Section 5.22 of the Texas Family Code: Control and Management of the Marital Estate

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Protection of the marital estate from attacks by creditors, fraudulent schemes of third parties, and mismanagement by the spouses during marriage has long been a primary concern to legislatures and courts throughout the United States. In Texas the husband traditionally has been recognized as the head of the household, trustee of the marital estate, and the sole manager of the community assets, the wife having little right to manage, control, or dispose of any of the marital assets without joinder of her spouse.

This inequality in management and control rights, coupled with the wife's lack of adequate remedies during marriage to protect her interest in the marital assets, enabled the husband to abuse his position of managing spouse to the detriment of the community estate. Frequently, the wife's only recourse when the marital assets were diminished by the husband was to institute a suit for divorce and rescission of all transfers that were in actual or constructive fraud of her rights.

In 1967 the Texas Legislature enacted extensive revisions in the area of control and management of matrimonial property, which were subsequently codified into chapter five of the Texas Family Code. The intent of these revisions was to place the wife on a level of equality with her husband in the area of control of the marital estate and thereby curtail the abuse of the husband's management powers. The purpose of this Comment is to evaluate these statutory control provisions as they relate to the role of each spouse during marriage, to analyze past and present judicial pronouncements regarding concealment and diminishment techniques, and to attempt to determine whether the legislature has completely solved the longstanding problems of control resulting from the inequality between spouses.

2 Id. § 361, at 524.
3 See notes 176-86 infra, and accompanying text.
4 Texas courts have dealt with many cases where the husband abused his control and management powers by: (1) concealing or diminishing the extent or value of the marital estate (see Roberson v. Roberson, 420 S.W.2d 495 (Tex. Civ. App.—Houston [14th Dist.] 1967), error ref. n.r.e.; Miller v. Miller, 285 S.W. 837 (Tex. Civ. App.—San Antonio 1962), error dismissed); (2) enhancing the value of his separate estate at the expense of the community (see Burton v. Bell, 300 S.W.2d 561 (Tex. 1964); Daniels v. Daniels, 490 S.W.2d 862 (Tex. Civ. App.—Eastland 1973), error dismissed); and (3) seeking to entangle the marital estate to make a just and equitable division of the marital property on divorce more difficult (see Herring v. Blakeley, 385 S.W.2d 843 (Tex. 1965); Davis v. Davis, 495 S.W.2d 607 (Tex. Civ. App.—Dallas 1973), error dismissed).
5 See Dillard v. Dillard, 341 S.W.2d 668 (Tex. Civ. App.—Austin 1960), error ref. n.r.e.
I. Past and Present Provisions of Control

The basic philosophy of the Texas community property systems is that upon marriage the husband and wife become partners, sharing in the losses suffered and gains made until the marriage is terminated by death or divorce. The objective of Texas law in assigning management and control of the marital estate has been to preserve harmonious marital relations while furthering the goal of stability in commercial transactions.

Control Provisions Prior to 1967. Texas derived its community property system from Spanish law, under which the wife's interest in the marital estate equaled that of her husband. The only real distinction between the interests of the two spouses was that during the marriage, the wife's rights were passive while those of her husband were active. Under Spanish law the husband, as head of the household, had authority to alienate community property without consent of his wife; however, he also had a corresponding duty to use community assets to maintain his family.

Early Texas statutes perpetuated the Spanish system and gave the husband the right of exclusive management and control of the community estate. The courts through various decisions accepted the husband as the managing spouse during the marriage, and allowed him the ease of alienability that was established under Spanish law. The few restraints placed on the husband's power of management, control, and disposition required that his dealings with the community assets enhance the community estate, and not be in fraud of the wife's rights. Prior to 1913 Texas law afforded the husband the power of management and control of all the community property, as well as the wife's separate property. In 1913, however, the Texas Legislature enacted a statute giving the wife the management of her special community property, which consisted of her personal earnings and income from her separate property. This express statutory authority of control was revoked in 1925, but her management powers over her special community property were inferred from other statutory provisions. Article 4616 of the Revised Civil Statutes exempted the wife's special community property from liability for her husband's debts. Article 4621 implied that special community property was liable for the wife's contracts. Although Texas courts stated on various occasions that the special com-

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9 O. Speer, supra note 1, § 350, at 508.
10 Id., § 90, at 118.
11 Id.
14 See 3 Speer, supra note 1, § 607, at 322.
19 Act of March 12, 1921, ch. 130, § 1, [1921] Tex. Laws 251 (repealed 1967).
community property was under the "exclusive control" of the wife, most of these cases dealt with a creditor of the husband attempting to levy upon the wife's special community property for payment of a debt. The state of the law regarding the wife's affirmative management powers over the special community was not as clearly defined as the extensive management powers over the general community afforded the husband.

**Control Under the Texas Family Code.** The Matrimonial Property Act of 1967 and its codification into the Family Code in 1970 introduced significant changes into the Texas system of management and control of separate and community property during marriage. The revisions revitalized the Act of 1913 by again dividing the community property into three distinct classifications subject to different rules of control and disposition. Sections 5.21 and 5.22 effectively divide the marital estate into separately owned property subject to the control of the owning spouse, community property subject to the management and control of the spouse who would have owned it had there been no marriage, and a new class of mixed community property subject to joint control and disposition of both spouses.

Section 5.01 defines separate and community property in basically the same manner as defined under Spanish law, except that the definition is in terms of "spouses" rather than terms of the "husband" and "wife." Under this section a spouse's separate property consists of that owned or claimed by the spouse prior to marriage and that property acquired during marriage by gift, devise, or descent. Community property consists of all other property acquired during the marriage. Section 5.22(b) provides that if community property subject to the sole management of one spouse is co-mingled with community property subject to the sole management of the other spouse, it becomes "mixed" community property subject to the management of both spouses.

The sections of the Family Code providing for separate and joint management and control present strong evidence that the Texas Legislature intended to place the spouses on a level of equality in the area of marital property rights. The new statute significantly reduces the power of the husband acting alone to deal with community assets. Prior to 1967, unless spouses

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20 See, e.g., Bearden v. Knight, 149 Tex. 108, 228 S.W.2d 837 (1950); Hawkins v. Britton State Bank, 122 Tex. 69, 52 S.W.2d 243 (1932).
23 The 1967 and 1970 codification into the Family Code was a direct result of the Texas bar's call for revision of the marital property statutes. This step seemed an attempt to pacify a group seeking equal rights for women, since a proposal which had been made to the Texas bar that an amendment be passed to the Texas constitution insuring these equal rights had been resoundingly rejected by referendum vote of the bar. See McKnight, *supra* note 8.
26 Id. § 5.22.
27 Id. § 5.01.
28 Id. § 5.01(a).
29 Id. § 5.01(b).
30 Id. § 5.22(b).
kept separate accounts for separate, community, and special community assets, the husband's extensive managerial powers over the general community assets encompassed all of the marital estate. Now the situation has been reversed, for when separate assets or community assets under separate management are co-mingled, they automatically become subject to the joint management, control, and disposition of both spouses. Whether the legislative intent of equality in control and management evidenced by these sections has indeed become a reality, and whether the legislature has succeeded in providing viable legislative safeguards against concealment, diminishment, or entanglement of the marital estate by one spouse acting alone is open to question.

**Criticism of the Control Provisions of the Texas Family Code.** Section 5.22 provides for a separate management system allowing equality of control and disposition if both spouses have personal earnings. Thus, at first glance, the Family Code provision seems to answer the demand for equality, thereby allowing the court to partition property equitably upon dissolution of the marriage without the possibility of concealment or entanglement by one spouse of a major portion of the community estate. However, this provision is subject to serious criticism. While the statute provides for equality of management and control when both spouses earn income outside the home, it says nothing about the control and management interests of a spouse who contributes only services relating to the management of the home and family. One commentator has suggested that for the Texas law to provide true equality in control and protection, a court would have to attribute a constructive salary to the spouse remaining at home for the value of his or her services rendered. Absent such judicial action, in the guise of equality Texas law allows the working spouse to regain the role of managing partner as existed in prior Texas statutes and case law. Therefore, similar opportunities for the use of diversified schemes of concealment and diminishment which existed under prior law may still exist under the Family Code.

The need for ease of disposition of property and stability in commercial transactions has given rise to another problem regarding joint management, control, and disposition of community assets. A provision was needed which

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32 TEX. FAM. CODE ANN. § 5.22(b) (Supp. 1973).
33 Id. § 5.22(a).
34 See Comment, Community Property: Male Management and Women's Rights, 1972 LAW & SOC. ORDER 163, 172. No Texas case has been found applying this approach.
37 Cf. Givens v. Girard Life Ins. Co. of America, 480 S.W.2d 421 (Tex. App.—Dallas 1972), error ref. n.r.e. (attempted purchase of a life insurance policy for the benefit of an unrelated person with community funds); Bohn v. Bohn, 455 S.W.2d 401 (Tex. Civ. App.—Houston [1st Dist.] 1970), error dismissed (wife contended that gift of stock to husband was induced by his breach of confidence).
would protect third parties in dealings with the "mixed community property," but which would also prevent slow and tedious commercial transactions, a possible result of any requirement of obtaining joinder of both spouses for sales and other dispositions of mixed community assets. Section 5.24 of the Family Code established a presumption that community property held in the name or the actual possession of one spouse is subject to that spouse's control. A third party dealing with that spouse may rely on this presumption and obtain good title from the vendor spouse so long as the third party has no notice of the spouse's lack of authority, and is not a party to a fraud on the other spouse. Despite the clear language envisaging joint control in section 5.22, this presumption potentially results in allowing one spouse to dispose of the mixed or separate community property of the other spouse without the knowledge or joinder of the non-consenting spouse. This presumption section conflicts in purpose and effect with section 5.22 and also could allow pre-1967 concealment and diminishment techniques to remain effective under the Family Code.

Personal property held during marriage often has no formal or legalistic documents or other indicia of title, and, therefore, the spouse in possession of the property will be presumed to be the owner. An illustration of diminishment devices which may be effective with the help of this presumption section is the use by a husband of mixed community assets to discharge an individual debt without his wife's knowledge. The creditor will receive good title from the misappropriating spouse unless he has sufficient knowledge of fraud or lack of authority. But the defrauded spouse may nonetheless be left without an adequate remedy if the remaining community assets are nominal and the separate assets of the transacting spouse are insufficient to secure reimbursement.

Thus far Texas is the only community property state to enact a joint management system, but the legislature recognized and attempted to cure its inherent defects by enacting the statutory presumption which allows separate disposition of mixed community property. The enactment of this presumption indicates the need in a joint management system to exempt small commercial transactions involving joint community property. While the Texas law is often labeled a joint management system, it is in reality a

39 Id. § 5.24(b).
40 Id. § 5.24(a).
41 Id. § 5.24(b).
42 See Hudspeth, supra note 8, at 560. Mr. Hudspeth also envisions problems which create a need for legislative clarification or judicial interpretation of the words "possession" and "notice" as used in the Family Code. Many situations can be imagined where the concept of possession would be very difficult to apply. Does a farmer who wishes to convey good title to the corn in his field "possess" this in a manner which brings presumption of § 5.24 into play? Does his wife "possess" the corn which she drives to market sufficiently to pass good title to an innocent purchaser? The Code also does not explicitly define what is meant by "without notice to the contrary." Clarification in this area is necessary before a vendee with some notice of the non-participating spouse's contribution to the goods can be legally secure in taking title without the joinder of both spouses. For a discussion of the history and transition of the law of notice and the importance of recitals in the area of purchases of community property, see Fritz, Marital Property—Effect of Recitals and Credit Purchases, 41 TEXAS L. REV. 1 (1962).
joint and several management system in that it contains provisions requiring joinder of both spouses to dispose of mixed community property, while allowing one spouse to dispose of mixed community property if it is in his possession and not subject to indicia of title. It is this feature of joint and several management which allows many pre-1967 concealment, diminishment, and entanglement cases to remain applicable to the current provisions of the Family Code. Thus, under the Family Code the problems of abuse of control and management of marital assets by the managing spouse remain. These abuses are discussed in the next section in an attempt to outline procedural and substantive remedies which are available to combat them.

II. Devices and Techniques for Concealing Marital Assets

Section 3.63 of the Family Code empowers the court, in its equitable jurisdiction, to divide the marital estate upon a decree of divorce or annulment in such manner as it deems just and right. The spouse who controls the majority of the community assets under the provisions of section 5.22 has the opportunity to frustrate this goal in various ways. He or she may deliberately conceal or diminish the value of the community estate or enhance his or her separate estate at the expense of the community. Income may be deferred until after the divorce decree has become final while the expenses to be reimbursed by the community are overstated. Still another method is to entangle community assets to make a "just and right" division more difficult, if not impossible. It is the purpose of this section to discuss some of the more common techniques used by the spouse who has control of the community assets to conceal or diminish these assets, and thereby outline the procedural and substantive remedies available to thwart the attempts to misuse the management powers provided by the Family Code.

A. Transfers of Marital Assets Without Consideration or for Inadequate Consideration

Each spouse in Texas has a vested interest in his or her separate property, a vested right of enjoyment in the entire community estate, and a power of testamentary disposition over a one-half interest in the community. Traditionally, the husband or wife does not have a testamentary power of disposition over the other spouse's one-half interest in com-

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44 Id. § 3.63.
45 Id. § 5.22.
46 Id. § 5.01 defines the spouses' separate property as that which is owned or claimed by the spouse before marriage or is acquired by the spouse during marriage by devise, descent, or gift. It includes money recovered for personal injury of each spouse except for loss of earning capacity during marriage. This section also provides that all but these enumerated items of separate property are community property, and thus subject to the control characterizations found in § 5.22. See note 43 supra, and accompanying text.
community property, and the surviving spouse retains the power of election to take the property devised to him or her by the deceased spouse or to invalidate the attempted testamentary disposition. In spite of these stringent restrictions on a spouse's testamentary power of disposition, it is relatively easy for one spouse to make inter vivos gifts of community property under his or her separate control to third persons. Thus, what a spouse cannot accomplish by testamentary disposition, he or she may accomplish by inter vivos transfer, subject to the somewhat ambiguous concept of fraud.

Inter Vivos Transfers. Throughout the development of the law of gifts, judicial tendency has been to uphold inter vivos transfers despite the fact that few, if any, incidents of ownership were conferred upon the donee prior to the death of the donor. Whether this judicial tendency has validity in the area of gifts of community property by either spouse is, however, open to question. It may be argued that, on the grounds of public policy, courts should nullify rather than validate such transfers as inter vivos gifts. Nevertheless, Texas courts have often upheld such transfers, and in doing so have utilized the legal principles developed in the more sympathetic area of inter vivos versus testamentary dispositions, where the intent of the donor usually prevails.


51 The court, under the theory of actual or constructive fraud, will invalidate excessive or capricious gifts which are detrimental to the nonconsenting spouse's rights in the marital estate. See notes 95-116 infra, and accompanying text.

52 Quilliam, supra note 21, at 30.

53 Although it is undoubtedly clear that under § 5.22(a) of the Family Code, the wife as well as the husband has the requisite power of management and control over her separate community property, it is not clear just what the requirement of joint management means in terms of alienation. Various types of ownership suggest some possible solutions: (a) the law of joint tenancy would allow the joint manager to alienate a fractional part of the mixed property; (b) the law of partnerships would allow each spouse as agent of the other to alienate any or all property as long as it was in pursuit of partnership business; or (c) the pure theory of joint management would indicate that once a spouse has permitted his or her community property to become mixed or mingled with the other mixed community property, the participation of both spouses is required before a conveyance would be effective. If the interpretation of (c) is accepted, then no gift of mixed community property would be effective as to any part thereof unless both spouses participated, thus restricting the statutory presumption of § 5.24 and hindering commercial transactions. But if the interpretation of (a) or (b) is accepted, the pre-1967 problem of ownership versus management and its problems of inequality and fraud which the Family Code was written to alleviate is again present. These are problems that the courts will be faced with and which must be answered clearly before the total impact of the Family Code may be fairly determined.

Texas courts have recognized that some type of present interest must pass to the donee before the gift may be upheld, but have often avoided the law of gifts, with its technical requirement of delivery, to find that such an interest has passed. The courts have often applied the contract principles of the law of third party beneficiary and the inherent power of the managing spouse to make *inter vivos* dispositions to find the requisite interest in the donee.

Recent Texas cases have employed the concept that a person having the rights of the intended beneficiary to a contract has received a sufficient interest to characterize the transfer as a valid *inter vivos* gift. *Krueger v. Williams* involved the question of the validity of the survivorship right of a third party in bonds and certificates purchased with community funds. Five years before his death, Mr. Williams purchased an investment share account in his name and the name of his daughter by a previous marriage. After his death the daughter attempted to secure the proceeds under her right of survivorship. The court held that no evidence of actual or constructive fraud on the rights of the donor's surviving wife was presented. In so doing the court stated: "There was here . . . a contract . . . by the terms of which the defendant, as registered beneficiary, acquired a present vested though defeasible interest contemporaneous with the superior rights of the decedent, and his death terminated his rights and left the defendant with an indefeasible ownership entitling her to demand payment of the proceeds." The court thus made it clear that the third party beneficiary theory would be applicable to accord *inter vivos* treatment to dispositions of community property made by the managing spouse.

In other decisions the courts have sustained gifts on the theory of the inherent power of the managing spouse to make non-fraudulent gifts of the community to third parties. In the leading case of *Shaw v. Shaw*, a court of appeals upheld gifts of savings and Liberty Bonds which the deceased had delivered to his son approximately twenty days before his death. The donor, as the managing spouse of the particular community

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55 Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962); Fleck v. Baldwin, 141 Tex. 340, 172 S.W.2d 975 (1943).
57 163 Tex. 545, 359 S.W.2d 48 (1962).
58 *Id.* at 549, 359 S.W.2d at 50.
59 *Id.* at 550, 359 S.W.2d at 51, quoting Reynolds v. Danco, 134 N.J. Eq. 560, 36 A.2d 420, 421 (Ch. 1944).
60 In Edds v. Mitchell, 143 Tex. 307, 184 S.W.2d 823 (1945), the court held valid a survivorship clause in a U.S. Savings Bond, thereby defeating the claim of the husband's heirs to one-half of the proceeds. Although the federal interest in uniform treatment of these bonds throughout the United States was an overriding consideration, the court relied on the third-party beneficiary concept to find a vesting of an ownership interest in the donee. *But see* Hartman v. Crain, 398 S.W.2d 387 (Tex. Civ. App.—Houston 1966), which held that a husband's creation of a joint bank account with his sister was presumptively fraudulent as to the surviving wife.
property, was held to have had the sole right to dispose of the property and "[b]arring any disposition made with intent to defraud [the surviving widow], he may sell, barter, or give it away."63

Coupled with these two rationales, the control provisions of section 5.22 may enable the spouse to diminish substantially the worth of the community estate. It is possible for the spouse who contributes more personal earnings and revenue from separate property to the marital estate to make a valid inter vivos gift of a major portion of community property without the joinder of the other spouse. The only control over such a disposition is the concept of fraud which is often a vague and unworkable standard.64

Life Insurance Policies. Although the third party beneficiary concept has been applied in the area of life insurance policies,65 the granting of the proceeds to the named beneficiary instead of the surviving spouse has been sustained in most recent decisions through the court's reliance on the power of the managing spouse to make inter vivos gifts.66 In Jones v. Jones67 the husband reserved the power to change the beneficiary of his life insurance policy. Shortly before his death he changed the named beneficiary from his wife to his father, and although the premiums had been paid with community funds, the court denied the surviving wife an interest in the proceeds. The court stated that the managing spouse had the right to dispose of the community assets within his control unless fraud could be proved. While the marriage continues, "he may expend their joint estate ever so unwise, may squander it in 'riotous living' or may give it away . . . yet [the surviving wife] cannot be heard to complain."68 Under the provisions of the Family Code69 this power of disposition now rests in each spouse when the property conveyed is under his or her sole management.70

The remedies available to the non-consenting spouse when he or she shows an abuse of control by the managing spouse over a life insurance policy vary with the circumstances of the case. It has been suggested in

63 Id. at 176, quoting Moody v. Smoot, 78 Tex. 119, 123, 14 S.W. 285, 286 (1890). See also Teas v. Republic Nat'l Bank, 460 S.W.2d 233 (Tex. Civ. App.—Dallas 1970), error ref. n.r.e.; Bohn v. Bohn, 455 S.W.2d 401 (Tex. Civ. App.—Houston [1st Dist.] 1970), error dismissed. But see Roberson v. Roberson, 420 S.W.2d 495 (Tex. Civ. App.—Houston [14th Dist.] 1967), error ref. n.r.e., where a gratuitous transfer of various community assets by a husband to his putative wife was held invalid as in fraud of his lawful wife.

64 The courts will set aside a spouse's conveyances of community property upon a proper showing of an actual intent to defraud the other spouse or circumstances from which fraud is presumed. See notes 95-116 infra, and accompanying text.

65 In Edds v. Mitchell, 143 Tex. 307, 320, 184 S.W.2d 823, 830 (1945), the supreme court, in dictum, stated that "[w]hen the insurance is effected in favor of a third person, his rights under the policy vest immediately. . . . [T]he right of the beneficiary named in the policy is not indefeasible but it is nevertheless a vested right."


68 Id. at 268.


some cases that whether or not there is an intent to defraud, the surviving spouse may be entitled to reimbursement from the remainder of the community estate for the share given away.\textsuperscript{71} In some cases the surviving spouse has recovered only one-half of the proceeds,\textsuperscript{72} while in others the spouse was allowed to recover the entire amount.\textsuperscript{73} The problem in this area is that neither the legislature nor the courts have clearly indicated what circumstances are adequate to give the non-joining spouse a right to attach the proceeds or to seek reimbursement from the community. One point does seem clear: If there is evidence that the gift is made solely for the private purposes of the managing spouse, the non-consenting spouse is normally entitled to a remedy.\textsuperscript{74} However, a subjective intent to defraud is often difficult to prove, and the presumption of a valid gift may leave the non-joining spouse without an adequate remedy.\textsuperscript{75}

The leading case of \textit{Davis v. Prudential Insurance Co. of America}\textsuperscript{76} indicated standards used by many courts in determining the existence and extent of the non-consenting spouse's remedy.\textsuperscript{77} Mr. Davis purchased an $11,000 life insurance policy and designated his wife as beneficiary. Three weeks after his wife filed for divorce, he changed the beneficiary of the policy to his mother. Before the divorce became final the insured died, and Prudential paid the proceeds to his mother. In an action brought by the wife, the district court found that the change of beneficiary did not constitute actual fraud on the rights of the wife, and, thus, the proceeds had been properly payable to the husband's mother.\textsuperscript{78} On appeal the Fifth Circuit reversed. By examining the facts at the time of the donor's death—a gift of over ninety-eight percent of the total worth of the community estate and no apparent need to make the mother beneficiary of the policy—the court stated that "the gift of the entire proceeds to [the mother] constituted a capricious and excessive gift of community property which was in constructive fraud of his wife's rights."\textsuperscript{79} The court granted the wife only one-half of the proceeds because her husband could legally dispose

\textsuperscript{72} Davis v. Prudential Ins. Co. of America, 331 F.2d 346 (5th Cir. 1964); Murphy v. Metropolitan Life Ins. Co., 498 S.W.2d 278 (Tex. Civ. App.—Houston [14th Dist.] 1973); Aaron v. Aaron, 173 S.W.2d 310 (Tex. Civ. App.—Texarkana 1943), error ref. w.o.m.
\textsuperscript{73} Moore v. California-Western States Life Ins. Co., 67 S.W.2d 932 (Tex. Civ. App.—Amarillo 1934), error dismissed.
\textsuperscript{74} See, e.g., Kemp v. Metropolitan Life Ins. Co. of America, 205 F.2d 857 (5th Cir. 1953); Givens v. Girard Life Ins. Co., 480 S.W.2d 421 (Tex. Civ. App.—Dallas 1972), error ref. n.r.e.
\textsuperscript{75} For an excellent discussion of the early development in this area of the law, see Huie, \textit{Community Property Law as Applied to Life Insurance}, 18 \textit{Texas L. Rev.} 121 (1940).
\textsuperscript{76} 331 F.2d 346 (5th Cir. 1964).
\textsuperscript{77} Although this case was decided before the Family Code became effective, its rationale has been followed by several post-Family Code cases. See Givens v. Girard Life Ins. Co. of America, 480 S.W.2d 421 (Tex. Civ. App.— Dallas 1972), error ref. n.r.e.; National Maritime Union v. Augustine, 458 S.W.2d 832 (Tex. Civ. App.— Beaumont 1970).
\textsuperscript{79} 331 F.2d 346, 352 (5th Cir. 1964).
It now appears that the non-consenting spouse will be entitled to at least one-half of the proceeds if he or she shows that under the circumstances of the particular case the gift was excessive or depleted the community to a major extent, and thus was in constructive fraud of his or her rights. The non-consenting spouse does not have the burden of proving the donating spouse's subjective intent to defraud.80

Community Property Trusts. The creation of a trust with community property may be upheld as an inter vivos gift, even though the interest passing to the beneficiary is defeasible by virtue of the settlor's retained power of revocation or alteration.81 As in the area of insurance policies, a showing that the managing spouse actually intended to defeat the non-participating spouse's right or that the circumstances at the time of creation of the trust or its effective date were constructive fraud on such rights will enable the non-consenting spouse to challenge and set aside the trust.82 The broad control and management provisions of section 5.2283 may enable a spouse by the use of the revocable trust to unjustly enrich his or her separate estate. For example, a spouse may use community assets under his separate control in establishing a revocable trust. Should the non-joining spouse predecease the settling spouse, it is possible that the trust will escape division as a part of the community estate. By subsequently exercising the power of revocation the managing spouse could make a gift of the deceased spouse's share of the corpus to his or her separate estate.84

In the landmark case of Land v. Marshall85 the husband had, without the wife's knowledge or consent, transferred the majority of the community assets in trust to his daughter, as trustee, for the benefit of himself, his wife, and his daughter. This transfer left the wife only a life estate in the community property, and deprived her of a testamentary power of disposition

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82 Johanson, Revocable Trusts and Community Property: The Substantive Problems, 47 Texas L. Rev. 537 (1969). See In re Marriage of McCurdy, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973), error dismissed, where the court held invalid a trust created for the benefit of the settlor's daughter out of community funds, because by diminishing the total estate, it diminished the need for funds which the husband, on divorce, would be required to provide out of his separate estate for the support, education, and maintenance of his daughter in a manner in keeping with the family's status.


84 In Salvato v. Volunteer State Life Ins. Co., 424 S.W.2d 1 (Tex. Civ. App.—Houston 1968), the husband attempted to enrich his separate estate by naming it beneficiary of a life insurance policy, the premiums of which were paid out of community funds. The wife was awarded a half interest in the proceeds as the court recognized that a managing spouse can give his or her interest in the community to a third person, but could not give the other spouse's interest in the community to his separate estate. See also Martin v. Moran, 11 Tex. Civ. App. 509, 32 S.W. 904 (1895).

85 426 S.W.2d 841 (Tex. 1968).
over her one-half interest. In his capacity as community manager, Marshall expressly reserved the income of the trust for life, the power to revoke or modify the trust, and the power to direct the trustee in her transactions concerning the trust. The Texas Supreme Court held the trust invalid based on the doctrine of illusory trusts—"the husband has the power to create an inter vivos trust . . . but when [the wife's] community share is involved, the wife can require the trust to be real rather than illusory, genuine rather than colorable." The court did not grant the remedy normally allowed in the case of invalid inter vivos gifts—setting aside one-half of the gift—but declared the entire trust invalid. In the court's opinion the entire trust failed because the invalidity of the one-half interest disrupted the entire scheme devised by the husband for the security of his family.

The question which still remains in Texas law is what factors make a trust illusory, fraudulent, or colorable? Citing with approval the leading illusory trust case of Newman v. Dore, the court stated that the illusory trust doctrine "expressly avoids the formulation of a fixed test for defining an illusory trust, but instead states a general and flexible test which is more adaptable to varied situations." The opinion thus fell short of a definitive statement of the standard which must be applied to determine illusoriness, and relied on a flexible standard designed to be clarified in subsequent litigation. Until a more definitive statement is written it would appear that Land v. Marshall offers little more protection to the non-joining spouse than the fraud test applied by Texas courts. The most appealing aspect of the decision is that it may signify the beginning of a trend toward a sterner judicial view of gratuitous transfers of community property by a managing spouse.

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86 Id. at 846.
87 See note 80 supra, and accompanying text.
89 426 S.W.2d at 848.
90 Subsequent decisions have not expounded or clarified the test of Land v. Marshall, although there has been some limitation of the doctrine. See Westerfeld v. Huckaby, 474 S.W.2d 189 (Tex. 1971) (holding that the illusory trust doctrine is limited in Texas to situations dealing with marital property and limited to instances in which a nonconsenting spouse's property is used to fund the trust), noted in 26 Sw. L.J. 786 (1972).
91 Professor Macdonald in his study of illusory trusts in various common-law and community property jurisdictions concluded that, as a protective device of the non-joining spouse, the doctrine has three major defects. First, it is illogical to decide cases solely on the degree of control retained by the settlor. Professor Macdonald argued that the simple power to revoke the trust, as granted by Texas trust law, gives the greatest amount of control, enabling the settlor to have decisive control over the trust assets and the trustee. No court has yet held the retention of the power to revoke, standing alone, renders the trust illusory, but such an approach has been suggested in Note, Wife's Forced Share and an Inter Vivos Trust, 60 Mich. L. Rev. 1197, 1200 (1962). Second, the doctrine has not been applied consistently. This is in a major part attributable to the "flexible standard" adopted by many courts. Third, the test is too narrow. To state that the retained quantum of control is the sole criterion for illusoriness may lead to inconsistent and conflicting decisions. W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 74-97 (1960).
Under the provisions of section 5.22 of the Family Code, unless the trust corpus is clearly the sole management property of the settlor, a trustee or beneficiary should require joinder of both spouses for the creation of any trust. Although no cases have turned on this point, future attacks by the non-consenting spouse may be invoked on the theory that the transfer was made by one who did not have the legal power to deal with assets placed in the trust. How the Texas courts will deal with this problem remains to be seen, but the joinder of both spouses may eliminate a future challenge by one of the spouses that the trust was fraudulent, illusory, or not within the management powers of the settling spouse.

**Fraudulent Transactions.** The principle limitation on the control and management powers of a spouse under section 5.22 is that a disposition must not be in fraud of the other spouse’s rights in the marital estate. The first expression in Texas of this limitation was made in *Stramler v. Coe* where the court said: “No consent of the wife is necessary to a valid alienation of community property by the husband. But excessive or capricious donations and sales, made with the intent to defraud the wife would be void; and she would be entitled to her action against the property of the husband and against third possessors.” The problem throughout the development of Texas marital property law has been seeking an equitable and judicially manageable standard for “excessive or capricious donations.”

Prior to 1953 Texas cases allowed the husband, as manager of the community estate, to dispose of community assets freely on the presumption that such disposition was not in fraud of the wife’s rights. Because of the public policy encouraging alienability of property and binding commercial transactions, the burden was placed on the wife to prove by a preponderance of the evidence the husband’s subjective intent to defraud.

In 1953 the Fifth Circuit rendered its decision in *Kemp v. Metropolitan Life Insurance Co.*, which introduced into Texas marital property law the concept of constructive fraud.

In *Kemp* the husband had purchased an annuity and life insurance policy reserving the power to change the beneficiary. Prior to his death the husband changed the beneficiary from his wife to his sisters. The policy constituted over half of the community estate, and the widow brought an action to recover the proceeds on the theory that the naming of the sisters constituted a fraud on her rights. The federal district court held there was no...

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94 United States v. Gordon, 406 F.2d 332 (5th Cir. 1969), held that a wife who joined with her husband in the execution of an instrument creating an insurance trust relinquished her rights to challenge the trust on the grounds that it was fraudulent or illusory.
95 15 Tex. 211 (1855).
96 *Id.* at 215.
99 205 F.2d 857 (5th Cir. 1953). At the time of this decision, the Texas Supreme Court had not delineated a test for constructive fraud.
evidence of actual fraud and such an essential element of the widow's action could not be presumed. The Fifth Circuit reversed and remanded, holding that the wife was protected by article 3996 of the Texas Civil Statutes from fraudulent transfers of her community interest and such a fraud could be either constructive (presumed from the surrounding circumstances and acts of the spouse) or actual (proof of the spouse's subjective intent). Texas courts have followed suit and the concept of constructive fraud has been applied frequently.

Although the concept of constructive fraud has received wide acceptance, it is far from clear what circumstances must be present before it will be applied by the courts. The most frequently cited factor is the value of the assets transferred in relation to the total community estate. Some courts have found fraud when the gifts were made for no apparent reason and constituted over one-half of the community estate. But if the value of the transferred assets was small in comparison to the total value of the community estate the courts have been very reluctant to find fraud even when the gifts were quite substantial if considered alone. There are some major problems with this test as a limitation on the rights embodied in section 5.22 which may actually thwart the discovery and return of concealed assets. The managing spouse could transfer a substantial amount of community assets by simply making small gifts, each constituting a minimal percentage of the community estate. Also the courts have applied a "hindsight" approach in measuring the value of the community estate, in which

101 Act of Feb. 12, 1927, ch. 30, [1927] Tex. Laws 42 (repealed 1967), which provided for protection against gifts or conveyances transferred by a debtor with intent to defraud "creditors, purchasers, or other persons" who are entitled to such assets has been recodified in TEX. BUS. & COMM. CODE ANN. § 24.02 (1968).
102 Such an analogy to the remedy of the defrauded creditor was originally suggested by Professor Huie in his classic article on community property and life insurance. See Huie, supra note 75, at 132. The same concept of the intent to defraud creditors allowed the court in Kemp to state that under the circumstances, as a matter of law the husband's gift constituted a legal fraud on the rights of the wife regardless of his subjective intent or motive.
105 Davis v. Prudential Ins. Co. of America, 331 F.2d 346 (5th Cir. 1964) (husband changed the beneficiary from his wife to his mother of a life insurance policy that constituted 98% of the total community property); Hartman v. Crain, 398 S.W.2d 387 (Tex. Civ. App.—Houston 1966) (husband's creation of a joint bank account with his sister which constituted more than double the husband's share of the community property).
106 Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962) (no fraud when the husband disposed of his wife's $10,000 interest in his joint survivorship account between himself and a daughter of a previous marriage; the husband had bequeathed $5,000 to the wife); Brown v. Brown, 282 S.W.2d 90 (Tex. Civ. App.—Waco 1955), error ref. n.r.e. (no fraud where children of a previous marriage and grandchildren were named beneficiaries of community life insurance policies to the extent of $30,000 when the community estate at the time of the husband's death was valued at approximately $250,000).
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the fraudulent gift is measured against the value of the estate when the fraud is discovered and not when it is perpetrated. Finally, the courts often test for fraud by determining whether the non-consenting or surviving spouse has been provided for adequately.108 Despite a gift of over one-half of the community estate, if the surviving spouse has other adequate means of support the gift may be upheld. These tests used to determine the circumstances of constructive fraud may at times be employed to further the concealment scheme of a spouse rather than place adequate limitations on his or her management powers.109

Another principle factor relied on by the courts to find constructive fraud is the relationship of the donee to the donor spouse. The courts will generally approve of transfers made in discharge of a legal, moral, or civic obligation, if not excessive.110 However, the courts will often invalidate gifts to third parties who bear no relation to the donor or have been a disruptive force in the marriage.111 In Roberson v. Roberson112 the court invalidated gifts by the husband to his putative wife made out of the community property of the first marriage. The court cited language from Watson v. Harris113 to summarize the attitude of the Texas judiciary to gifts of this nature: "It is so repugnant to our sense of justice that this court will never sanction the proposition that a husband may desert his lawful wife, and while living in adultery with another woman, donate to the latter as a gift his wife's interest in property owned by them in common, unless the Legislature enacts a law which will admit of no other construction."114 While the legislature has never enacted such a law it is interesting to note that one provision recommended by the drafting committee of the 1967 Texas Matrimonial Property Act would have legislatively limited the power of control and management of a spouse under 5.22 to make fraudulent gifts.115


109 Prof. Quilliam in his article on gratuitous transfers of community property indicated how the tests for constructive fraud may be used to reach anomalous results. It is possible that the gift by a husband of one-half of a one million dollar community estate might be upheld if the other half were still on hand at his death and the life expectancy of his widow were not too great. The remaining $500,000 would be more than sufficient for her adequate support. On the other hand, a similar gift of one-half of a $100,000 estate would probably be considered fraudulent where the widow had a considerable life expectancy. See Quilliam, supra note 21, at 42.

110 On the second trial of Kemp v. Metropolitan Life Ins. Co., 220 F.2d 952 (5th Cir. 1955), the court sustained the gifts to the sisters as beneficiaries of the life insurance policy because evidence was presented to show a moral duty of the insured to support his sisters who were in need at the time.

111 See, e.g., Roberson v. Roberson, 420 S.W.2d 495 (Tex. Civ. App.—Houston [14th Dist.] 1967), error ref. n.r.e. (gratuitous transfer of community funds to putative wife); Alexander v. Alexander, 410 S.W.2d 275 (Tex. Civ. App.—Houston 1966) (designation of the putative wife as beneficiary of the husband's life insurance policy purchased with community funds); Roye v. Roye, 404 S.W.2d 92 (Tex. Civ. App.—Tyler 1966) (release by the husband of a debt, payable to the community, of a woman he intended to marry immediately after he procured a divorce).

112 420 S.W.2d 495 (Tex. Civ. App.—Houston [14th Dist.] 1967), error ref. n.r.e.


115 The recommended provision was to have become art. 4623 of the Revised Stat-
By the rejection of this provision, the legislature has opted to allow the courts to promulgate the test for fraudulent transfers and concealment, and unfortunately at times this test has been inconsistent and inadequate.\textsuperscript{114}

\section*{B. Deferral of the Maturity of Community Property}

Contingent benefits capable of maturing after the termination of the marriage present unique problems to courts attempting to partition the marital estate equitably. These benefits of contractual arrangements do not fit neatly into the traditional distinctions between community and separate property. Courts have been reluctant to concede that the one spouse has an interest in future benefits that will accrue to the other. An examination of recent cases indicates that the determining factor is whether the deferred benefits have become fully vested in the participating spouse.

\textit{Pension and Profit-sharing Plans}. Pension and profit-sharing plans offer great problems of valuation and equitable division to Texas courts. Unlike life insurance, these plans often have no immediate cash surrender value and vary in terms and features. The proceeds from pension and profit-sharing plans are normally considered earned property rights if the plans are fully vested at the time of the dissolution of the marriage. The portion of these benefits earned during marriage often constitute a major portion of the economic worth of the marital estate and should be subject to division by the trial court as part of the community property.\textsuperscript{117} Because of the uncertainty concerning the interest of a non-participating spouse in these plans before they become fully vested, they offer an opportunity for the managing spouse to conceal the real worth of the community by dissolving the marriage before full vesting.\textsuperscript{118}

In \textit{Herring v. Blakely}\textsuperscript{119} the Texas Supreme Court was directly presented with the problem of the classification of deferred compensation plans. Herring participated in a profit-sharing plan maintained entirely from contributions of his employer, and an annuity plan maintained by joint contributions by him and his employer. Although both plans contained spendthrift provisions and thus had no present assignable value, Herring had the right to name a beneficiary in each. The husband's rights in the plans had fully vested, although he had not retired and was not receiving benefits. After the wife had filed for divorce, the husband changed the beneficiary of both plans from his wife to the trustee of his residuary estate. Ten months later he died and the trustee brought an action against

\footnotesize{\begin{itemize}
\item \textsuperscript{114} See Quilliam, \textit{supra} note 21, at 43.
\item \textsuperscript{118} Davis v. Davis, 495 S.W.2d 607 (Tex. Civ. App.—Dallas 1973), \textit{error dismissed}.
\item \textsuperscript{119} 385 S.W.2d 843 (Tex. 1965).
\end{itemize}}
the wife and the community receiver, asserting that no part of the corpus of the plans was community property. The court found that the vested plans could be classified as property, and since the employer's contributions were actually compensation earned during marriage, the plans were community property. Further, the court held that community rights may exist and are capable of division although not capable of being reduced to immediate possession.

The decision in Blakeley indicates that the mere addition of a spendthrift clause by either the employer or employee does not affect the characterization of the plans as community if they are fully vested. Had the court accepted such an argument, the participating spouse or his employer could write an agreement changing community to separate property by the mere addition of a spendthrift provision. The case also held that a vested interest in an unmatured compensation plan has sufficient substance to be subject to the jurisdiction of the divorce court. Since most pension and profit-sharing plans have early vesting dates, this should enable the court to respond with a more equitable division of all the community assets at the termination of the marriage.

Although Blakeley was a major step in the attempt to thwart the concealment of the value of the marital assets at divorce, there still remain several problems with which Texas courts must deal in order to halt this concealment or diminishment of the real worth of the community through these plans. One problem was foreshadowed by the recent decision in Williamson v. Williamson. The court held that the questioned pension plans had ripened when the husband reached the age of fifty-five, since this was when benefits could commence. The husband reached fifty-five on May 15, 1969, and filed for divorce eleven days later. The court was thus correct in its statement that the husband's two retirement plans "matured" during his marriage, and the wife was fully entitled to one-half of the benefits when paid to the husband. However, a major question remained unanswered: What would have been the decision had the husband filed for divorce before, instead of after, the maturity date of the policies? There are three possible answers to this question: the court should (1) disregard the value of the benefits completely when partitioning the marital estate; or (2) be allowed to partition mathematically the future retirement benefits regardless of their maturity; or (3) be allowed to consider potential retirement benefits in making an equitable division of the estate of the parties. The second approach seems far preferrable to the others because many of these plans increase in value as the participating spouse continues to be em-

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120 Id. at 846.
121 Id. at 847.
122 This was the position asserted by Herring to the court of appeals. He claimed that such a spendthrift provision prevented him from having a fully assignable present interest and that, therefore, the wife could not claim a community share in such a plan. Blakeley v. Herring, 374 S.W.2d 677, 680 (Tex. Civ. App.—Tyler 1964), rev'd, 385 S.W.2d 843 (Tex. 1965).
125 Id. at 315.
ployed. Thus, valuation and division is an almost impossible task for a
divorce court to accomplish at a stage long before such benefits are to be
received.126

There are four situations in which the divorce court is faced with the
problem of attempting an equitable division of a pension or profit-sharing
plan. The first involves a plan presently vested and matured, freely
alienable, and capable of exact valuation.127 This situation should offer little
difficulty in the partition proceedings before the court. The second is where
the benefits are not payable at the time of the divorce but are fully vested.128
The courts have had little difficulty in holding these to be divisible commu-
nity property, despite spendthrift provisions and the unavailability of the
proceeds at the time of the dissolution of the marriage. Third is a plan
where on the death of the employee spouse the proceeds are distributable
to a named beneficiary. Although this type of plan might clearly be com-
community property, it could be subject to disposition by the managing spouse
and, therefore, capable of concealment or fraudulent transfer.129 Last is a
plan which is not fully vested and is not capable of adequate valuation.
This situation presents the greatest number of problems for courts in effec-
tuating an equitable division, and should be the subject of immediate legis-
lar action in order to protect fully the rights of the non-participating
spouse. Although contingent, the interest of the participating spouse is cap-
able of division on a fractional basis (the number of years of marriage
during which the spouse participated in the plan over the total number of
years of participation), and the non-participating spouse should receive an
expectant interest despite the possibility that such an interest could be totally
defeated.

Federal and Military Retirement Benefits. In considering a federal retire-
ment plan, the court in Allen v. Allen130 held that a contribution of com-

126 The Supreme Court of Texas has not yet affirmatively passed on this question,
but this rationale seems to have been accepted by several courts of civil appeals. In
In re Marriage of McCurdy, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973), error
dismissed, the court held that the benefits under a retirement program, although not
capable of present distribution, were capable of division upon divorce even though
under certain contingencies the wife might not be able to receive anything. The court
awarded the wife “one-half of all benefits under the retirement plan . . . if, as and
when such benefits are paid or received by the appellant,” id. at 716, noting that the
husband had completed all but a few months of employment necessary to qualify for
the benefits during the marriage. The court recognized that the accruals credited after
the divorce would not be properly acquired during this marriage, yet did not restrict
the division to community property alone, because separate property interests of the
husband may be awarded to the wife in order to effect an equitable property division.
See also Webster v. Webster, 442 S.W.2d 786 (Tex. Civ. App.—San Antonio 1969).
It should be noted that in these cases, the pension plans were written so that there was
partial vesting throughout the husband’s employment but not full vesting until a set
number of years.
128 Webster v. Webster, 442 S.W.2d 786 (Tex. Civ. App.—San Antonio 1969);
129 See notes 95-116 supra, and accompanying text.
130 363 S.W.2d 312 (Tex. Civ. App.—Houston 1962).
The court ruled that because federal law controlled over state law, it could not award the widow any interest in the retirement benefits. It thus seems that if a specific federal statute provides for a late maturity date, the non-participating spouse's right in such a plan may be completely defeated if the marriage is dissolved prior to that time.

In Kirkham v. Kirkham the husband had completed twenty-two years of military service at the time of his divorce. Although he had not retired and was receiving no benefits, his rights in the retirement plan had fully vested, since he had served the required number of years. The wife was awarded an interest in the future benefits computed by dividing the number of months of marriage while the husband was in the service by the total number of months the husband was in the service, with half of the resulting amount being the portion of each monthly benefit the husband was to pay his wife. The courts have viewed such benefits as earned property rights accruing during marriage and subject to division upon divorce.

In the recent case of Busby v. Busby the Texas Supreme Court held that the wife had a cognizable interest in the military disability retirement benefits of her husband. The husband had been ordered to retire, due to a diabetic condition, on the same day the couple's divorce was granted, but he was entitled to the benefits because the retirement plan was fully vested. The court's reasoning again turned on the fact that the benefits were earned property rights constituting community property, subject to equal division between the husband and wife. The dissenting opinion pointed to the inequity of the majority's decision, in that the title to benefits payable in the future vest only when one becomes eligible for them. The dissent's contention was that benefits payable in the future should not constitute property, but the trial court could properly take such benefits into consideration in the partition of the marital estate.

Busby and Kirkham also point out the need for judicial or legislative clarification in the area of federal as well as state deferred payment plans. In both cases, since the husband had completed twenty years in the service, the benefits were capable of immediate enjoyment and thus fully vested. But the question lingers whether the same conclusion would have been reached had the dissolution of the marriage occurred prior to vesting. From these cases it may be surmised that prior to serving twenty years there is not an interest the divorce court can consider property or that is...

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131 Mr. Allen was a participant in a federal retirement plan which contained a spendthrift provision.
132 Allen was distinguished but not overruled in Herring v. Blakeley, 385 S.W.2d 843, 847 (Tex. 1965), because no federal legislation was involved.
134 See also Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App.—San Antonio 1968), error dismissed.
136 457 S.W.2d 551 (Tex. 1970).
137 Id. at 555 (Walker, J., dissenting).
138 Id.
capable of division between the spouses. If this is the case, the non-participating spouse is placed in the precarious position of having his or her rights defeated despite the length of the marriage if the plan has not fully vested. Solutions similar to those seen in the previous section are available to her, but to achieve the most equitable results a mathematical partition of the future retirement plan regardless of vesting seems preferable.

C. Enhancement of the Separate Estate with Community Funds

The Family Code provides that "property possessed by either spouse during or in dissolution of marriage is presumed to be community property." But section 5.22 will allow one spouse to manage and control the community property he or she would have owned had there not been a marriage. It is possible for a spouse to divert community assets to projects outside the community's interest without the requirement of reimbursement to the non-consenting spouse or to the community.

**Improvement of the Separate Estate.** Most Texas cases hold that separate or community ownership of fixtures or improvements is presumed to be the same as the status of the property on which they are found. This avoids the problems inherent in situations where land and improvements upon it are owned by different people. The burden is often placed on the challenging spouse to affirmatively trace community funds to the improvements of the separate property unaided by any presumption that such funds acquired during marriage are community assets. In the leading case of *Younger v. Younger* the husband claimed one-half of the enhancement in value of certain separate property of the wife by reason of the construc-

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139 The terms and conditions of the military retirement program as set out in 5 U.S.C. §§ 8331-39 (1970). Although the normal maturity period for these plans is 20 years, the method of compilation of this period varies with the particular branch of the armed services.

140 The recent case of *Davis v. Davis*, 495 S.W.2d 607 (Tex. Civ. App.—Dallas 1973), *error dismissed*, seems to reject this solution. In this case the husband had been a member of the armed services for eight years before the divorce was filed, and was capable of receiving retirement benefits only after 20 years of service. The trial court awarded the wife an interest in the monthly benefits to be received by the husband computed in accordance with the method set out in the text accompanying note 134 *supra*. The court of civil appeals reversed, holding that the husband had not acquired community property rights in the benefits which might become payable 11 years hence. The controlling factor was that the benefits did not vest until the statutory period transpired *during* the marriage relationship. The court, recognizing that at times such a decision could lead to inequitable results, stated that such inequity could be avoided by the use of the broad powers of division of community property granted to the divorce court under § 3.63 of the Family Code. Thus, consideration may be given to the acquirement of a portion of military retirement benefits during marriage by the divorce court. It is submitted that the problems of valuation and the contingent nature of the benefits cast a doubt upon the decision in *Davis* as leading to a just and right division.


142 *Id.* § 5.22.


tion of a hotel which was allegedly built with community funds. The court of civil appeals, reversing the trial court's decision that the husband was entitled to this one-half interest, held that he had not adequately discharged his burden of proof to trace the community funds into the structure erected on the wife's property. The court found, in effect, that the challenging spouse must not only show that community funds were used in the construction of the improvements, but also prove the amounts to be repaid.

Norris v. Vaughn presented to the Texas Supreme Court the problem of tracing both community funds and efforts into the separate estate of one spouse. In this case the husband owned several gas wells before his marriage, but during his marriage a certain amount of labor and maintenance was required to keep the wells producing. The wife's heirs sued for one-half the proceeds of the gas production, claiming that the expenditure of community labor, talent, and funds in its production and sale had impressed upon it community character. The court concluded that the heirs did not have any interest in the proceeds, because they had failed to plead and prove such a large expenditure of community labor and talent as to change the status of the property from separate to community. Therefore, the gas produced and the proceeds therefrom remained the separate property of the husband.

This stringent requirement of tracing is questionable in light of the revised control provisions of the Texas Family Code. With the husband or wife both capable of dealing with separately controlled community assets freely, it seems that either spouse is legally justified, under normal circumstances, in using them to place improvements on his or her separate property. It might be more justifiable to presume that the improvements were made with community funds. Such a presumption would conform to the general proposition in marital property law that all assets earned or acquired during marriage are presumed community property. Further, the spouse claiming separate assets would be required to trace and identify them. Also, the possibility of unjust enrichment to the separate estate of one spouse at the expense of the community would be greatly curtailed.

Payment of Prenuptial Debts. Another technique of diminishment of the community estate is the use by one spouse of community funds under his or

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146 Id. at 453.
147 See Burton v. Bell, 380 S.W.2d 561 (Tex. 1964); Lane v. Kittrel, 166 S.W.2d 763 (Tex. Civ. App.—Amarillo 1942).
148 32 Tex. 491, 260 S.W.2d 676 (1953).
149 Id. at 499, 260 S.W.2d at 680. In Cone v. Cone, 266 S.W.2d 480 (Tex. Civ. App.—Amarillo 1953), error dismissed, the court stated that oil produced from a separate lease was separate property regardless of the amount of community funds and effort spent on its production.
151 Id. § 5.02.
153 Should the spouse be successful in tracing community funds into separate improvements, the measure of recovery is not the amount expended, but the amount that such expenditures have enhanced the value of the separate property. In re Marriage of Greer, 483 S.W.2d 490 (Tex. Civ. App.—Amarillo 1972), error dismissed; Harris v. Royal, 446 S.W.2d 351 (Tex. Civ. App.—Waco 1969), error ref. n.r.e.
her separate control to discharge, during marriage, antenuptial debts encumbering separate property. In this area the party seeking reimbursement for these expenditures must affirmatively trace community funds into the discharge before reimbursement will be allowed.154

In *Colden v. Alexander*155 the husband purchased land before his marriage, but used community funds to pay the purchase-money debt. The wife claimed a one-half interest because of such community payments. The Texas Supreme Court rejected the wife's contention, stating that the character of the husband's title, whether separate or community, "depends alone upon the existence, or non-existence, of the marriage of Mr. and Mrs. Colden at the time of the incipiency of the right in virtue of which he acquired title."156 Although the court noted that the payment out of the community of such items would normally require reimbursement,167 this would not be the case unless the expenditures were adequately traced, and it was shown that they were greater than the benefits received by the community from the land. The court's opinion was also based on the fact that the wife's contention would lead to uncertainty regarding land titles purchased on credit by either spouse before marriage, and thus would require litigation in almost all instances to determine the real ownership thereof.

In *Klein v. Klein*158 periodic payments had been made out of community funds to discharge a purchase money lien on the wife's separate property. The court of civil appeals reformed the trial court's decision that a lien in favor of the husband was an equitable result since the wife was "generally" indebted to the community because of the free spending of community funds. The court held that since the right to reimbursement was equitable, and the husband did not prove that the community income from the separate property was less than the amount paid by the community, the lien against the wife's separate property was not justifiable.159

The holdings in *Colden* and *Klein* illustrate that a non-consenting spouse may face a double burden of proof in this area before any remedy may be afforded by the court. First, the spouse must trace community funds into the property without the benefit of the presumption that funds acquired during marriage are community property.160 The argument may be made, as in other areas,161 that the burden placed on the challenging spouse is much too stringent and, therefore, may allow unjust enrichment to the separate estate of one spouse at the expense of the community. Secondly, should the non-consenting spouse be successful in tracing the community

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155 Id. at 147, 171 S.W.2d at 334.
156 See MacRae v. MacRae, 144 S.W.2d 320 (Tex. Civ. App.—El Paso 1940), error ref.
157 Id. at 774.
159 Id. at 774.
161 See note 150 *supra*, and accompanying text.
funds, unless that spouse can prove that the expenditures by the community were greater than the benefits received, reimbursement will be denied.\textsuperscript{162} Often because of inadequate bookkeeping and lack of information this proof may be impractical or impossible for the non-managing spouse.

\textit{Recitals in the Conveyance of Property.} The probative effects which Texas courts have assigned to deed recitals which expressly declare land purchased during marriage the separate property of the grantee-spouse, offer an opportunity for the managing spouse to diminish the real worth of the marital estate.

In \textit{Lindsay v. Clayman}\textsuperscript{163} the wife entered into a contract with a third party for the sale of land which named her as grantee and recited that payment was to be made from her separate money. After the death of the wife, the husband instituted suit for title and possession of the land on the theory that community funds were actually used as payment on the contract. The Texas Supreme Court held that as a matter of law, the land was vested solely in the wife’s separate estate.\textsuperscript{164} The court relied upon the inception-of-title doctrine, holding that ownership of land is determined by the circumstances existing at the time of purchase and subsequent circumstances have no bearing unless they create a recognizable property interest.\textsuperscript{165} Since the deed stated the nature of the estate conveyed to the wife, and the husband had knowledge of the deed, extrinsic evidence was inadmissible to prove other ownership or payment from another source than that indicated by the recital.\textsuperscript{166}

In contrast to the inception-of-title rule is the decision in \textit{Hodge v. Ellis}.\textsuperscript{167} The wife had acquired two parcels of land on credit. The deeds recited her separate ownership, and she alone signed the purchase-money notes. Unlike the situation in \textit{Clayman}, there was no direct evidence that the husband had any knowledge of the transactions. The Texas Supreme Court concluded that the land was community property because of evidence that it was bought with community funds.\textsuperscript{168} The court plainly rejected, without explanation, the inception-of-title rule, stating that the ownership was “to be determined according to what funds went into the purchases.”\textsuperscript{169} Thus, the court was willing to allow the husband to trace community funds into the separate property and thereby establish its community character.

In the recent case of \textit{Messer v. Johnson}\textsuperscript{170} the Texas Supreme Court again faced the problem of contractual recitals and parol evidence. In \textit{Messer} the recital in the deed was that the property was the separate estate of the

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\item \textsuperscript{162} Klein v. Klein, 370 S.W.2d 769 (Tex. Civ. App.—Eastland 1963).
\item \textsuperscript{163} 151 Tex. 593, 254 S.W.2d 777 (1952).
\item \textsuperscript{164} \textit{Id.} at 596, 254 S.W.2d at 779.
\item \textsuperscript{165} \textit{Accord}, Henry S. Miller Co. v. Evans, 452 S.W.2d 426 (Tex. 1970); Dorfman v. Dorfman, 457 S.W.2d 91 (Tex. Civ. App.—Waco 1970).
\item \textsuperscript{166} \textit{Accord}, Grunwald v. Grunwald, 487 S.W.2d 240 (Tex. Civ. App.—Houston [1st Dist.] 1972), \textit{error ref. n.r.e.}
\item \textsuperscript{167} 154 Tex. 341, 277 S.W.2d 900 (1955).
\item \textsuperscript{168} \textit{Id.} at 352-53, 277 S.W.2d at 907.
\item \textsuperscript{169} \textit{Id.} at 351, 277 S.W.2d at 906.
\item \textsuperscript{170} 422 S.W.2d 908 (Tex. 1968).
\end{itemize}
wife, but the deed did not state that the consideration was to be paid by the grantee out of her separate funds. According to the husband, all payments on the contract were made with community funds. Further, he testified that he had deliberately placed title in his wife's name as a matter of convenience and to diminish the inheritance of his son by another marriage. The heirs of the wife objected to such evidence as a violation of the parol evidence rule, but these objections were overruled and judgment was rendered that the property was community. This judgment was affirmed by the court of civil appeals. The Texas Supreme Court reversed, holding that where there was evidence that the challenging spouse participated in the transaction, extrinsic evidence was not admissible to vary the recital of the deed. The court rejected an argument for the relaxation of the parol evidence rule in this situation, on the theory that there might be situations in which the spouses find it desirable to create an appearance of separate ownership while intending the wife to hold the property in trust for the community. The court adhered to the general rule of the inadmissibility of such evidence in the absence of equitable grounds for reformation or rescission.

The inception-of-title doctrine, coupled with the stringent requirements of the parol evidence rule, may be used to defraud a spouse of a share of property purchased with community funds. The implication of these cases is that if a spouse can obtain a recital on the deed that the property is the separate property of that spouse, and conveyance is in exchange for a separate obligation, the property will be part of his or her separate estate, despite the subsequent use of community funds in deferred payment. If payment of the purchase price with community funds is proved, it merely creates a right of reimbursement in behalf of the community. The recital, as prima facie proof of payment with separate funds, makes it possible for a dishonest spouse to create proof in support of a false claim of separate ownership, and after a lapse of time it may be difficult or impossible for the challenging spouse to rebut this prima facie case established by the false recital. The only effective remedy against this concealment technique is close judicial scrutiny of all deed recitals and their surrounding facts to determine whether the property was actually purchased with separate funds.

III. Remedies of the Non-consenting Spouse

The remedies available to the non-consenting spouse, when successful in uncovering a plan by the managing spouse to conceal assets or the con-

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172 Messer v. Johnson, 422 S.W.2d 908, 912 (Tex. 1968).
174 Lindsay v. Clayman, 151 Tex. 593, 254 S.W.2d 777 (1952).
175 The spouse's claim of separate ownership is also aided by the general presumption that a person's conduct on any particular occasion was lawful and not fraudulent. C. McCORMICK, EVIDENCE § 342, at 806 (2d ed. 1972). For an excellent discussion of the problems presented in this area, see Fritz, supra note 42.
cealed assets themselves, are as varied as the devices used to conceal the assets. The appropriate remedy will depend not only on the type of assets traced, but also on the time the scheme is exposed.

**Remedies During Marriage.** It is well established in Texas law that the spouse may sue for the protection of his or her property rights, both community and separate, without obtaining a divorce.\(^{176}\) In *Letcher v. Letcher*\(^{177}\) the court established that, despite the refusal of divorce, the trial court may adjudicate the question of the status of property and thereby protect the wife’s separate estate. In *Teas v. Republic National Bank*\(^{178}\) the court held that if a wife can establish fraud, she may also sue for the protection of her interest in the community estate during coverture. Although a spouse may sue in these situations, it is very hard to challenge transactions of the managing spouse unless they constitute capricious gifts or transfers for inadequate consideration.\(^{179}\) There is almost a complete lack of remedies to prevent a spouse’s waste of community property under his or her separate control through dissipation or mismanagement.

One remedy that may be afforded by the court when the managing spouse has been guilty of an abuse of the control and management provisions of section 5.22 is rescission or compensation for the loss of the property. In *Bettis v. Bettis*\(^{180}\) the husband conveyed the family homestead to a third party after inducing his wife by fraudulent representations to execute the deed. The court of civil appeals affirmed the trial court’s decision to rescind the transaction and to pay the wife the fair rental value of the property for the time she was dispossessed. A recent case also indicates that the non-consenting spouse may be protected against fraudulent conveyances under the provisions of section 24.02 of the Texas Business and Commerce Code,\(^{181}\) which protects creditors and other interested persons from transfers of real or personal property intended to defraud or hinder the rights of such persons in the property.\(^{182}\)

In *Borton v. Borton*\(^{183}\) the court declared that a wife, apart from an action for divorce, may maintain a suit against her husband for the conversion of her separate estate, and also have a resulting trust declared in her favor in lands claimed as her separate property and which the husband had possessed as his own. Since under the provisions of section 5.22 of the Family Code the husband, as a matter of law, is no longer in possession and control of his wife’s separate estate and thus can no longer hold it against her will, the wife has the remedy of the resulting trust to regain possession of

\(^{176}\) See *Trimble v. Farmer*, 305 S.W.2d 157 (Tex. 1957); *Bettis v. Bettis*, 83 S.W.2d 1076 (Tex. Civ. App.—El Paso 1935).

\(^{177}\) 421 S.W.2d 162 (Tex. Civ. App.—San Antonio 1967), error dismissed.

\(^{178}\) 460 S.W.2d 233 (Tex. Civ. App.—Dallas 1970), error ref. n.r.e.


\(^{180}\) 83 S.W.2d 1076 (Tex. Civ. App.—El Paso 1935).

\(^{181}\) TEX. BUS. & COMM. CODE ANN. § 24.02 (1968).


\(^{183}\) 190 S.W. 192 (Tex. Civ. App.—Galveston 1916), error ref.
her separate estate. As seen in Shaw v. Shaw, the court is authorized to appoint a receiver to establish a separate interest in property and to prevent the disposition or conversion of that interest. Also, the court has authority to impound community property pending final action in a divorce case.

Remedies in a Suit for Divorce or Annulment. The actual suit for divorce or annulment offers the greatest opportunity for the marital assets to be equitably divided. The trial court is empowered to divide the marital estate in any manner that it "deems just and right, having due regard for the rights of each party and any children of the marriage." A trial court's conclusion that the division was fair cannot be reversed unless an abuse of discretion is clearly established. Since the Family Code requires that the division be just and right, it may include separate as well as community property and does not require mathematical certainty.

As one of the many remedies available to the divorce court in its equitable jurisdiction, it may appoint a trustee or receiver to take control and dispose of both separate and community property for the benefit of all interested parties. An equitable lien may be affixed to the separate property of one spouse to secure payment of a money judgment to the other. Where the managing spouse has paid the purchase price of property from community property or the separate estate of the non-consenting spouse, a resulting trust may arise in favor of the non-consenting spouse if he or she can clearly show the amount of community funds used. Where the managing spouse perpetrates a fraud on the other spouse by making excessive gifts of community property to third persons, the non-consenting spouse may be entitled to recover the property from the defrauding spouse or a third possessor by means of a constructive trust.

The ultimate goal of the court in the partition proceedings is to make it equitable under the circumstances existing at the time of the divorce. To this end, all the circumstances, including nature of the property, rights of the parties and children, the earning capacity of each spouse, and the

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184 The leading case in this area is Miller v. Miller, 285 S.W. 837 (Tex. Civ. App.—San Antonio 1926), error dismissed w.o.j.
186 Ex parte Preston, 347 S.W.2d 938 (Tex. 1961).
benefits that each spouse would have derived had the marriage continued, will be taken into account. A major objective of the court and each lawyer in a divorce action must be to make sure all property properly within the jurisdiction of the court is presented for division and accurately valuated. If this objective is not met, the goal of a “just and right” division cannot be accomplished.

Post-Divorce Remedies. Neither spouse is precluded by the divorce decree from claiming his or her rights to property not partitioned at divorce, but the court’s broad power of equitable division is limited to a suit for divorce. In a suit brought for the division of community property after divorce, the parties are treated as joint owners and as if they had never been married. Thus, under certain circumstances, if a spouse is successful in concealing community assets beyond the divorce decree, an inequitable division may be obtained.

A typical case in this area of post-divorce remedies is Dudley v. Lawler. The wife obtained a divorce and property division judgment pursuant to a property settlement made in contemplation of the divorce. She did not employ counsel for the divorce on the insistence of her husband that the cost would be exhorbitant and that his lawyer would handle all aspects of the divorce. The wife subsequently determined that the community estate had been much larger than represented to her and sued for reimbursement by an equitable bill of review. The court of civil appeals held that the husband’s fraud prevented the wife from knowing and presenting her rights, and, therefore, the judgment of the divorce court was set aside. Lawler points out that representations of the managing spouse as to the nature and extent of the community estate, if false, are treated as a species of extrinsic fraud, justifying the modification of the property settlement and judgment on the theory of an implied trust.

After the divorce decree has become final, the defrauded spouse is often precluded from modifying the partition of property at divorce because of the inability to value adequately the community estate. The defrauded spouse may institute a suit for an accounting to disclose both the status of the concealed assets and their accurate valuation. In Miller v. Miller, a trespass to try title action, the court held there would be a resulting trust for the wife where the funds used to purchase land were community property and the husband fraudulently took title in his name. In Tarver v. Tarver an action was brought by the second wife against her husband for partition of their community estate and for accounting. Two children and two grand-

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children of the husband's previous marriage intervened, seeking to withhold one-half of the property in the possession of the husband and second wife from the partition proceedings on the theory that the husband was a constructive trustee for them. The Texas Supreme Court held that the children and grandchildren had failed to meet the burden of tracing community assets of the first marriage into property on hand at the divorce of the husband and his second wife. Thus, although equitable remedies are available to the non-consenting spouse and his or her heirs when the marital assets were concealed at the time of the dissolution of the marriage, such claims may be difficult to prove and such assets hard to trace because of the passage of time or the burdens of proof placed on the challenging spouse.

IV. CONCLUSION

The devices and techniques of concealment of marital assets are varied and often incapable of detection. Often the non-consenting spouse is left with the problem of nonexistent or inadequate remedies. There are at least two solutions to these lingering problems. First is development of a satisfactory community property and control system designed to frustrate intentional and negligent dissipations of the community by either spouse, and to satisfy the interest of family harmony, while also satisfying the state's interest in ease of commercial transactions. Present Texas law often does not fully accomplish the curtailment of attempts to diminish the community by the managing spouse. A system of modified joint management and control could accomplish the curtailment of diminishment techniques while also maintaining family harmony and ease in commercial transactions. This system would require that both spouses consent to community property transactions of any nature in excess of a predetermined statutory limit, such as five hundred dollars. If a spouse entered into a transaction involving more than this limit without joinder of the other spouse, the non-consenting spouse would be entitled to reimbursement or rescission.

The second solution concerns the need for adequate remedies in the area of diminishment and mismanagement. Restraining orders and injunctions to prevent the abuse of the control and management provisions of section 5.22, which threaten to dissipate the community, should be statutorily and judicially encouraged. Redirection of the tracing doctrine in the area of enhancement of the separate estate at the expense of the community is necessary to strengthen the non-consenting spouse's claim rather than thwart its existence. Finally, a further extension of the equity powers of the court to all situations, before and after the divorce proceedings, dealing with the partition of community property could effectuate an equitable solution despite the time the concealed assets are discovered. The legislature and courts must provide for adequate remedies under the Family Code for the protection of the separate and community estates of the spouses. Without these remedies, the equality between the spouses under any system of control and management will be totally frustrated.