the petition on its merits, or whether it deferred consideration to a court of civil appeals.\textsuperscript{372}

**Collateral Attack.** Except for a proceeding by bill of review, an attempt to alter the disposition of property in a divorce decree by a subsequent suit constitutes a collateral attack on the judgment and will fail. Thus, an assertion in a new action that the post-divorce receipt of renewal commissions by a life insurance agent constitutes community property is barred as res judicata when the issue was argued and resolved in the suit for divorce.\textsuperscript{373} Similarly, an ex-wife awarded a fixed amount representing one-half of the 1971 value of the family homestead cannot effectively assert a one-half interest in the present value of the property eight years later.\textsuperscript{374}

**Effects of Bankruptcy on Property Division.** Questions of the dischargeability of property settlements and property divisions will continue to be raised under the Bankruptcy Reform Act of 1978,\textsuperscript{375} as under the earlier act.\textsuperscript{376} As most recently emphasized in *Harbour v. Harbour*,\textsuperscript{377} the ex-spouse challenging a discharge must show that the obligation was in the nature of alimony, support, and maintenance rather than a property settlement or property division. When the Fifth Circuit Court of Appeals last reviewed a Texas case of this sort in 1975,\textsuperscript{378} the court concluded that a money judgment awarded by a divorce court to an ex-wife for reimbursement or repayment of a loan constituted an "alimony substitute" for discharge purposes.\textsuperscript{379} The test, however, must be formulated by the state courts.\textsuperscript{380} A divorce court's award for a wife's attorney's services are in the

\textsuperscript{370} TEX. REV. CIV. STAT. ANN. art. 1824a (Vernon Supp. 1980).
\textsuperscript{371} Ex parte Dillard, 577 S.W.2d 519 (Tex. Civ. App.—Texarkana, no writ).
\textsuperscript{372} 572 S.W.2d at 522.
\textsuperscript{374} When the trial court commits judicial error in wrongly characterizing marital property, the litigant's recourse is a direct appeal. *Id.*
\textsuperscript{378} 590 S.W.2d 828, 830 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).
\textsuperscript{379} In re Nunnally, 506 F.2d 1024 (5th Cir. 1975).
\textsuperscript{380} See Barth v. Barth, 448 F. Supp. 710 (E.D. Mo. 1978), aff'd without published opin-
nature of support and thus are not subject to discharge in bankruptcy.\textsuperscript{381} If attorney's fees are treated as an integral part of the property division on divorce,\textsuperscript{382} however, an award for attorney's fees would be properly treated as discharged in bankruptcy.\textsuperscript{383}

\textsuperscript{381} Silcott v. Wilson, 579 S.W.2d 291, 293 (Tex. Civ. App.-Dallas 1979, no writ). See also In re Shacter, 467 F. Supp. 64 (D. Md. 1979); cf. In re Albin, 591 F.2d 94 (9th Cir. 1979) (court applied law of Virginia).

\textsuperscript{382} See notes 368-69 supra and accompanying text.

\textsuperscript{383} See, e.g., Jones v. Tyson, 518 F.2d 678, 681 (9th Cir. 1975), in which the court comments on California authorities.