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THE COMMINGLING OF SEPARATE AND COMMUNITY FUNDS: THE REQUIREMENT OF TRACING IN TEXAS

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The status of specific items of property as separate or community property is a frequent subject of litigation in Texas courts. This question of status most often arises in one of two situations. The first situation occurs when a creditor is seeking to levy on the community property, and the spouse who did not incur the obligation seeks to invoke the protection of Section 5.61(a) of the Texas Family Code[1] by establishing that the specific property in question is his separate property. The second occasion for such disputes arises upon the dissolution of a marriage by divorce or the death of a spouse, wherein the spouses themselves or their heirs are the contesting parties, seeking to obtain a favorable division of the property in question. It can be argued that the distinction as to separate or community status of property is immaterial in divorce actions, inasmuch as the courts have the statutory discretion to make a division of all property, both separate and community, as they see fit.[2] This contention does not stand up, however, in view of the actual disposition of property being made in the courts, for there has been a tendency to allow each spouse to retain his separate property.[3] Where the courts feel that an unequal division of property is equitable, they often bring this about by an imbalanced allotment of the community property.[4] With this tendency in mind, the distinction, even on divorce, between separate and community property remains significant.

1. TEX. FAM. CODE ANN. § 5.61(a) (1973): "A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law." The protection was formerly afforded to husband and wife, respectively, by TEX. REV. CIV. STAT. ANN. arts. 4613 and 4616 (1960).

2. TEX. FAM. CODE ANN. § 3.63 (1973) states: "In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage."

3. *E.g.*, Harrison v. Harrison, 495 S.W.2d 1 (Tex. Civ. App.—Tyler 1973, no writ); Cusack v. Cusack, 491 S.W.2d 714 (Tex. Civ. App.—Corpus Christi 1973, writ dism'd); Fuhrman v. Fuhrman, 302 S.W.2d 205 (Tex. Civ. App.—El Paso 1957, writ dism'd). Prior to enactment of Section 3.63 of the Texas Family Code, the law expressly forbade divestiture of title to a spouse's separate realty on divorce. TEX. REV. CIV. STAT. ANN. art. 4638 (1960).

4. *E.g.*, Cusack v. Cusack, 491 S.W.2d 714 (Tex. Civ. App.—Corpus Christi 1973, writ dism'd); Dorfman v. Dorfman, 457 S.W.2d 417 (Tex. Civ. App.—Texarkana 1970, no writ); Buckler v. Buckler, 424 S.W.2d 514 (Tex. Civ. App.—Fort Worth 1968, writ dism'd).

The focal point of this discussion will be the examination of the problems a spouse encounters in claiming specific property (whether personalty or realty) as his separate property, when he has allowed it to be intermixed with property belonging to the community. Analysis will be made of the presumptions he must overcome, the burden of proof he must carry, and the relief to which he will be entitled if he is successful in proving his claim.

BACKGROUND AND PRESUMPTIONS

One of the most basic principles in the scheme of Texas marital property law is the presumption that all property acquired during marriage is community property.[5] Closely allied with this is the presumption that all property in the possession of the spouses at the time of the dissolution of a marriage is community.[6] In general, the former principle protects creditors of the community during marriage, while the latter protects each spouse and his heirs from fraud by the other spouse upon termination of the marriage. These presumptions have been codified, and are succinctly expressed in the current Section 5.02 of the Texas Family Code.[7] A spouse who seeks to prove the separate status of property which has been commingled with community property will quickly realize the strength of the aforementioned presumptions, and the difficulty of overcoming them. To be sure, they are rebuttable presumptions, but the quantum of proof is high. The most frequent characterizations of the degree of proof required are "clear and convincing" and "clear and satisfactory."[8] One case described the requirement as "between a preponderance of the evidence and evidence beyond a reasonable doubt."[9] What is specifically required to overcome the presumption that property has a community status is for the party asserting separate ownership to trace the original separate property into the particular assets on hand at the time of the dispute.[10]

5. Wilson v. Wilson, 145 Tex. 607, 609, 201 S.W.2d 226, 227 (1947); Magee v. Young, 145 Tex. 485, 487, 198 S.W.2d 883, 885 (1947); Hardee v. Vincent, 136 Tex. 99, 102, 147 S.W.2d 1072, 1073 (1941); Purdom v. Boyd, 82 Tex. 130, 135, 17 S.W. 606, 608 (1891).

6. Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. Sup. 1965); Cox v. Miller, 54 Tex. 16, 25 (1880); Wright v. Wright, 3 Tex. 168, 179 (1848); Kirtley v. Kirtley, 417 S.W.2d 847, 853 (Tex. Civ. App.—Texarkana 1967, writ dism'd); Duncan v. Duncan, 374 S.W.2d 800, 802 (Tex. Civ. App.—Eastland 1964, no writ); Stanley v. Stanley, 294 S.W.2d 132, 135-36 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.), *cert. denied*, 354 U.S. 910 (1957).

7. TEX. FAM. CODE ANN. § 5.02 recites that "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property." Its predecessor was TEX. REV. CIV. STAT. ANN. art. 4619 (1960).

8. Van v. Webb, 147 Tex. 299, 302, 215 S.W.2d 151, 152 (1948); Wilson v. Wilson, 145 Tex. 607, 610, 201 S.W.2d 226, 227 (1947); Harkness v. McQueen, 232 S.W.2d 629, 633 (Tex. Civ. App.—Beaumont 1950, no writ).

9. Thomas v. Thomas, 277 S.W. 210, 212 (Tex. Civ. App.—Beaumont 1925, writ dism'd).

10. McKinley v. McKinley, 496 S.W.2d 540, 543 (Tex. Sup. 1973); *In re* Marriage

Where a spouse succeeds in tracing his separate property, another principle of law comes into play, but this time it favors such a spouse. Sometimes known as the mutations doctrine, it provides that the mere exchange of separate property for other property does not bring about such commingling as would cause the loss of the separate property status and conversion into community.[11] Chief Justice Stayton expressed the principle in this way:

> Property purchased with money, the separate property of husband or wife, or taken in exchange for the separate property of either, becomes the separate property of the person whose money purchases or whose property is given in exchange, in the absence of some agreement, express or implied, to the contrary . . . .[12]

The principle of mutations is based on the settled rule that the status of property is determined at the moment of its acquisition,[13] dependent on facts existing at that time.[14] And, in the absence of significant recitals to the contrary,[15] a factual determination of which estate furnished the consideration for a purchase is determinative of the status of the property acquired. The policy behind the courts' adoption of this position is the preservation and protection of the separate or community property interests of the respective spouses.

THE TRACING OF SEPARATE PROPERTY: STRICT CONSTRUCTION

The simplest type of tracing, identity tracing, may be illustrated by the very early case of *Rose v. Houston*.[16] In *Rose* the wife showed that she had sold her separately owned tract of land, receiving in return a promissory note, which was likewise held to be her separate property.[17] This type of case poses little or no difficulty, as it merely involves separate property which has undergone a mutation in form, but which is susceptible of being clearly and indisputably traced and identified. Where transactions become more complex, particularly where a spouse has permitted his separate prop-

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of Greer, 483 S.W.2d 490, 493 (Tex. Civ. App.—Amarillo 1972, writ dism'd); Cox v. Cox, 439 S.W.2d 862, 865 (Tex. Civ. App.—San Antonio 1969, no writ).

11. Chapman v. Allen, 15 Tex. 278, 283 (1855); Rose v. Houston, 11 Tex. 324, 325 (1854); Farrow v. Farrow, 238 S.W.2d 255, 257 (Tex. Civ. App.—Austin 1951, no writ) ("[T]he separate character of property is not affected by any number of changes and mutations in its form.")

12. Dixon v. Sanderson, 72 Tex. 359, 362, 10 S.W. 535, 536 (1888).

13. Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 430 (Tex. Sup. 1970); John Hancock Mut. Life Ins. Co. v. Bennett, 133 Tex. 450, 458, 128 S.W.2d 791, 795 (1939); Gleich v. Bongio, 128 Tex. 606, 611, 99 S.W.2d 881, 884 (1937); Dakan v. Dakan, 125 Tex. 305, 317, 83 S.W.2d 620, 627 (1935).

14. Hilley v. Hilley, 161 Tex. 569, 574, 342 S.W.2d 565, 568 (1961); Kellett v. Trice, 95 Tex. 160, 169, 66 S.W. 51, 54 (1902).

15. For a comprehensive analysis of the significance of recitals in a determination of the status of property, see Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEXAS L. REV. 1 (1962).

16. 11 Tex. 324 (1854).

17. *Id.* at 326.

erty to be mingled indiscriminately with community property, the mutations doctrine begins to break down, and the strong presumption of the entire mass being characterized as community property is raised. Since the Texas courts have dealt with the problem of tracing for over a century, one would expect that a clear-cut set of guidelines would have been established, defining what is, or is not, successful tracing. But in the following survey of significant case law, it will become apparent that the courts have varied between a strict and lenient approach to the tracing requirement, to such a degree that the Texas attorney may be unable to predict with any degree of certainty whether the mode of tracing which his client has adopted will be considered sufficient to preserve his separate property interests.

A majority of Texas cases dealing with the tracing problem have taken a rather dogmatic approach, literally requiring the party asserting separate ownership to trace his separate funds, dollar for dollar, into the existing asset of which he claims ownership. Typical of this stance is *Hardee v. Vincent*,[18] where a wife sought to enjoin the sheriff from executing on certain goods and fixtures in satisfaction of a judgment rendered against her husband. The wife alleged that the items sought to be levied upon were her separate property, and thus not subject to execution for a liability created by her husband. The husband testified that he had begun the business with his wife's separate funds, that she owned the business, and that he was merely her employee. The court held that since community property (the profits of the business) had been reinvested therein, and since the wife had failed to show which specific items on hand were bought with her separate funds and which with community funds, the entire mass would be subject to the presumption of community property.[19] The court was clearly endorsing a public policy which protects third parties who deal with husband and wife, and who must rely on appearances because they have no access to knowledge of the actual status of property.

The specificity with which tracing must be accomplished is depicted by *Lindemood v. Evans*,[20] and *West v. Austin National Bank*.[21] In *Lindemood*, a husband sold his separate realty and deposited the proceeds in a joint bank account. He later made a withdrawal from the joint account, in a lesser amount, and deposited it in his separate account. Finally, he purchased the realty whose status was disputed, with funds from this separate account. The court held that when the funds were deposited in the joint account, they lost their identity through commingling with community funds, causing the land purchased with these funds to be considered community.[22]

18. 136 Tex. 99, 147 S.W.2d 1072 (1941).
19. *Id.* at 103, 147 S.W.2d at 1074.
20. 166 S.W.2d 774 (Tex. Civ. App.—San Antonio 1942, writ ref'd).
21. 427 S.W.2d 906 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.).
22. Lindemood v. Evans, 166 S.W.2d 774, 775-76 (Tex. Civ. App.—San Antonio 1942, writ ref'd).

In *West*, the trial court held that a $4,000 down payment made by the testator on certain property was derived from his separate property. The court reasoned that shortly before making the payment, the testator had received $4,000 from the sale of his separate realty. Thus, the $4,000 was considered to have been successfully traced into the newly acquired property. This determination, however, was reversed on appeal, the court finding that there was not sufficient proof that the money used in the two transactions was the *same* $4,000. The appellate court implied that the "chain of custody" of the $4,000 could have been demonstrated if the testator had put the funds into a bank account as soon as he received them, and then withdrawn them to make the purchase.[23] This approach seems unreasonably harsh; yet even more strict applications of the tracing requirement can be found. One of the most severe occurred in *Schemltz v. Garey*,[24] in which the plaintiff, in order to establish his claim, attempted to prove that certain property was the separate property of one Reuben Wright. Wright testified that he had about $100,000 in separate funds when he married. He made additions to, and withdrawals from, this account with community funds. Further, he showed that in each year prior to suit, the withdrawals of community funds exceeded the deposits, thus depleting his original $100,000 of separate funds. It was contended that since the disputed property was bought out of the remaining proceeds of the original account, it was clearly separate property.[25] The court nevertheless held the property to be community, stating that Wright was unable to trace the particular funds used in the purchase.[26]

It is apparent that the rationale behind the above opinions is that of resolving any doubts in favor of the community. One reason for this is that the individual possessing separate property has the burden of administering it in such a way as will preserve its integrity. His error in permitting commingling should result in a loss to him rather than the community (and thus the innocent spouse), all other factors being equal. The inference which one could draw from these oppressive decisions is that virtually any time separate funds are mingled with community funds, such as by deposit in one bank account, they completely lose their identity and can never be successfully traced. If this were clearly the law in Texas, harsh as it might be, both laymen and attorneys could seek to act in accordance with it. But

23. West v. Austin Nat'l Bank, 427 S.W.2d 906, 908-09 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.).

24. 49 Tex. 49 (1878).

25. *Id.* at 60.

26. The court pointed out that this was:

> [A] case in which it was necessary to trace the means through mutations and changes, and this should have been done 'clearly and indisputably.' The means invested should have been traced back to the separate estate, not through indefinite channels and unknown changes, but connectedly and plainly.

Id. at 61 (citations omitted).

there are a number of decisions, some very recent, which adopt a more lenient view of the tracing requirement, and thus make a definitive statement of the law in this regard difficult.

It is noteworthy that a legislative effort was made to somewhat clarify the status, at least of funds deposited in an individual account under the name of one spouse, by creating a presumption that such funds would be the separate property of that spouse.[27] But the Texas Supreme Court, in *Hodge v. Ellis,*[28] held that, notwithstanding the statute, such a presumption would not apply in a contest between spouses and their heirs. Today the statutory presumption of separate property under such circumstances no longer exists.[29]

Lenient Construction of the Tracing Requirement

Farrow v. Farrow[30] proposes a more reasonable view of tracing. At the time of marriage, the husband had $29,000 in the bank, and his wife had separate realty which she sold shortly after the wedding for $3,000, which was deposited in the same account. During the marriage, the husband carried on a real estate business, in which he kept careful records; the profits and expenses of the business were deposited and withdrawn from the same account. Under the logic we have heretofore seen expressed, a finding of total commingling would not have been surprising. But in this case, the trial court awarded the wife the proceeds from the sale of her separate realty. The court of civil appeals affirmed, opining that one dollar has the same value as another and that there is no commingling if the number owned by each claimant is known.[31] In *Farrow* the concept was refuted that all funds deposited in one account become, *per se*, commingled beyond identification—an idea which was implicit in *Schmeltz* and *Lindemood.*

There have been other isolated cases in which the courts have accepted less than specific tracing of separate funds into the assets on hand at the time of the dispute. In *Sibley v. Sibley*,[32] where the wife's separate funds were on deposit in the same account with community funds, the court em-

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27. Tex. Rev. Civ. Stat. Ann. art. 4622 (1960) (repealed by Acts 1969, 61st Leg., ch. 888, § 6, at 2707) stated:

> Funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

28. 154 Tex. 341, 352, 277 S.W.2d 900, 907 (1955).

29. Rippy v. Rippy, 49 S.W.2d 494, 496 (Tex. Civ. App.—Austin 1932, writ ref'd) held that the presumption created by article 4622 was never meant to supplant the general presumption of community property.

30. 238 S.W.2d 255 (Tex. Civ. App.—Austin 1951, no writ).

31. *Id.* at 257.

32. 286 S.W.2d 657 (Tex. Civ. App.—Dallas 1955, writ dism'd).

ployed a trust theory, awarding the wife her separate funds, while painting an overly optimistic picture of the whole tracing situation:

> In divorce proceedings our courts have found no difficulty in following separate funds through bank accounts. Equity impresses a resulting trust on such funds in favor of the wife and where a trustee draws checks on a fund in which trust funds are mingled with those of the trustee, the trustee is presumed to have checked out his own money first . . . .
>
> The community moneys in [a] joint bank account of the parties are therefore presumed to have been drawn out first, before the separate moneys are withdrawn.[33]

The court went on to state that since there were sufficient funds in the bank at all times to cover the wife's separate estate balance at the time of the divorce, such balance would be presumed to be her separate funds.[34] The stance taken in this case is seemingly contradictory to that of *Schmeltz*, under relatively similar circumstances. A notable distinction between the two cases, however, is the fact that in *Sibley*, the spouse (wife) who successfully claimed separate property had entrusted that property to the other spouse. In *Schmeltz*, on the other hand, the spouse (husband) who unsuccessfully asserted separate ownership was himself responsible for the commingling which took place. Implicit in the comparison is a concept of fault in commingling, where a spouse responsible for the confusion of his own funds will bear a heavier burden of proof in tracing than will a spouse who was a passive party to the commingling. Clearly, the *Sibley* presumption (that community funds are deemed to have been withdrawn first) would not prevail in a situation where it was the spouse's own funds which had been commingled with community funds.

In an extreme case at the liberal end of the spectrum, *Spencer v. Green*,[35] a deed recited that the property in dispute was paid for by Mrs. Green, out of her separate property. She had kept the money used to make the purchase in a bank account in which she had also deposited community funds. In effect relieving her of any burden of tracing, the court, speaking of the presence of funds from both estates in a single account, stated "it is not thought that this is sufficient, standing alone, to establish that she had so commingled her separate and community funds that such could not be distinguished," and held that the money paid for the property was her separate funds.[36] It is difficult to justify this decision in view of the fact that the party asserting separate ownership was the one responsible for commingling her separate funds with those of the community. Seemingly, the

33. *Id.* at 659 (citations omitted).
34. *Id.* at 659. The circumstances here foreshadow the "net accounting" theory of tracing which will be discussed hereinafter.
35. 203 S.W.2d 957 (Tex. Civ. App.—El Paso 1947, no writ).
36. *Id.* at 960.

weight of the deed recitation was overcome by evidence of the commingled status of the account from which the purchase money was drawn. Given that status, it should have devolved upon Mrs. Green to come forward with sufficient evidence to clearly trace and identify the funds used in the purchase as separate funds.

Tracing on a Net Accounting Basis

The most significant departure from specific, dollar-for-dollar tracing, and one which has met with some acceptance by the courts, may be termed the "Net Accounting" method. Ideally, under this method, the claimant asserting a right to separate property attempts to first show that at the time of the marriage, he possessed a certain amount of separate property, usually funds. Secondly, he concedes that there has been a commingling of his separate property with that of the community. Finally, he shows that over the term of the marriage, or at least over the period from the time of commingling until the dispute arose, the *community* withdrawals exceeded the community deposits. The logical conclusion sought to be drawn is that the remaining funds, or property purchased with the remaining funds, must be separate property. Such a conclusion, if accepted, would sustain a claim of separate property without the necessity of specific tracing by the claimant. As an alternative to the third step suggested above, the claimant may show that the commingled mass has grown throughout the marriage, concluding that the original balance of separate funds must still be contained in the now larger community estate. The argument has received a varied response from the courts, and its final acceptance or rejection still awaits a decisive pronouncement by the Texas Supreme Court.

In two early cases in which this net accounting procedure was sought to be used, it met with courts which strictly construed the presumption of community property and refused to accept anything less than specific tracing of separate property into particular assets on hand. In both *York v. Hilger*[37] and *Rippy v. Rippy*,[38] husbands proved the amount of separate assets they had upon entering marriage, demonstrated that their transactions with commingled community funds resulted in a net loss which cut into their separate funds, and sought to have the remainder declared separate property. The argument failed in both cases because the husband had allowed the commingling to take place, and the courts adamantly held to the position that this constituted a loss of the separate identity of the funds.[39]

More recent cases have met with a more yielding position in the courts.

37. 84 S.W. 1117 (Tex. Civ. App. 1905, no writ).

38. 49 S.W.2d 494 (Tex. Civ. App.—Austin 1932, writ ref'd).

39. York v. Hilger, 84 S.W. 1117, 1119 (Tex. Civ. App. 1905, no writ); Rippy v. Rippy, 49 S.W.2d 494, 496 (Tex. Civ. App.—Austin 1932, writ ref'd).

The 1947 case of *Coggin v. Coggin*[40] involved a wife who had deposited rents from her separate lands (community property) into an account in which she had separate funds. She was able to demonstrate that the expenditures from the account for living expenses (community expenses) were greater than the deposits into the account from rents. The court agreed that this removed the possibility of her having commingled community funds with separate funds and held that certain properties she purchased from the account acquired separate property status.[41] In so doing, the court implictly recognized a distinction between mingling of funds in the common sense of the word, and "commingling," in the legal sense. In *Coggin*, the court accepted the proposition that where a net loss of funds results from community transactions, there is no corpus of community assets to be commingled with separate funds, even where all funds are kept in one account. Similarly, in *Barrington v. Barrington,*[42] the husband carried on a tire shop business, using the same bank account for his business and separate funds. He was able to demonstrate that the net withdrawals for his business exceeded the net deposits, and the court agreed that this obviated the application of the commingling doctrine which would forfeit the husband's separate estate to the community.[43] In *Gifford v. Gabbard,*[44] the net accounting method was applied in a suit by a creditor. Mrs. Gabbard sought to prevent execution of a judgment against her husband on an automobile she claimed as her separate property. She testified that she had established a business with her separate funds, and that, as of the time of the purchase of the car, the business was operating at a net loss, so the car could not have been purchased with business profits (community property). The court accepted her contentions, citing *McDaniel v. State Fair*[45] for a correct definition of profits, and adopting the view that without profits, there were no community funds, foreclosing the possibility of commingling.[46] The logic of the accounting method is appealing, and would certainly change the law as applied in *Schmeltz*. It lends itself particularly to situations involving a family business, where careful records of deposits and withdrawals would normally be kept; but it is applicable as well where the community withdrawals are merely for domestic expenses, provided they can be convincingly dem-

40. 204 S.W.2d 47 (Tex. Civ. App.—Amarillo 1947, no writ).
41. *Id.* at 52.
42. 290 S.W.2d 297 (Tex. Civ. App.—Texarkana 1956, no writ).
43. *Id.* at 304-05.
44. 305 S.W.2d 668 (Tex. Civ. App.—El Paso 1957, no writ).
45. 286 S.W. 513 (Tex. Civ. App.—Dallas 1926, writ ref'd).
46. Gifford v. Gabbard, 305 S.W.2d 668, 671 (Tex. Civ. App.—El Paso 1957, no writ). The court in McDaniel v. State Fair, 286 S.W. 513, 516 (Tex. Civ. App.—Dallas 1926, writ ref'd) stated:

> [T]he word profit . . . means . . . as to a commercial enterprise, the difference between the combined cost of the stock of merchandise and all operating expenses and the total receipts of said business—the difference where there is a gain over the investment representing the profits of the business and, where the returns are less than the investment, a loss to the business.

onstrated. These cases evidence a departure from a theory of fault, in commingling situations, to a position respecting a reasonable mathematical demonstration of equities.

In 1957, the United States Court of Appeals for the Fifth Circuit, purporting to apply Texas law, permitted a husband to avoid the forfeiture of his separate estate, through a variation of the net accounting method, despite commingling of separate and community funds.[47] The husband offered evidence tending to prove the maximum amount of community funds which could have been in the commingled mass. This was in fact a tracing in reverse, of the community funds, with a denomination of the remaining assets as separate.

Current Status of Net Accounting Tracing

The Supreme Court of Texas had occasion to deal with a net accounting theory of tracing in the 1965 case of *Tarver v. Tarver.*[48] The suit was initiated by a wife against her husband for partition of their community property after their divorce. The husband's children by a former marriage intervened, seeking to recover half the property on hand at dissolution of the second marriage, since they had never received their share of the community property from the first marriage after their mother had died. In the words of the court:

> [T]hey [the intervenors] argue that they discharged their burden of tracing . . . when they proved (1) the amount, character and value of the first community estate at the time of their mother's death; (2) that Tarver used the entire estate in his business, selling the property and investing the proceeds as his own and mixing and mingling their interest with his; (3) that he acquired no property from any other source and had no other income; and (4) the amount, character and value of the property on hand at the time of the divorce.[49]

The court disagreed with the intervenors, and affirmed the trial court's decision that they had not discharged their burden of tracing.[50] The subsequent case of *In re Marriage of Greer*[51] interpreted *Tarver* as refuting "before and after" accounting as a valid method of tracing.[52] This, however, may be too broad a generalization. The unusual factual situation in *Tarver* may hold the answer as to why the attempted tracing was insufficient. The intervenors were not merely suing a father who had withheld their share of community funds (with their approval); they would be ne-

47. Duncan v. United States, 247 F.2d 845 (5th Cir. 1957).

48. 394 S.W.2d 780 (Tex. Sup. 1965).

49. *Id.* at 784.

50. *Id.* at 785.

51. 483 S.W.2d 490 (Tex. Civ. App.—Amarillo 1972, writ dism'd). (Husband showed amount of separate assets on hand at marriage, and again at time of divorce, and contended that the net increase was community property.)

52. *Id.* at 495.

gating, if successful, the common labors of a second marriage of 40 years' duration. The efforts of Tarver and his second wife increased the value of their community assets from $50,000, at one point, to $340,000. To award the intervenors half of that amount would have been a travesty of justice. In addition, they did not follow the guidelines for tracing by net accounting provided by prior cases. After identifying the community property left at their mother's death, the intervenors should have been satisified in recovering one-half of their father's half of the proceeds of the second community, rather than seeking one-half of the total community assets. The former would have been a more valid reflection of the amount of their separate property which was commingled with property of the second community by their father.

Though the court in *Tarver* held the tracing attempt therein unsuccessful, it neither implicitly nor explicitly refuted the net accounting method of tracing in general. It is unfortunate that the state's highest court let pass an opportunity to voice its thoughts on an unclear and frequently litigated area of the law. Its denial of the intervenors' argument in *Tarver*, with little explanation, left the future of the net accounting method of tracing a matter of speculation. The subsequent case of *Waheed v. Waheed*[53] rejected plaintiff's comparison of net worth at the time if marriage and reduced net worth at the time of divorce as a valid tracing procedure, citing both *Tarver* and the infamous *Schmeltz* case as authority. It is to be hoped that *Tarver* does not plunge the Texas Courts of Civil Appeals back into the dark age of strict, unyielding, dollar-for-dollar tracing of separate funds into specific assets at the time of the dispute, as the minimum prerequisite to the recovery of separate property.

There is evidence that not all courts interpret the *Tarver* decision as refuting net accounting, and perhaps not even the supreme court itself. In *DePuy v. DePuy*,[54] the spouses had a joint account with a small amount of money in it. The husband then deposited $66,000 which he received by inheritance into the account. Several investments were made from the account, which the husband sought to have declared his separate property. It was proven that the income and the living expenses of the couple were approximately equal during the marriage. Relying on *Farrow, Barrington,* and *Coggin*, the court held that the husband's separate funds were not so commingled with community funds as to defy segregation of the items claimed as separate property.[55] The court apparently felt that *Tarver*'s rejection of a similar method of tracing was confined to its own particular situation.

The most recent, but by no means the final, opinion of the Texas Supreme

53. 423 S.W.2d 159, 160-61 (Tex. Civ. App.—Eastland 1967, no writ).
54. 483 S.W.2d 883 (Tex. Civ. App.—Corpus Christi 1972, no writ).
55. *Id.* at 888.

Court on tracing came in *McKinley v. McKinley.*[56] The court exemplified a quite liberal approach to tracing, and reversed the appellate court's decision (which relied on *Tarver.*)[57] The decedent husband had $9,500 in separate funds on deposit in a bank account. After some 35 transactions in the account,[58] involving deposits and withdrawals of community funds, he purchased a $10,400 savings certificate, which the executor claims was the decedent's separate property. Noting that decedent had sufficient separate funds to cover $9,500 of the savings certificate, the supreme court refused to accept the contention that those separate funds had been lost by commingling with community funds.[59] Unfortunately, the court did not detail its rationale. Yet, one of two conclusions is justified. The court may be considered to have approved an attempt at tracing by net accounting, in that decedent's original amount of separate funds was shown, commingling was admitted, and the remaining asset was large enough to include those separate funds. In the absence of specific language, however, it would be presumptuous to read such an endorsement into the opinion. Clearly, though, there is an acceptance of a relaxed tracing requirement as to funds commingled in one account. No longer are funds so deposited deemed to have automatically lost their identity, with the accompanying loss of separate funds into the community. It is encouraging to note that in its most recent pertinent decision, the Texas Supreme Court is willing to accept a reasonable quantum of evidence as sufficient to trace separate funds into a purchase therefrom, rather than the stringent requirements of earlier courts.

In *McKinley* there is demonstrated an important basic principle of marital property law. Normally, the purpose of a party in attempting to trace his separate property is to establish ownership of either the original property, or of its current mutation. But when tracing of the separate property proves that one part of the purchase price of the asset presently on hand was separate, and the remainder community, a tenancy in common between the two estates results with respect to the property in question. Each estate owns a share in proportion to the amount of funds it furnished for the purchase.[60]

In circumstances where tracing is sufficient to prove the advancement of funds from one estate for the benefit of the other, but is insufficient to es-

56. 496 S.W.2d 540 (Tex. Sup. 1973).

57. 483 S.W.2d 310, 314 (Tex. Civ. App.—Tyler 1972), *rev'd*, 496 S.W.2d 540 (Tex. Sup. 1973).

58. *Id.* at 312-13 n.1 (fact-finding no. 15).

59. McKinley v. McKinley, 496 S.W.2d 540, 543 (Tex. Sup. 1973).

60. *Id.* at 543; *accord*, John Hancock Mut. Life Ins. Co. v. Bennett, 133 Tex. 450, 460, 128 S.W.2d 791, 796 (1939); Gleich v. Bongio, 128 Tex. 606, 610, 99 S.W.2d 881, 883 (1937); Hartman v. Hartman, 253 S.W.2d 480, 483 (Tex. Civ. App.—Austin 1952, no writ); Edsall v. Edsall, 240 S.W.2d 424, 428 (Tex. Civ. App.—Eastland 1951, no writ).

tablish ownership of the specific property involved, the spouse may be able to avail himself of the equitable remedy of reimbursement. Reimbursement is an important alternative, for it requires a lesser quantum of proof, in that mathematical precision is not a requisite.[61]

THE RIGHT OF REIMBURSEMENT

There are many situations in which a spouse may have expended separate funds either in conjunction with, or in lieu of, community funds, but where he cannot trace his funds so as to give rise to ownership of the specific asset. This occurs where realty of one estate has been improved by the use of funds from the other estate; it also happens where one estate has initially acquired property, but installments of the purchase price are paid with funds from the other estate. In the former case, the estate which advanced the money for the improvement cannot claim ownership of the improvement, because fixtures become the property of the owner of the soil.[62] Also, it must be noted that there is a presumption which must be overcome in this situation—that funds used for improvements have been furnished by the estate improved.[63] In the installment purchase situation, one paying such installments from his separate funds, after initial purchase by the community, cannot claim ownership, because the status of the property is determined at the time of acquisition,[64] and it would therefore be community property. This rule is subject to qualification, as in the case where part of the purchase price is paid in cash and the remainder is secured by a note binding only the other estate. In such a case, both estates acquire an interest in the property at the time of acquisition.[65]

Although the spouse who has expended separate funds in this manner cannot lay claim to ownership, he is not without remedy. By proving that such an advancement of funds has taken place, the spouse will entitle himself to reimbursement from the other estate.[66] This rule applies whether the estate contributing the improvement is the community or a separate estate.[67] Reimbursement is not a right, title, or interest in the property sought

61. Fulwiler v. Fulwiler, 419 S.W.2d 251, 252 (Tex. Civ. App.—Eastland 1965, no writ).

62. Dakan v. Dakan, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935); Furrh v. Winston, 66 Tex. 521, 524, 1 S.W. 527, 529 (1886); Rice v. Rice, 21 Tex. 58, 66 (1858).

63. Welder v. Lambert, 91 Tex. 510, 526-27, 44 S.W. 281, 287 (1898); Younger v. Younger, 315 S.W.2d 449, 452 (Tex. Civ. App.—Waco 1958, no writ); King v. King, 218 S.W. 1093, 1096 (Tex. Civ. App.—San Antonio 1920, writ dism'd); Darden v. Taylor, 126 S.W. 944, 947 (Tex. Civ. App. 1910, no writ).

64. *See* note 14 *supra.*

65. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881 (1937).

66. Burton v. Bell, 380 S.W.2d 561, 567 (Tex. Sup. 1964); Dakan v. Dakan, 125 Tex. 305, 318, 83 S.W.2d 620, 627 (1935).

67. Dakan v. Dakan, 125 Tex. 305, 318, 83 S.W.2d 620, 627 (1935).

to be charged, but is an equity.[68] It does not constitue a lien on the property but is susceptible of being enforced by a lien.[69]

Inasmuch as reimbursement is an equitable remedy, it does not lend itself to unbending rules of application. In practice, however, the courts have arrived at a set of principles applicable to many frequently faced circumstances. In cases where installments of the purchase price of property have been paid on behalf of one estate with the funds of another estate, the measure of reimbursement is the amount of money advanced.[70] Where the property of one estate has been improved with the use of funds from the other estate, there were at one time two distinct lines of authority as to what the measure of reimbursement should be. One view was that the cost of the improvement was the amount to be returned to the estate making the advancement.[71] In opposition to the cases advocating cost-reimbursement, there were numerous cases stating that the correct measure of reimbursement was the enhanced value of the improved property.[72] The 1935 landmark case of *Dakan v. Dakan*[73] considered both views and opted for the enhanced-value rule.[74] This has now become the settled rule of law in Texas,[75] except in the case of the improvements of a mineral estate.[76] The

68. Burton v. Bell, 380 S.W.2d 561, 564 (Tex. Sup. 1964); Dakan v. Dakan, 125 Tex. 305, 319, 83 S.W.2d 620, 628 (1935); Hayworth v. Williams, 102 Tex. 308, 314, 116 S.W. 43, 45 (1909); Schmidt v. Huppmann, 73 Tex. 112, 116, 11 S.W. 175, 176-77 (1889); Curtis v. Poland, 66 Tex. 511, 513, 2 S.W. 39, 40 (1886); Furrh v. Winston, 66 Tex. 521, 524, 1 S.W. 527, 529 (1886).

69. For a thorough study of the relationship of the right to reimbursement and the enforcement of that right by impressment of a lien, see Bartke, *Yours, Mine and Ours —Separate Title and Community Funds*, 21 BAYLOR L. REV. 137 (1969).

70. Dakan v. Dakan, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935); Rowe v. Gilbert, 276 S.W.2d 583, 587 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); Hartman v. Hartman, 253 S.W.2d 480, 483 (Tex. Civ. App.—Austin 1952, no writ); Hillen v. Williams, 60 S.W. 997, 998 (Tex. Civ. App. 1901, no writ).

71. Furrh v. Winston, 66 Tex. 521, 524, 1 S.W. 527, 529 (1886); Bond v. Hill, 37 Tex. 626, 628 (1873); Rice v. Rice, 21 Tex. 58, 66-67 (1858).

72. Herndon v. Reed, 82 Tex. 647, 653, 18 S.W. 665, 667 (1891); Thomas v. Quarles, 64 Tex. 491, 493 (1875); Pynes v. Pynes, 225 S.W. 777, 780 (Tex. Civ. App. —Texarkana 1920, no writ); Lynch v. Lynch, 130 S.W. 461, 463 (Tex. Civ. App. 1910, writ ref'd); Hillen v. Williams, 60 S.W. 997, 998 (Tex. Civ. App. 1901, no writ).

73. 125 Tex. 305, 83 S.W.2d 620 (1935).

74. *Id.* at 320, 83 S.W.2d at 628.

75. Lindsay v. Clayman, 151 Tex. 593, 600, 254 S.W.2d 777, 781 (1952); Daniels v. Daniels, 490 S.W.2d 862, 863 (Tex. Civ. App.—Eastland 1973, writ dism'd); *In re* Marriage of Greer, 483 S.W.2d 490, 497 (Tex. Civ. App.—Amarillo 1972, writ dism'd); Harris v. Royal, 446 S.W.2d 351, 352 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.); Waheed v. Waheed, 423 S.W.2d 159, 163 (Tex. Civ. App.—Eastland 1967, no writ).

76. Norris v. Vaughan, 152 Tex. 491, 501, 260 S.W.2d 676, 683 (1953). The reason for the exception is explained in Cone v. Cone, 266 S.W.2d 480, 484 (Tex. Civ. App.—Amarillo 1953, writ dism'd) (The value of the oil in place is not enhanced by the drilling of wells; such drilling merely creates the means to extract a part of the mineral estate; therefore, the enhancement rule cannot be applied, as in the normal situation of reimbursement.)

logic of cost-reimbursement is, obviously, to return to a given estate exactly what it advanced. The theory behind enhanced-value reimbursement is to recognize that when one estate has made an investment, it should be entitled to the full benefit thereof, with no unjust enrichment accruing to the party on whose land the improvement was made.

There is another set of circumstances, involving neither purchase price nor improvements, where reimbursement comes into play. This results when one estate advances money for the benefit of the other, as where a spouse furnishes separate capital for use in the community business, and then seeks reimbursement upon dissolution of the marriage, even though specific tracing has become impossible. The Texas Supreme Court allowed such reimbursement in *Schmidt v. Huppmann*,[77] wherein the husband owned a business at the time of marriage, and had $2,000 stock in trade. Upon the death of his wife, the husband was awarded a $2,000 reimbursement from community funds.[78] The policy behind the award, though he was unable to trace his separate property into existing assets, was apparently to reward, rather than penalize, a spouse who used his separate funds to create and develop the community estate. More recently, *Hartman v. Hartman*[79] reached the same result under similar facts. The court stated that it would be grossly inequitable to forfeit the husband's separate property, where he had used it for the benefit of the community.[80] A common ground in the two cases is that the total assets increased, due to the investment by the husband. A contrary result was reached in *Moor v. Moor*,[81] where there was a decrease in the assets due to the dealings of the husband. He had invested his separate funds, for the benefit of the community, and had allowed commingling to take place, to the point where tracing was not possible. Due to his dealings, the commingled mass dropped in value from $82,000 to $38,000, and he sought reimbursement of the $36,000 separate funds he initially advanced. The claim was not allowed, the court feeling that when a spouse allows commingling, and then through poor investments lowers the value of the commingled mass, he should not be able to get back

77. 73 Tex. 112, 11 S.W. 175 (1889).
78. *Id.* at 114, 11 S.W. at 175.
79. 253 S.W.2d 480 (Tex. Civ. App.—Austin 1952, no writ). In *Hartman*, the husband had over $37,000 in separate funds which he invested in a community business enterprise. Though his separate funds became commingled beyond segregation, and no tracing was possible, the court allowed him reimbursement from the assets on hand at the time of dissolution.
80. *Id.* at 482. The court made this determination even though it realized that: "It is obvious from appellee's own testimony that his separate and community funds have been indiscriminately used to either buy or improve all of the real estate set aside to him in the judgment." *Id.* at 483. The case was remanded to the trial court with instructions to give the appellee either reimbursement or part ownership of the realty, even though he was unable to trace.
81. 255 S.W. 231 (Tex. Civ. App.—San Antonio 1900, no writ).

his own investment and force the community to bear the brunt of his poor management.[82]

It is an inconsistent principle, to be sure, when a spouse who invests his separate property for the benefit of the community, may either be penalized or rewarded for so doing, depending on the eventual success of the investment. It would be a better policy to consistently provide reimbursement, to whatever extent is possible in these circumstances; this would serve to encourage the advancement of separate funds to sustain and increase the community estate, and avoid the holding back of separate funds by spouses to the detriment of the community, out of a fear of losing those funds.

CONCLUSION

The equitable principle of reimbursement may provide a desirable alternative to establishing ownership by tracing. As Professor Huie stated, "Allowing reimbursement for separate funds absorbed into the community tends to simplify the community property system by keeping to a minimum the difficulties and complexities incident to ownership tracing."[83] It has utility in situations where even successful tracing would not lead to ownership (as in the purchase and improvement situations detailed above). Furthermore, it can be used in some cases where a claimant has allowed commingling but is unable to meet the requirements of tracing, at least in those cases where the advancement of separate funds has resulted in a successful investment and overall increase in the commingled mass. Reimbursement has the further advantage of requiring less than mathematical precision. Once the right to reimbursement has been established, the degree of reimbursement can be approximated on equitable principles, with far less specificity than is required for ownership tracing. Since reimbursement may be accorded in a commingling situation, in which specific tracing is not possible, it would be wise for the responsible advocate attempting to trace his client's separate funds into ownership of specific assets, to plead in the alternative for reimbursement. This is particularly true in light of the multifarious opinions of Texas appellate courts as to the specific requirements of tracing, and the comparative silence of the Texas Supreme Court in the face of this dilemma.

82. *Id.* at 236-37.

83. Huie, *Commentary on the Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. ANN. 1, 27 (1960).