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Matrimonial Property

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ALTHOUGH a full year has passed since the Matrimonial Property Act of 1967 became effective, appellate courts have yet to deal with any of its provisions specifically. However, the results in almost all cases decided during the last year would not be disturbed by applying the provisions of the Act.

I. Characterization

The courts continued to struggle with problems inherent in dealing with retirement schemes. In Mora v. Mora the nature of a federal military pension was in dispute. At the time of the divorce proceeding the husband was eligible for retirement but had not retired. The wife asserted a community property interest in the pension subject to division by the divorce court. Because the husband's rights were subject to forfeiture if he died in the service or was dishonorably discharged, he argued that his interests were not "property" at all. Relying on Herring v. Blakeley, the court of civil appeals concluded that the husband's right to receive benefits was a vested property right when earned. Thus the portion earned during marriage was community property. The forfeiture provision, which the court found to be "in the nature of a condition subsequent," did not detract from the vested nature of the property right. The court distinguished Allen v. Allen on the ground that in Mora there was no evidence of a federal statute that would deprive the court of power to assign or to partition the anticipated benefits as the Railroad Retirement Act was construed to provide in Allen. It is submitted that a federal statute similar to that in Allen should not deprive a divorce court of such power with

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2 Tex. Prob. Code Ann. § 320A (Supp. 1968), enacted at the same legislative session, provides that the whole of funeral and burial expenses of a decedent are chargeable to the community share of the decedent in order to achieve full deductibility of those expenses for estate tax purposes. The statute has been construed, in effect, as not being retroactive to cover estates of decedents who died before its effective date, May 27, 1967. United States v. Collins, 399 F.2d 90 (5th Cir. 1968).


4 363 S.W.2d 843 (Tex. 1963), noted in 19 Sw. L.J. 370 (1965).

5 429 S.W.2d at 662.


regard to the husband’s obligations, since assignability is relevant only to the enforceability of a claim and should not affect the proper characterization of retirement benefits.  

Aside from the characterization problem, the divorce court is faced with some practical difficulties in making a proper valuation and suitable division of community interests in retirement plans. One approach has been to grant the wife a money judgment in the discretionary division of the community estate. However, if the prospective pensioner’s right to receive income is to be postponed for many years, something of a dilemma is presented to the court in determining present value against future value and in taking into account the possibility of forfeiture. Therefore, in demanding Mora, the court noted that the wife might be given the right to receive one-half of each payment when and if received by the husband. If the prospective pensioner’s health is impaired at the time of the divorce proceeding, another imponderable is introduced.

Other difficulties may arise in the enforcement of divorce decrees dividing the community interests in a retirement pension. In United States v. Smith the husband assigned one-half of the benefits of his army pension to his wife in a property settlement agreement which was incorporated in their divorce decree. After directing the Army Finance Center to send his retirement checks to a bank which would in turn send one-half of each payment to his wife, the divorced husband later asked that the checks be sent directly to him. When he thereafter failed to send his former wife any part of the checks, she brought a proceeding in federal court against the husband and the United States. Judgment was rendered against both defendants but only the United States appealed. The Court of Appeals for the Fifth Circuit held that the federal district court had no jurisdiction over the dispute between the wife and the United States because her claim did not arise under any constitutional provision, act of Congress, federal regulation, or contract, express or implied, with the

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3 But the respondents' brief in Commissioner v. Wilkerson, 368 F.2d 512 (9th Cir. 1966), aff'd 44 T.C. 718 (1965), nicely points up this difference between private and federal pension schemes.

The conjectural quality of the military retirement program prior to actual retirement is almost unique. In this respect, the contrast between private retirement plans and the military retirement program is great. Typically, private retirement plans are embodied in a contract negotiated between employer and the employee (either acting individually or through his union). Such plans are almost always currently funded by employer or employee contribution, or both. Employee rights in the fund so created must 'vest' (become non-forfeitable) within a reasonably short time if the plan is to qualify under existing Internal Revenue standards. Customarily, the employee may withdraw all of his own contributions and the 'vested' portion of employer contributions any time he terminates his employment, and under some plans such withdrawals may be made without terminating employment upon the payment of a small penalty (to avoid the 'constructive receipt' doctrine under the Internal Revenue laws). Under the military retirement program there is (1) no contract, (2) no fund, (3) no contributions, (4) no 'vested' benefit available to the serviceman at all until 30 years has elapsed. Because of these differences, any analogy to the private retirement cases must be approached with great caution.

Brief for Respondent at 18, Commissioner v. Wilkerson, supra.

4 Kirkham v. Kirkham, 335 S.W.2d 393 (Tex. Civ. App. 1960). With regard to the characterization problem, it is important to note that this was a case of a wholly vested military retirement pay account.

5 393 F.2d 318 (5th Cir. 1968).
United States. Furthermore, the assignment was contrary to both the Anti-Assignment Act and the statute which provides that a serviceman may not assign his pay in advance of the date it becomes due and payable.

It may be noted that any agreement between husband and wife for the discharge of debts incurred by either would not bind the spouses' creditors. Likewise, a debtor without notice would not be bound by an agreement between husband and wife that one or the other should be entitled to payment of debts owed to either or both of them. To resolve these difficulties, ordinary creditors and debtors may be made parties to the divorce action under the Family Courts Act of 1967. But could the United States be made a party? In light of the federal acts mentioned in Smith, if the United States were joined as a party defendant, the plaintiff could anticipate (1) a motion to dismiss as against the United States, or (2) a motion for transfer to a federal court followed by a motion for dismissal there.

A divorce court may sidestep some difficult problems in the exercise of its discretion in making an equitable division of the property. In Fulwiler v. Fulwiler the trial court used its discretionary powers of property division to deal with reimbursement rights. Community property had been used to make substantial improvements on the husband's separate property. The divorce court granted the wife reimbursement on the basis of testimony relating to both the cost of improvements and the enhancement of value of the separate property. The husband appealed, asserting that the right of reimbursement was limited to enhancement of value, apparently relying on the principle that the amount of reimbursement is determined by the cost of improvements made or by the enhancement in value of the estate, whichever is less. The appellate court found no abuse in the exercise of the trial court's discretionary division of the community property, perhaps because the evidence indicated that the cost of the improvements and the enhancement of value were the same.

Some have expressed the view that the redefinition of duties of support in article 4614 may change the established rules with respect to reimbursement and necessaries. Whatever change may come about, the results in two 1968 cases apparently would be the same under the new formulation of the statute. In one case the husband claimed a right of reimburs-
ment for the use of his separate property to provide for his family. On the law applicable before 1968 the court held that no such right arose. It is submitted that no such right will arise under the reformulation of article 4614. Similarly, the revised statute would not have disturbed a second court's award of attorney's fees to the wife as necessaries.¹⁹

Until recently no one other than Professor Huie²⁰ gave much attention to the problem of how the right to receive income from a trust is to be characterized for matrimonial property purposes.²¹ On the one hand, since the right is not acquired by the beneficiary's giving consideration, it may be analyzed as a separate interest.²² The income is merely the measure of value of the equitable estate—its only tangible dimension.²³ On the other hand, in the great majority of instances when the question has been before the appellate courts, the right to receive income from the trust corpus has been analogized to income produced by separate property and hence defined as community property. The latter analysis stems from the concept of an equitable "estate" in trust as an entity separate from the right to receive income. Relying on one of the few early cases,²⁴ the Fort Worth court of civil appeals recently concluded that undistributed income produced by a spendthrift trust subject to distribution at the sole discretion of the trustee was not community property.²⁵

Though a Texas court will normally adjudicate disputes between nonresidents concerning Texas land,²⁶ problems of choice of law may arise in

¹⁹ Elliott v. Elliott, 422 S.W.2d 717 (Tex. Civ. App. 1967), error dismissed. Division of property on divorce may also create tax problems in addition to those of state substantive law. In Collins v. Commissioner, 388 F.2d 353, 357 (10th Cir. 1968), an Oklahoma court granted a divorce and distributed the property to the couple under a state statute giving the trial judge discretion to divide the property accumulated during the marriage as may appear just and reasonable. The Revenue Service contended that the transfer of title to the wife is a taxable event to the husband. The Tenth Circuit Court of Appeals affirmed this view. The Oklahoma statute, like its Texas counterpart, gives the judge wide discretion. In Texas there is no requirement that the community property or separate property is to be divided equally. If it is not so divided, tax consequences may result. For tax problems encountered in contractual alimony situations, see Mauck v. Philney, 290 F. Supp. 167 (S.D. Tex. 1967); Price v. Commissioner, 49 T.C. 676 (1968). For some non-tax problems, see Gray v. Bush, 430 S.W.2d 258 (Tex. Civ. App. 1968), error ref. n.r.e.; High v. Glameyer, 428 S.W.2d 872 (Tex. Civ. App. 1968), error ref. n.r.e.


²¹ A good deal has been written in recent years with respect to equitable interests as separate or community property. Branscomb & Miller, Community Property and the Law of Trusts, 20 Sw. L.J. 699 (1966); Counts, Trust Income—Separate or Community Property, 30 Tex. B.J. 851 (1967); Davis, Income Arising from Trusts During Marriage Is Community Property, 29 Tex. B.J. 901 (1966); Newman, Income Distributions from Trust—Separate or Community Property, 29 Tex. B.J. 449 (1966). The problem seems to have been first recognized by Justice Gaines in Martin Brown Co. v. Perrill, 77 Tex. 199, 13 S.W. 975 (1890), though it may have been alluded to earlier in Hutchinson v. Mitchell, 39 Tex. 487 (1871).

²² McClelland v. McClelland, 37 S.W. 310 (Tex. Civ. App. 1896), error ref. As to the distributed income, see Martin Brown Co. v. Perrill, 77 Tex. 199, 13 S.W. 975 (1890).


²⁴ iff.

²⁵ Buckler v. Buckler, 424 S.W.2d 514 (Tex. Civ. App. 1967), error dismissed. The supreme court lacked jurisdiction of the property dispute because it was merely ancillary to the divorce action and there was no conflict among courts of civil appeals on this point. Tex. Rev. Civ. Stat. Ann. art. 1728(2) (1962). An analogous jurisdictional problem is encountered by a trial court when a property division is sought when no prayer for divorce is before the court. In Burleson v. Burleson, 419 S.W.2d 412 (Tex. Civ. App. 1967), noted in 22 Sw. L.J. 129, 138 (1968), the appellate court held that the trial court had jurisdiction to make a property division as opposed to a partition. This conclusion is seriously questioned.

determining the separate or community character of the property. The better Texas rule is that if a non-resident purchases Texas land, its nature is characterized by the facts surrounding the inception of title. Thus if a husband in a common law state buys Texas realty using his separate earnings, that Texas property will be the husband's separate property.7 But how should the court deal with the various presumptions that surround taking of title in the name of one spouse or the other? In Patterson v. Metzinger8 an Arizona husband bought realty in Texas. In his contest with the children of his deceased wife with respect to title to the land, the husband testified that he paid the full purchase price with his separate estate. However, when the conveyance was made, the husband and wife were both named as grantees in the deed, which was recorded in Texas and then sent to the husband at his residence in Arizona. The husband testified that after receiving the deed he forwarded the purchase price immediately because a time delay for working out the mistake in the deed would cause him to lose $500 placed in escrow. The court, nevertheless, applied the Texas presumption that when a purchase is made with separate funds and title is taken in the name of the wife, the husband intends to make a gift of the property to the wife.9 The husband's testimony was deemed insufficient to overcome the presumption of gift. Of course, the same conclusion would be reached with respect to Texas spouses, even if it may be questioned whether this is a very satisfactory way to approach acquisitions by non-residents.

As when Texas judges apply Texas law to non-residents, equally lopsided results may be anticipated when a Fifth Circuit panel on which no Texas judge sits attempts to apply Texas law for Texas litigants in order to characterize an insurance policy for estate tax purposes. The Fifth Circuit had an occasion in both the 1967 and 1968 Survey periods to determine whether Internal Revenue Code section 2042(2)10 applies to an insurance policy taken out by one spouse and naming the other as beneficiary and owner of the policy. Under this section if the decedent is the holder of "incidents of ownership" in a policy, its proceeds are includible in his estate.11 In 1967 in Freedman v. United States12 the circuit court looked to Texas law to determine whether the deceased wife had rights of ownership. It concluded that mere designation of the husband as owner of a policy on the life of the wife was not sufficient to characterize the policy as the husband's separate property. In 1968 in Prichard v. United States13 the Fifth Circuit panel went much further. It looked beyond Texas law to the "realities" of the situation to obtain a similar result.14 In that case

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7 See McKnight, Matrimonial Property, Annual Survey of Texas Law, 22 Sw. L.J. 129-30 (1968).
9 Smith v. Strahan, 16 Tex. 314 (1856), where title was in the name of the wife alone; Tate v. Tate, 299 S.W. 310 (Tex. Civ. App. 1927), a case like Patterson, where title was taken in the name of husband and wife.
12 382 F.2d 742 (5th Cir. 1967), noted in 22 Sw. L.J. 129, 133 (1968).
13 397 F.2d 60 (5th Cir. 1968).
14 Id. at 63.
during negotiations to finance a shopping center the husband had agreed to purchase a $250,000 insurance policy on his life and to have it assigned to the long-term financier. He purchased the policy, naming his wife as sole beneficiary and owner, and they assigned the policy to the financier as collateral for the loan. After the husband’s death the Internal Revenue Service asserted that one-half the proceeds of the policy should be included in his estate since he was “owner” of the policy on behalf of the community. That the surviving wife in *Prichard* was owner “as a matter of state title law” was incontestable. Nevertheless, the court relied on the broad language of the Treasury Regulations, which includes in the incidents of ownership “the right of the insured or his estate to economic benefits of the policy.” These economic benefits were illustrated by several factors: the husband agreed to assign the policy to the financier; the wife cooperated with him in carrying out the agreement; and the husband obligated himself to pay the loan which he received by the assignment of the policy.

By use of this “economic benefit” argument one might anticipate inclusion of the whole of the policy in the husband’s estate. But the Texanless panel concluded that only one-half of the proceeds should be included. The reasoning underlying this result is not clear, but it is presumably related to what the court understood by “community debt” and the decedent’s community share in liability therefor. The court seems to be saying that if the husband takes out a policy on his life and agrees to assign it to secure a debt he has incurred on behalf of the community, the policy is still a community policy though the wife subsequently acquires all incidents of ownership. This line of reasoning is somewhat awkward, to say the least, since the court noted that the wife was owner of the policy “as a matter of state title law.” It was the husband’s use of the policy that was fatal here. But if the wife was the owner of the policy under Texas law and it was no longer community, then the husband lost power of management, control and disposition of the property. To say that this view is “unrealistic,” begs the question of characterization.

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Footnotes:

35 One-half of the unpaid balance on the loan in an amount that exceeded a quarter of a million dollars was allowed as a deduction to the estate.

36 397 F.2d at 61.


38 The reasoning of the case is therefore distinguishable from Freedman v. United States, 382 F.2d 742 (5th Cir. 1967). There policy of insurance was taken out on the life of the wife, premiums were apparently paid for with general community property and the husband was named as owner of the policy. In concluding that one-half the proceeds were includable in the wife’s estate, the husband’s position as owner was said to be in no way inconsistent with his status as manager of the general community. It would appear that those who set up the Freedman estate plan had gambled on “having it both ways” regardless of which spouse died first. But this cannot be said of the Prichard plan.

39 The concept of “community debt” utilized here has been undermined by the 1967 Matrimonial Property Act through the rewording of TEX. REV. CIV. STAT. ANN. arts. 4619, 4620, 4621 (Supp. 1968). The husband can no longer be said to contract debts “on behalf of the community.” He may merely commit for payment that part of the community over which he has sole or joint power of management, control and disposition.

40 In effect, such a view allows the lender to characterize the property for purposes in which he has no concern. Characterization by “business reality” is only valid if the assignee is all wise. If the assignee is mistaken about the husband’s power to assign the policy or to deal with it, the assignee may take nothing.
The result in Prichard might have been unexceptionable if the transaction had been differently characterized. A more realistic analysis is that the husband acquired the policy as community manager, pledged it for a community debt, and gave his wife the remainder when he relinquished all power to deal with it. If the wife owned no more than an interest in remainder, then so much of the property as was collateral for the loan was still community property and half-owned by the husband.

The current interpretation of Internal Revenue Code section 2042 (2) seems to come to this. The statute prescribes that if incidents of ownership are retained in an insurance policy, the ownership interest in the policy is taxed to the decedent’s estate. Section 20.2042-1 (2) of the Treasury Regulations provides that “incidents of ownership” means having “economic benefits.” Hence the section has been made to cover not only ordinary incidents of ownership,4 but also merely legal, as opposed to equitable, ownership41 and the receipt of economic benefits.42 It is submitted that the regulation goes well beyond the terms of the statute, but one wonders whether this trend to construe the Code so broadly can be reversed.

A related problem is the includability in a decedent’s estate of premium payments (on policies owned by others) within three years of death as “in contemplation of death” under Internal Revenue Code section 2035.43 In Revenue Ruling 67-46344 the Revenue Service took the position that when a decedent within three years of death makes premium payments on a policy of insurance on his life, the incidents of ownership of which were transferred more than three years prior to death, payment of premiums is a transfer of an interest in the proceeds of the policy measured by the proportion which the amount of those premiums paid bears to the total amount of premiums paid. Hence the Treasury attempts to trace dollars paid for premiums into ultimate proceeds and thus to swell the amount of the gift in contemplation of death. This interpretation was repudiated in a non-community property state45 and in a recent Arizona case, Nance v. United States.46 In Nance the insurance policy was taken out on the life of the husband, the wife was named as owner and beneficiary of the policy, and premiums were paid with community funds. In refusing to follow the Treasury’s argument that a portion of the proceeds were includable in the husband’s estate, the court

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40 Freedman v. United States, 382 F.2d 742 (5th Cir. 1967). In Catalano v. United States, 293 F. Supp. 1300 (E.D. La. 1968), however, the court concluded that under Louisiana law merely taking title to an insurance policy on the husband’s life in the wife’s name constituted a gift to the wife of the policy and the source of premium payments was irrelevant. But see First Nat’l Bank v. United States, 69-1 U.S. Tax Cas. ¶ 12,174 (W.D. Tex. 1968).
held that premiums were not paid in contemplation of death. As an alternative ground the court held that even if the premium payments were made in contemplation of death and did not constitute gifts to the wife, the extent of the community interest would only be the amount of the premiums paid.  

These problems may be alleviated by a partition of community property into separate shares or by a gift of a community property interest by one spouse to the other in order to pay premiums. But this poses a choice of advice that must be made in connection with the ultimate tax consequences of the rule that the entire community is entitled to a stepped-up basis on the death of either spouse under the provisions of the Internal Revenue Code  

enacted to equalize treatment of residents of community property states with those of common law states, and vice versa. If a sale of property (which might be the subject of partition or gift) is anticipated, the prospect of a stepped-up basis for capital gains purposes must be weighed against any tax benefits that might be gained by gift or partition of the community.  

An interesting characterization argument was advanced by the insurer in Firemen's Insurance Co. v. Burch to limit liability on a policy purchased during marriage with community funds when damages arose from a tort committed by the wife of the insured. In this suit for a declaratory judgment the defendant insurance company argued that liability was fixed by the husband’s property interest in the community estate. The couple were divorced shortly after the tort occurred and the community estate was insufficient to satisfy the claim for damages and far below the policy limit of $10,000. Rejecting the insurer’s argument on the basis of the language of the policy, the Austin court of civil appeals affirmed the lower court’s holding that the insurance company would be liable to the full extent of the policy limits. Though the Texas Supreme Court reversed the decision on other grounds, the reasoning of the court of civil appeals is nonetheless sound.

47 Since the executrix of the estate consented to the inclusion in the taxable estate of an amount equal to one-half the premiums paid, there was no further room for conflict. No difference in result would seem to be anticipated if the Texas wife paid premiums on a policy on her life with her earnings. See also Catalano v. United States, 293 F. Supp. 1300 (E.D. La. 1968).  

48 Int. Rev. Code of 1954, § 1014(b) (6).  

49 But whatever benefits there are in Int. Rev. Code of 1954, § 1014(b) (6) are limited to the continued holding of community property as such until the death of a spouse. For this tax purpose the proceeds of community property cannot be traced into an investment in a tenancy in common, for example, when the spouses move their domicile to a common law state. Rev. Rul. 68-80, 1968 Int. Rev. Bull. No. 7, at 20.  


51 The action arose in a rather circuitous way. An action was commenced by a person injured in a collision with a car driven by the wife of the insured. While this first suit against the wife and husband was pending, the plaintiff sued the defendant-husband’s insurance company for a declaratory judgment that the insurance company should defend the defendant-husband and wife and that the court should make a determination of the extent of liability.  

II. Management and Control

The most significant Texas Supreme Court case decided during the past year was *Land v. Marshall*[^53]. Presumably fearful of the consequences of leaving his wife unfettered control of their community estate during widowhood, the husband without his wife’s knowledge created an *inter vivos* trust consisting of substantially all the community estate, named his daughter as trustee, gave his wife the income for her life, and made his daughter and granddaughter remaindermen of the corpus. The settlor reserved the right (1) to receive all the income of the trust for life, (2) to amend or revoke the trust, (3) to direct investments of the trust corpus, and (4) to demand all the principal at any time or to encumber it as he wished. After the husband’s death, the wife brought suit to have the trust declared invalid[^54] and to obtain her community share of the corpus. The supreme court held the trust was illusory rather than real and it therefore failed. The court’s reason for adopting the illusory trust concept was set forth by Justice Pope:

The central question in this case arises out of an apparent conflict in the law and policy of our community property system. The husband, under Texas law, has managerial powers over the wife’s community interest. However, the husband’s managerial powers do not extend beyond his death so as to allow the husband to dispose of the wife’s community interest by his will. The wife, for that reason, has the right to elect to take under or against her husband’s will when he undertakes to dispose of her community share upon his death. Thus, the question is whether the husband can accomplish by inter vivos trust what he could not do by a will. . . . We believe the paradox can be resolved by the doctrine of illusory trusts. Under the doctrine, the husband has the power to create an inter vivos trust as a part of his managerial powers over the wife’s share; but when her community share is involved, the wife can require the trust to be real rather than illusory, genuine rather than colorable.^[55]

As pointed out elsewhere,^[56] it will often be difficult to determine whether a particular trust is illusory either on its face or on the basis of the facts surrounding its creation. This particular instance gave rise to little doubt since all the elements of control were retained by the settlor.

By invalidating the *entire* trust, the *Land* court went further than the illusory trust doctrine necessarily demands. It would therefore be dangerous to assume that a decree of total invalidity, demanded by the equities of this case, should apply in all illusory trust situations. Of course, the concept’s inherent difficulties of application need not be grappled with in most cases of this sort. The illusory trust principle merely provides a sec-

[^53]: The court’s failure to deal forthrightly with the *lit pendens* issue in Fannin Bank v. Blystone, 417 S.W.2d 502 (Tex. Civ. App. 1967), rev’d, per curiam, 424 S.W.2d 626 (Tex. 1968), noted in 22 Sw. L.J. 129, 138-139 (1968), was its most notable omission.


[^55]: 426 S.W.2d at 846.

ond line of attack after arguments with respect to actual or constructive fraud have been exhausted.58

The strictures of Land v. Marshall are applicable to either spouse in dealing with that part of the community subject to his or her sole management, control and disposition. Another case dealt with the consequences of one spouse's interference in managing property subject to the control of the other. In Herrington v. Pelkey39 the liability of a married woman who purported to contract with regard to certain property not subject to her management was in question. The wife entered into a contract with a real estate broker to sell the family home. The husband was not a party to the contract and had no knowledge of it. The broker found a willing buyer who reached an agreement with the spouses to buy the home. When the broker sued both the husband and wife to recover a commission, the husband was exonerated from liability as he knew nothing of the arrangement between his wife and the broker. The court then freed the wife from liability as well. Because the husband had sole management and control of this community property, the wife's purported undertaking to contract with respect to it was treated as a nullity, giving rise to no liability. This interpretation of article 4626 as amended in 1963 seems dubious at best.61

The precise extent of the power of the competent spouse over community property after the other spouse has been judicially declared incompetent has been long open to question, and articles 4617 and 4618 were amended in 1967 to ease the difficulties of the competent spouses in certain circumstances. In Salvato v. Volunteer State Life Insurance Co.44 the husband's children by a prior marriage contested the power of their father's present wife to make a change of the beneficiary of a community life insurance policy in her favor after the husband had become incompetent. The policy was taken on his life by the husband in favor of his estate, and premiums were paid with community funds. It provided that the beneficiary might be changed only by the insured. The Probate Court apparently declared the husband incompetent and then specifically empowered the wife to manage the entire community estate. When the wife requested that the beneficiary be changed to herself with her estate as alternate beneficiary, the insurance company filed an action for a declaratory judgment to determine whether she had the power as community survivor under Probate Code section 157 to require the company to change the beneficiary. Holding that the wife could compel the insurance

58 As a result of what appears to have been an unfortunate admission on the part of the wife's counsel that no actual or constructive fraud was asserted, the court was unable to consider whether the settlor's acts constituted a constructive fraud of the wife's post mortem rights. Fraud has also sometimes been an element in showing that a trust is illusory. The court stresses this point when it says, "In our opinion fraud may be a basis for invalidating a trust; however, the failure of an illusory trust need not rest on proof of an intent to defraud the wife." 426 S.W.2d at 848.
60 TEX. REV. CIV. STAT. ANN. art. 4626 (Supp. 1968).
63 Id. art. 4618.
company to change the beneficiary, the court noted that although the husband could not make an ultimate diversion of community property to his separate property by naming his estate as beneficiary, neither the company nor those previously named as beneficiaries had a present standing to contest the wife's naming herself beneficiary because of the powers vested in her by section 157. The court left open the question whether the designation by the wife would have the same effect as the husband's designating her as beneficiary; the question of the ownership of the proceeds of the policy, the court concluded, could arise only after the husband's death. But if a similar question should arise under article 4617 as amended in 1967, would such a passive attitude on the part of a court be justified?

A slim trickle of cases continues to raise the issue of a married woman's lack of capacity. Of course, if contractual capacity is challenged, and if the contract was entered into prior to the effective date of the 1963 statute, the point is generally well taken. Mata v. Rangel dealt with the effect of a wife's dealings with Texas realty under article 4614, as amended in 1957. An alleged married woman (a non-resident) made a conveyance of separate realty in Texas to her husband without the husband's joinder and without a privy acknowledgment. At the time of the conveyance in 1958, article 4614 provided that a married woman who was at least twenty-one years old might have sole management of her separate property by filing an acknowledged statement of her election to that effect in the deed records of her county of residence. In the absence of filing such a statement, the husband's joinder in her conveyances of separate realty was required. The Houston court concluded that compliance with article 4614 would have made the husband's joinder unnecessary but that the separate acknowledgment still would have been required. Since the husband had not joined in the conveyance and the deed was not separately acknowledged, it was invalid.

Contracts made by her since 1963 bind a married woman, and a discharge in bankruptcy of the co-obligor husband has no effect on her liability. The persistence of instances of this sort prompts reiteration of the suggestion that unless she has substantial separate property, a wife whose husband is in failing financial circumstances should become a bankrupt along with her spouse if she has joint obligations with him.

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71 In 1961 article 4614 was amended to allow a non-resident to file her statement in the county where the property was located. At the time of the conveyance a non-resident married woman could not, therefore, have taken advantage of the right to manage her separate property without her husband's interference. The amended version of Tex. Rev. Civ. Stat. Ann. art. 4626 (1963) was construed to repeal the necessity of a separate acknowledgment for essential validity of the conveyance in Diamond v. Borenstein, 414 S.W.2d 454 (Tex. 1967). But in that enactment article 1299 was repealed.
III. Suits

In *General Insurance Co. v. Casper* the issue was whether the husband was an indispensable party in a wife's action for workmen's compensation benefits. The wife sustained the injury, divorced her husband, remarried the same man, and then developed permanent incapacity. The court held that without competent evidence of a second divorce prior to the appearance of the incapacity the husband was an indispensable party to the suit under rule 39. Because at least a portion of the benefits accrued during the second marriage and hence constituted community property, the husband's interest in the recovery made him a person "having a joint interest" and therefore a necessary party under the rule.

Under article 4621 as amended (effective January 1, 1968) the wife has sole management of recoveries for her injury. It is submitted that the husband would not be a necessary party in a similar action arising after that time. Even if the action is pleaded under article 4615 as amended (effective January 1, 1968) and the injury sustained may be characterized partly as community property and partly as separate property of the wife, property interests are still irrelevant, for the married woman has the power to manage all recoveries for personal injury under article 4621. The reference in article 4626 to joinder of parties is troublesome but should give way to the more specific language of article 4621.

Though the meaning of the phrase "necessary party" as used in the venue statute is not coextensive with its usage in rule 39, its meaning in the rule may have some bearing on its future construction for purposes of the venue statute. In *Ross v. Katz Employees Credit Union* the husband signed two notes to the credit union, pledging as collateral two accounts therein. One of these accounts was held in the name of husband and wife and the other was held in the name of the wife. On the husband's default, the credit union sued the husband and wife on the notes and for foreclosure of the collateral. The wife filed a plea of privilege to be sued in her county of residence. The court rejected the plea, holding that article 1995(12) allowed bringing the suit at the place where the collateral was situated. As an alternative ground the court found that the wife was a "necessary party" under article 1995(29a) because she had participated in the loan transactions by endorsing a loan check and because she asserted a separate property interest in one of the accounts. By analogy to the *Casper* case, a further reason for her being a "necessary party" could be her community interest in the other account.
In two cases a court of civil appeals dealt with the effect of a divorce decree on a subsequent suit between the ex-spouses concerning the disposition of property in the decree. In the first instance a divorce decree granted the wife a money judgment in lieu of her half interest in the community homestead. When the husband failed to satisfy the judgment, the wife instituted a suit in equity to impress a vendor's lien on the former homestead and to have it sold to satisfy the judgment. She asserted that the divorce decree fixed an equitable vendor's lien on the property by operation of law. The court of civil appeals reversed the trial court's order fixing a vendor's lien on the property and ordering its sale, saying that the same subject had been litigated in the divorce action and hence the matter was res judicata. In the second case in a somewhat similar situation a divorce was granted to the wife. The decree characterized a house and other improvements as community property without characterizing the land upon which the dwelling was situated. Use of the dwelling and improvements were awarded to the wife until the couple's minor child had reached the age of twenty-one. After residing in the house for two years, the wife decided she no longer wished to use it and brought an action seeking that the property be sold as community estate. However, the wife then abandoned this plea and relied on an alternative plea that she be reimbursed for her community share in the improvements. The parties stipulated that the land was the separate property of the husband. The trial court gave a money judgment to reimburse the wife for one-half of the stipulated value of the dwelling and improvements and created a lien on the property in favor of the wife for this amount. In taking an appeal from the trial court's judgment, the husband argued that the matter was res judicata. This argument was rejected by the appellate court in that the question of reimbursement had not been before the divorce court because that judgment was limited to the right to use the property and had provided expressly that there should be no sale of the land except by court order. The court of civil appeals in the subsequent case held, in effect, that if a divorce court does not settle the respective rights of the parties in property claimed by each, a subsequent and separate suit for partition and reimbursement is not precluded.

That setting aside a property settlement between a husband and wife is a proper subject matter for an action between them, even after such a settlement has been approved in a divorce decree, is unquestionable. However, in the absence of a judgment setting aside such an agreement,
the Dallas court of civil appeals in Cole v. Lee held that insofar as disputes between non-residents are concerned, article 1975 is purely discretionary as to the court's jurisdiction. In Cole the wife sued the former husband in Texas to set aside portions of a settlement agreement, for specific performance of other aspects of the agreement, and for recovery of a half interest in Texas real estate alleged to have been the community property of the spouses. The parties had been divorced in the Virgin Islands, the continuing residence of both. In the Texas suit the husband made a special appearance under rule 120a objecting to the jurisdiction of the court under the principle of forum non conveniens. The wife asserted that this was a suit in rem for recovery of title to Texas property and that article 1975 conferred jurisdiction. In affirming the judgment of the trial court in favor of the husband, the court of civil appeals concluded that the settlement agreement must first be rescinded before an action for recovery of realty can be brought, and the proper forum under the forum non conveniens doctrine for the action for rescission of the settlement contract would be the Virgin Islands.

IV. EXEMPT PROPERTY

Fidelity Savings & Loan Ass'n v. Baldwin illustrates a pitfall that may be encountered by lenders who supply funds for improvements on homestead property. The plaintiff-owner had agreed to pay $1,000 down and $15,000 on completion of the house on his homestead property. The contractor assigned the contract to the defendant-interim-financier who advanced $10,400. The contractor abandoned the construction, and the owner completed the house at his own expense of $10,000. When the assignee of the contractor notified the plaintiff of its intent to foreclose its lien, the owner brought suit to enjoin the foreclosure. The court of civil

90 TEX. R. CIV. P. 120a.
91 In this the wife could take little comfort since any suit which she might commence in the Virgin Islands for rescission of the agreement was apparently barred by the Virgin Islands statute of limitations.
92 Many appellate decisions of the past year provided very little to illuminate the already generally settled principles of homestead law. See Englelander Co. v. Kennedy, 424 S.W.2d 305 (Tex. Civ. App.), error ref., per curiam, 428 S.W.2d 806 (Tex. 1968), with respect to the irrelevance of prior statements to third persons in respect to a later homestead claim with respect to the same property as against others, and West v. Austin Nat'l Bank, 427 S.W.2d 906 (Tex. Civ. App. 1968), error ref. n.r.e., as to the inconclusiveness of evidence of removal of furniture and putting up property for sale in determining abandonment. On the surviving spouse's right to partition and sale of the former homestead, see Day v. Day, 421 S.W.2d 703 (Tex. Civ. App. 1967). Maxey v. Citizens Nat'l Bank, 432 S.W.2d 722 (Tex. Civ. App. 1968), may be dismissed as an aberration. There the husband and wife conveyed a vacant lot to a corporation controlled by the husband, and the corporation then constructed a house on the lot which the corporation rented to the husband and wife. The corporation subsequently used the land as security for a loan under a deed of trust, which the holder of the note later sought to foreclose. The husband and wife brought suit to enjoin the sale on the ground that the property was their homestead. Eschewing such an obvious reason for rejecting the petitioners' position as the spouses' inability to claim a homestead of corporate property, the court found that the principal issue was whether the corporation's deed of trust constituted a mortgage on a homestead. The court concluded that the fact situation did not present a mortgage of a homestead because no debt could be shown owing from the husband and wife to the holder of the note who was seeking to foreclose the lien.
93 416 S.W.2d 482 (Tex. Civ. App. 1967), error ref. n.r.e.
appeals held that the defendant-financier was entitled to a personal judgment against the plaintiff-owner for $5,000 ($16,000 contract price minus $1,000 down payment, minus $10,000 necessary to complete the house). But the defendant had no lien since a lien could only arise on substantial performance of the contract by the contractor.

The most significant decisions during the past year with respect to exempt property turned on the use of the exemption statutes and the homestead provisions of the Texas Constitution as a means of hindering, delaying and defrauding creditors. In Bauncum v. Texam Oil Corp., an officer of plaintiff-corporation established a “paper” supplier corporation for the purpose of acting as middle man in the sales of equipment to the plaintiff-corporation. The venture resulted in a substantial profit to the officer. The corporation sued for an accounting, for a constructive trust to be established on property purchased by its officer with his profits, and for an injunction to prevent him from selling that property pending the disposal of the case. Profits of the “paper” corporation had been invested in properties exempt under Texas law from the claims of creditors, and the officer therefore argued that the court could not restrain him from disposing of such property. Relying on First State Bank v. Zelesky, the court of civil appeals held that when property is wrongfully obtained and then converted into “exempt” property, such property will be subject to a constructive trust just as any other property wrongfully obtained because it “never belonged to the individual anyway.” The result was consistent with the long standing rule that “homestead and exemption laws of this State were never intended to be, and cannot be, the haven of wrongfully obtained money or properties.”

For a long time the bankruptcy bar has been aware of serious abuses of the exemption statutes by persons in failing financial circumstances. The notoriety of the Medders case and extensive discussions of the need for constitutional or statutory revision by lawyers and other public bodies evidence considerable public concern in this regard.

An attorney from time to time advises a client in failing financial circumstances to invest non-exempt funds in improving or reducing the indebtedness on his home or to buy productive rental property (e.g., a large apartment building) and to live in a part thereof. More elaborate financial manipulation led to the voluntary petition in bankruptcy in In re Hunter. Adopting a course of conduct as early as July 1966, with

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42 S.W.2d 434 (Tex. Civ. App. 1967), error ref. n.r.e.
423 S.W.2d 434, 442 (Tex. Civ. App. 1967), error ref. n.r.e.
Id.
Nos. 1150-67, 1531-67 (consolidated) (E.D. Tex., petitions filed Feb. 23, 1967), which culminated in the preservation of a rural homestead sumptuously improved with money borrowed under circumstances involving some suspicion of fraud.
The Constitutional Revision Commission, after considerable dispute, has proposed a revision of the constitutional definition. The Committee on Bankruptcy and Reorganization Laws of the Corporation, Banking and Business Section of the State Bar of Texas has statutory revisions under consideration.
Tyler v. Thomas, 6 S.W.2d 310 (Tex. Comm'n App. 1928), judgment adopted.
No. BK-4-350 (N.D. Tex. Apr. 7, 1967), briefly noted in 5 Tex. Lawyers Weekly Let-
the intention of becoming a bankrupt, the debtor procured merchandise on credit and sold it at reduced retail rates sometimes amounting to a loss. He systematically invested the proceeds in property which is enumerated by Texas statutes as exempt from creditors' claims. Presumably to simplify the work of his tax advisors in keeping all his transactions within a single taxable year, the debtor began to wind up his affairs just prior to Christmas, 1966. He procured a certified check and presented it to the savings and loan association which held the mortgage on his home. He also negotiated to buy a large truck and trailer and gave payment therefor. On December 27, 1966, he filed his voluntary petition in bankruptcy. The receiver promptly acted to enjoin the seller from delivering possession of the truck and trailer and disposing of the purchase price and to enjoin payment of the cashier's check. Using the doctrine of constructive trust, the court refused to characterize as exempt property the truck and trailer, the portion of the equity in the home represented by the proceeds of the cashier's check, and five recently purchased cows and their calves. As in Baucum, the referee reached his conclusion by forthright recourse to the doctrine of constructive trust and other general principles of equity, and the conclusions were confirmed by the district judge.

There can be little doubt that the revulsion generated in the public mind by the use of the exemption statutes as an instrument of fraud will bring about some effort to revise existing exemption statutes and perhaps the constitutional definition of the homestead. Such changes, however, should not be made without careful study and close attention to the consequences in relation to titles and related matters.

102 The Referee found that the property claimed as exempt was "purchased with proceeds realized from the sale of merchandise which he ordered and received on credit after he had decided to take bankruptcy." Referee's Opinion at 14, In re Hunter, No. BK-4-330 (N.D. Tex. Apr. 7, 1967).

103 An appeal was taken to the Fifth Circuit Court of Appeals but was subsequently dismissed on motion of the appellant.