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DIVISION OF MARITAL PROPERTY ON DIVORCE: A PROPOSAL TO REVISE SECTION 3.63

J. BRIAN SOKOLIK

The manner in which courts have historically dealt with the division of the property of the spouses upon divorce calls for a revision of our divorce statutes. In most jurisdictions the husband is the one who "pays" for the divorce in the majority of cases. Such payment may be in the form of alimony, or of an unequal division of the property of the spouses, or both depending on the jurisdiction. Some jurisdictions penalize a spouse for transgressions of cruel treatment or adulterous conduct.¹ Many jurisdictions justify the unequal treatment afforded the spouses in the name of equity.²

Nowhere does the unequal division of property in divorce suits appear to be more unjust than in a community property state such as Texas.³ Property rights and the equality of the spouses regarding those rights are the very cornerstones of the community property system.⁴ Texas is unique even as a community property state in that it has no provision for permanent alimony,⁵ therefore the subject matter of property awards on divorce in Texas is necessarily confined to court ordered division of property.⁶

1. *E.g.*, IDAHO CODE ANN. § 32-712(2), (3) (Supp. 1974).

2. *See, e.g.*, *Stephens v. Stephens*, 288 S.W.2d 957, 959 (Ark. 1956); *Hartman v. Hartman*, 34 N.W.2d 137, 139 (Wis. 1948). *See generally* 27B C.J.S. *Divorce* § 291(1), at 260 (1959); 24 AM. JUR. 2d *Divorce and Separation* § 925, at 1052, 1053 (1966).

3. The other community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico and Washington. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20 (1967).

4. W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 11.1, at 24 (2d ed. 1971); Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 40 (1967).

5. Currently TEX. FAMILY CODE ANN. § 3.59 (1975) only contains a provision for temporary alimony. The statute allows for payments in support of the wife and discriminates against the husband by allowing him the same "if he is unable to support himself." It appears that a husband must be incapacitated whereas a wife may receive temporary payments whenever necessary. Permanent alimony has been held to be against public policy in Texas. *Francis v. Francis*, 412 S.W.2d 29, 32 (Tex. 1967); *Brunell v. Brunell*, 494 S.W.2d 621, 623 (Tex. Civ. App.—Dallas 1973, no writ).

6. In addition to a court ordered division of property, the parties are permitted to draft their own property settlement as well as contract for permanent alimony. *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967); *Shaw v. Shaw*, 483 S.W.2d 825, 826 (Tex. Civ. App.—San Antonio 1972, no writ). Child support which is normally incident to a divorce is clearly distinguishable in its use and purpose from the adjustment of property rights between the parties and therefore will not be covered in this comment. Texas has a separate statute which provides for the custody and support of the children of spouses undertaking a divorce action. *See* TEX. FAMILY CODE ANN. § 3.55 (1975).

BIENES GANANCIALES⁷

Texas inherited, by way of Mexico, the Spanish ganancial system of marital property.⁸ In 1836 the Republic of Texas officially provided for the adoption of the common law of England with modifications as the rule of decision within its constitution,⁹ and later provision was made to retain the community property system of marital rights.¹⁰ The purpose for adopting a system which is strikingly different from the common law was to provide protection for the wife so that she did not suffer the same disabilities of coverture which a wife residing in a common law state had to endure.¹¹ The common law regarding property rights did not acknowledge the wife as a person capable of holding property; all her rights to her personal property acquired before and after marriage became her husband's property.¹² The ganancial system on the other hand, recognized a woman as a distinct person in the eyes of the law even while married. It protected the wife's right to ownership of property to the extent that all the separate property of both husband and wife remained separate, and each spouse owned a vested one-half undivided interest in the community property.¹³

The ganancial system is founded on the theory of equality of the spouses.¹⁴ This system has the attributes of a partnership in which "both partners con-

7. "Bienes gananciales in Spanish law is that property held in community by husband and wife, having been acquired or gained by them during the marriage." W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1, at 1, n.2 (2d ed. 1971). For a more extensive coverage of the origins and peculiarities of this system see W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971); McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. WEST. L. REV. 117 (1971); Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20 (1967).

8. McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. WEST. L. REV. 117 (1971).

9. TEX. CONST. art. IV, § 13 (1836). See also McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. WEST. L. REV. 117, 118-19 (1971).

10. TEX. CONST. art. VII, § 19 (1845).

11. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 11.1, at 24, 25 (2d ed. 1971); 1 E. OAKES, SPEER'S MARITAL RIGHTS IN TEXAS § 92, at 121 (4th ed. 1961).

12. H. PLATT, THE PROPERTY RIGHTS OF MARRIED WOMEN § 1, at 1 (1885).

13. *Id.* § 7, at 5; Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 26, 34 (1967).

14. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 26-27 (1967). The only inequality within the ganancial system which can be alleged by opponents of the system is that the wife was not permitted to manage the assets of the marriage. The husband was the exclusive manager of the community. Proponents of the system reason that biological and practical factors required the husband to be appointed the business manager. See Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 46 (1967). Texas has become the vanguard of change in this regard, for the wife has now achieved total equality in management rights. See TEX. FAMILY CODE ANN. § 5.22 (1975); *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974). See also Note, 6 ST. MARY'S L.J. 933 (1974).

tributed to the partnership all of their time and efforts and the use of and revenue from all their individual capital.”¹⁵ Furthermore, the “profits” of the partnership are equally divided on dissolution of the marriage.¹⁶ This equal division is one of the features of the ganancial system which most of the American community property states have completely altered.¹⁷

THE TEXAS COMMUNITY PROPERTY SYSTEM

Within the Texas marital property system there are three estates which exist concurrently within a marital relationship: the wife’s separate estate, the community estate (in which each spouse owns a vested undivided one-half interest), and the husband’s separate estate.¹⁸ The Texas Constitution defines community property merely by designating a wife’s separate property.¹⁹ A definition of community property is also included in the Texas Family Code which describes the property in terms of both spouses but does not enlarge the constitutional definition.²⁰

In a divorce the court must first classify any property involved in the marriage as either separate or community as determined by the constitutional definition.²¹ Once the estates have been clearly identified the court can render

15. Huie, *Commentary on the Community Property Laws of Texas*, 13 TEX. REV. CIV. STAT. ANN. § 1, at 2 (1960). See also Jackson, *Community Property and Federal Taxes*, 12 SW. L.J. 1, 2 (1958); Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 40 (1967).

16. Huie, *Commentary on the Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. ANN. § 1, at 2 (1960).

17. Six of the eight states allow a district court to exercise its discretion when dividing the community property. California and Louisiana are the only states which require an equal division like the ganancial system. See CAL. CIV. CODE ANN. § 4800 (Deering 1972); LA. CIV. CODE ANN. art. 2406 (West 1971).

18. TEX. FAMILY CODE ANN. § 5.01 (1975).

19. TEX. CONST. art. XVI, § 15. See also *Commission v. Wilson*, 96 F.2d 766, 768-69 (5th Cir. 1935). Although the constitution defines the separate property of the wife alone, the Texas Supreme Court has held that under the “implied exclusion” method all other property of the spouses is community property. See *Graham v. Franco*, 488 S.W. 2d 390, 392 (Tex. 1972); *Arnold v. Leonard*, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925).

20. Separate property under both the constitution and the Family Code includes property acquired by a spouse before marriage, property acquired during marriage by gift, devise or descent, and the separate property created by a partition agreement of the parties; all other property is community property. TEX. CONST. art. XVI, § 15; TEX. FAMILY CODE ANN. §§ 5.01, 5.42 (1975). The legislature is prohibited from enlarging the constitutional definition. *Arnold v. Leonard*, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925).

21. *Cooper v. Cooper*, 513 S.W.2d 229, 232 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); *Davis v. Davis*, 495 S.W.2d 607, 610 (Tex. Civ. App.—Dallas 1973, writ dism’d). See also Comment, *Partitioning Community Property*, 2 ST. MARY’S L.J. 219, 220 (1970). A court when classifying the property employs the statutory presumption that on divorce all property is presumed to be community property. TEX. FAMILY CODE ANN. § 5.02 (1975). This is a strong presumption but the party who asserts otherwise may rebut it by “tracing” his separate property from the inception of its title and proving it remained separate. For an excellent review of the law of tracing, see Com-

an equitable division.²² This area of the Texas community property system is distinctly different from the Spanish ganancial system, for the legislature has instructed the courts to carry out this division, not equally, but in a manner which the court deems "just right."²³

Since 1841 the Texas courts have been empowered by the legislature to exercise discretion in dividing the property of spouses upon divorce.²⁴ Abuse of this discretion has been alleged many times on appeal but appellate courts have been reluctant to find such abuse.²⁵ The extent of this broad power is illustrated by the fact that even if a verdict is rendered by a jury as to how the property should be divided, it is the court "and not the jury that is charged with the responsibility of making a division of the property."²⁶

The extent to which the district court may exercise its discretion can be seen from some of the early and present day cases. In *Fitts v. Fitts*²⁷ the Texas Supreme Court recognized that the community property of the spouses was the primary fund which should be the subject of an equitable division, and expressly acknowledged the trial court's power in certain cases to subject the separate property to charges "*especially in favor of the wife*" to bring about a just division.²⁸ Charges brought against the separate property of the husband were not considered divestiture of title to realty and therefore were held to be permitted by the statute.²⁹ *Trimble v. Trimble*,³⁰ decided the

ment, *The Commingling of Separate and Community Funds: The Requirement of Tracing in Texas*, 6 ST. MARY'S L.J. 234 (1974).

22. Comment, *Partitioning Community Property*, 2 ST. MARY'S L.J. 219, 220 (1970).

23. TEX. FAMILY CODE ANN. § 3.63 (1975).

24. "Until revised in 1969 the basic Texas divorce law dated back to An Act Concerning Divorce and Alimony §§ 1-14 [1841] Tex. Laws 19-22, 2 H. Gammel, Laws of Texas 483-86 [1898]." McKnight & Raggio, *Family Law*, 25 Sw. L.J. 34 n.1 (1971). The district court's discretion in this area is so wide as to be almost unlimited. *Daniels v. Daniels*, 490 S.W.2d 862 (Tex. Civ. App.—Eastland 1973, no writ); *Berdoll v. Berdoll*, 398 S.W.2d 397, 399 (Tex. Civ. App.—Austin 1966, no writ); *Barry v. Barry*, 162 S.W.2d 440, 442 (Tex. Civ. App.—Galveston 1942, no writ); *Hamm v. Hamm*, 159 S.W.2d 183, 185 (Tex. Civ. App.—Fort Worth 1942, no writ).

25. See, e.g., *Hudson v. Hudson*, 308 S.W.2d 140, 141 (Tex. Civ. App.—Austin 1957, no writ); *Stanley v. Stanley*, 294 S.W.2d 132, 137 (Tex. Civ. App.—Amarillo 1956, ref'd n.r.e.); *Bush v. Bush*, 237 S.W.2d 708, 710 (Tex. Civ. App.—Amarillo 1950, no writ); *Bagby v. Bagby*, 186 S.W.2d 702, 706 (Tex. Civ. App.—Amarillo 1945, no writ).

26. *Bagby v. Bagby*, 186 S.W.2d 702, 705 (Tex. Civ. App.—Amarillo 1945, no writ). See also *Becker v. Becker*, 299 S.W. 528, 530 (Tex. Civ. App.—El Paso 1927, no writ). The discretionary power of a trial court judge has been described by Justice Funderburk: "The writer cannot escape the conviction that in practical effect the exercise of judicial discretion by a trial judge means doing as he pleases, unguided by law . . ." *Barger v. Mineral Wells Clay Prod. Co.*, 80 S.W.2d 333, 334 (Tex. Civ. App.—Eastland 1935, no writ).

27. 14 Tex. 443 (1855).

28. *Id.* at 450 (emphasis added). The emphasis illustrates that very early in the history of Texas a wife was favored in a divorce.

29. *Id.* at 450. The same rationale can be seen in later cases. See, e.g., *Hedtke v. Hedtke*, 112 Tex. 404, 410, 248 S.W. 21, 22 (1923); *Rice v. Rice*, 21 Tex. 58, 69

same year as *Fitts*, held that, considering the particular equities involved, a decree granting two-thirds of the community property to the wife and one-third to the husband was not an abuse of discretion.³¹ Thus, it appears that the early interpretation of the degree of trial court discretion over community property allowed the court to make as unequal a division as it deemed right. Title to separate realty could not be divested, but there could be charges levied against it, especially in favor of the wife.

The most perplexing problem with which courts have had to contend was the prohibition against divesting a spouse of title to realty.³² Confusion existed for over one hundred years as to which estates were included in that prohibition.³³ Each spouse owns a vested undivided one-half interest in the community estate; therefore it appeared that if the court was statutorily prohibited from divesting a spouse of title to realty, the prohibition includes the title of each spouse in the community realty. The statute did not read "title to separate realty," which would unequivocally apply only to separate property, but read "divest himself or herself of the title to real estate."³⁴ The statute might very well have been intended to prohibit the courts from divesting title to both separate and community realty. In one of the earliest cases to encounter this controversy, the Texas Supreme Court held that the statute was meant to prohibit trial courts from divesting a spouse of title to either separate or community realty.³⁵ The court stated that the decree would operate to divest the husband of title to real estate even though the

(1858); *Bush v. Bush*, 237 S.W.2d 708, 710 (Tex. Civ. App.—Amarillo 1950, no writ) (wife awarded life estate in husband's separate realty held not to be divestiture of title to realty).

30. 15 Tex. 19 (1855).

31. *Id.* at 20.

32. Article 4638, the predecessor of Section 3.63 of the Texas Family Code, reads:

The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. *Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.*

Tex. Laws 1841, An Act Concerning Divorce and Alimony §§ 1-14, at 19-22, 2 H. GAMMEL, LAWS OF TEXAS 483-86 (1898), cited in McKnight & Raggio, *Family Law*, 25 Sw. L.J. 34, n.1 (1971). This section was amended by TEX. FAMILY CODE ANN. § 3.63 (1975).

33. See Comment, *Hailey, Hilley, and House Bill 670—A Study in Partition and Survivorship in Texas Community Property*, 15 Sw. L.J. 613, 614 (1961). This confusion has been evidenced even in cases of recent origin. See, e.g., *Maisel v. Maisel*, 312 S.W.2d 679 (Tex. Civ. App.—Houston 1958, no writ); *Walker v. Walker*, 231 S.W.2d 905 (Tex. Civ. App.—Texarkana 1950, no writ); *Swanson v. Swanson*, 229 S.W.2d 843 (Tex. Civ. App.—El Paso 1949, no writ); *Puckett v. Puckett*, 205 S.W.2d 124 (Tex. Civ. App.—Texarkana 1947, no writ); *Lewis v. Lewis*, 179 S.W.2d 594 (Tex. Civ. App.—Fort Worth 1944, no writ).

34. Tex. Laws 1841, An Act Concerning Divorce and Alimony §§ 1-14, at 19-22, 2 H. GAMMEL, LAWS OF TEXAS 483-86 (1898), cited in McKnight & Raggio, *Family Law*, 25 Sw. L.J. 34, n.1 (1971).

35. *Tiemann v. Tiemann*, 34 Tex. 522 (1871).

realty was community property, and that it was not within the power of the court to do so because of the prohibition in article 4638.³⁶

This decision did not resolve the conflict; considerable confusion continued to exist in regard to the proper interpretation of divestiture of title to realty as contained in the statute.³⁷ In 1960 the supreme court in *Hailey v. Hailey*³⁸ finally settled this controversy:

That part of Article 4638 contained in the last sentence, which prohibits the divestiture of title by either party to real estate, has no application to the community real estate but applies to the separate property of each party.³⁹

After *Hailey* courts were prohibited from divesting a spouse of title to separate realty, although they could "charge" the separate estate of a spouse with the support of the other spouse.⁴⁰ A court could also defeat title and interest to community realty by vesting the entire title to all the community realty in one spouse.⁴¹ Thus, after *Hailey* the law appeared to be well settled. The controversy was inadvertently revived in 1969, however, when the legislature omitted the prohibition against divestiture of title to realty in enacting Section 3.63 of the Family Code.⁴² The immediate problem of interpretation was whether the courts would continue to follow *Hailey* in limiting the prohibition to separate realty, or whether the courts would construe the legislative omission as authorization to divest title to separate realty.

The recent case of *Wilkerson v. Wilkerson*⁴³ is an indication of the manner in which the divorce courts might choose to deal with this problem. In *Wilkerson* the trial court held that the property at issue constituted the community property of the spouses even though the wife successfully traced a certain portion of the purchase money to her separate property.⁴⁴ It appears that the trial court attempted to avoid the statutory omission problem by finding that the separate interest and the community interest together amounted

36. *Id.* at 525. The decree of the trial court stated "all title or claim set up to the same [community realty] by defendant [husband] is hereby annulled and vacated." *Id.* at 524-25.

37. Cases cited note 33 *supra*.

38. 160 Tex. 372, 331 S.W.2d 299 (1960).

39. *Id.* at 376, 331 S.W.2d at 303.

40. *Hedtke v. Hedtke*, 112 Tex. 404, 409, 410, 248 S.W. 21, 22-23 (1923); *Fitts v. Fitts*, 14 Tex. 443, 450 (1855); *Ex parte Gerrish*, 42 Tex. Crim. 114, 116, 57 S.W. 1123, 1124 (1900).

41. *See, e.g., Reardon v. Reardon*, 163 Tex. 605, 607, 359 S.W.2d 329, 330 (1962) (relied on *Hailey* for authority).

42. TEX. FAMILY CODE ANN. § 3.63 (1975). One of the original drafters of the Family Code believes it was an oversight or a draftsman's error. *See McKnight, Matrimonial Property*, 27 Sw. L.J. 27, 39 (1973). In May 1966 Professor McKnight was designated by the Family Code Council as Director of its Family Code project. McKnight, *Recodification of Matrimonial Property Law*, 29 TEX. B.J. 1000, 1002 (1966).

43. 515 S.W.2d 52 (Tex. Civ. App.—Tyler 1974, no writ).

44. *Id.* at 55

to community property,⁴⁵ for by so doing a court can divest a spouse of title to realty which it has determined to be community property.⁴⁶ In affirming the disposition the Tyler Court of Civil Appeals appears to have disregarded that the separate estate of the wife, even when mixed with community, is hers alone.⁴⁷ It is well settled that in a case where funds from both the wife's separate estate and the community estate are used to purchase property, these estates assume the status of "a sort of tenancy in common between the separate and community estates."⁴⁸ In *Wilkerson* the court stated, "[i]n her suit for a divorce and division of property, appellant, in effect, called on the court to partition the [property in issue] . . ."⁴⁹ Therefore, the court could have chosen to achieve a result more consistent with the principles governing the partition of property held by tenants in common by following the rule stated in *Chace v. Gregg*.⁵⁰ That case involved a petition of partition land between the devisees of a husband who had bequeathed certain lands to his wife and son. Discussing the basic nature of such a partition the court said,

A partition between joint owners . . . has the effect only to dissolve the tenancy in common, and leave the title as it was before, *except to locate such rights as the parties may have*, respectively, in the distinct parts of the premises, and to extinguish such rights in all other portions of that property.⁵¹

Partition suits are proceedings in equity⁵² and therefore consideration is given by a court to adjusting the equities between the parties.⁵³ In a partition action not involving a divorce the particular equities involved often concern reimbursement to one of the co-tenants for expenditures or improvements on the property.⁵⁴ It is difficult to comprehend how such reimbursements can be equated to the equitable considerations involved in dividing property in a divorce suit.⁵⁵ Fault, future earning ability, and age are some of the factors which a court considers in a partition of marital property.⁵⁶

45. *Id.* at 55.

46. *Hailey v. Hailey*, 160 Tex. 372, 376, 331 S.W.2d 299, 302-303 (1960).

47. *See Gleich v. Bongio*, 128 Tex. 606, 610-11, 99 S.W.2d 881, 883 (1937).

48. *Id.* at 610-11, 99 S.W.2d at 883.

49. *Wilkerson v. Wilkerson*, 515 S.W.2d 52, 56 (Tex. Civ. App.—Tyler 1974, no writ).

50. 88 Tex. 552, 32 S.W. 520 (1895).

51. *Id.* at 558, 32 S.W. at 522 (emphasis added).

52. *Thomas v. Southwestern Settlement & Dev. Co.*, 132 Tex. 413, 424, 123 S.W.2d 290, 296 (1939).

53. *See, e.g., Tompkins v. Hooker*, 200 S.W. 193, 197 (Tex. Civ. App.—Texarkana 1917, no writ); *Johnson v. Johnson*, 191 S.W. 366, 369 (Tex. Civ. App.—Texarkana 1917, no writ).

54. *Cleveland v. Milner*, 141 Tex. 120, 127, 170 S.W.2d 472, 476 (1943); *Whitmire v. Powell*, 103 Tex. 232, 236, 125 S.W. 889, 890 (1910).

55. *Wilkerson v. Wilkerson*, 515 S.W.2d 52, 55 (Tex. Civ. App.—Tyler 1974, no writ).

56. *Id.* at 55.

These same factors, however, are never taken into account in a partition between co-tenants who are not spouses. In a non-marital partition without such considerations the end result is protection and enforcement of vested legal rights in property, whereas under the current method of marital property partition these vested property rights are frequently summarily extinguished under the discretion of the trial court. The right of married individuals to own property would be better protected if the principle of partition pronounced in *Chace* were adhered to in divorce actions. In *Wilkerson* the rights of the parties in the disputed property were obvious; the wife and the community each had a vested right in the property in proportion to the amount each had contributed to the purchase price.⁵⁷ The partition would have been more equitably accomplished if the court had determined the rights of the parties in accordance with *Chace*,⁵⁸ thus more strictly protecting the right of individuals, even as spouses, to own property.

Wilkerson was the first case decided after the enactment of Section 3.63 of the Texas Family Code in which a spouse was divested of separate property. That divestiture was accomplished through the court's interpretation of the legislative intent behind section 3.63: since the statute did not specifically limit the discretionary powers of courts in divorce to the community property, the Tyler court found that such discretion also extended to the parties' separate estates.⁵⁹ A more realistic construction of the statute would have resulted in a finding that the statute's use of the term "estate" in the singular allows no other interpretation than to mean only the community estate.⁶⁰

In Texas there are three estates which exist concurrently within a marriage—the wife's separate estate, the community estate, and the husband's separate estate.⁶¹ Had section 3.63 included the term "estates" in the plural, then all three of these estates would obviously have been intended to be included.⁶² There is only one estate common to both parties in the marriage, and that is the community estate. Therefore by the term "estate of the parties" only the one common estate of both parties could have been intended.

57. *Id.* at 55; see *Gleich v. Bongio*, 128 Tex. 606, 610-11, 99 S.W.2d 881, 883 (1937).

58. *Chace v. Gregg*, 88 Tex. 552, 558, 32 S.W. 520, 522 (1895).

59. *Wilkerson v. Wilkerson*, 515 S.W.2d 52, 55 (Tex. Civ. App.—Tyler 1974, no writ).

60. See *McKnight, Dissolution of Marriage*, 5 TEX. TECH. L. REV. 320, 338 (1974).

61. TEX. FAMILY CODE ANN. § 5.01 (1975).

62. Washington, another community property state, has statutorily designated the estates which are subject to division to include both "community and separate property." Wash. Laws 1st Extra Sess. 1973, ch. 157, § 8, at 840. Community and separate property of the parties cannot be construed to mean other than the three estates which exist in marriage. The Texas Legislature could have expressed its intent in the same manner had they wished to do so.

The mere omission of the prohibition as to separate realty without a change in the word "estate" from the singular to plural should not empower the divorce courts to decide that legislative authorization now exists to divest title to separate realty.

The language of section 3.63 has been described by Professor McKnight as a draftsmen's error and a legislative oversight,⁶³ and the *Wilkerson* decision illustrates that courts may interpret section 3.63 to mean other than that which was intended by the Texas Legislature.⁶⁴ If the legislature had intended to endow the courts with a power which had been denied them for approximately 130 years, surely the legislature would have drafted the statute in such a manner so as to unequivocally vest in the courts power to divest title to separate realty.

Arizona, another community property state, has adopted language almost identical to Texas Article 4638 into its divorce statute.⁶⁵ The divorce courts of that state had a similar problem regarding the intention of the legislature by the use of the singular "property" of the parties. The Arizona Supreme Court in *Collier v. Collier*⁶⁶ interpreted this language to refer only to the community property:

Although this section provides: 'On entering a decree of divorce the court shall order such division of the property of the parties as to the court shall seem just and right', the phrase 'the property of the parties' can only refer to the community property of the parties.⁶⁷

By emphasizing the critical phrase "*of the property of the parties*," it appears that the court was addressing the issue of the use of the singular "property" instead of "properties." The use of the term "property" instead of "estate"

63. Professor McKnight stated:

The commentary of the draftsmen distributed to the members of the committee was simple and concise with respect to this provision [section 3.63]: This is a codification of the present law.

McKnight, *Matrimonial Property*, 27 Sw. L.J. 27, 39 n.95 (1973). It amounted to a mere unintentional legislative omission as Professor McKnight later stated:

When Section 3.63 was drafted and presented to the legislature in 1969, another oversight occurred. The proviso against divestiture of realty had been dropped out of the proposed revision, though the section was presented to the legislature as unchanged.

Id. at 39.

64. Other courts have held that a district court has the power to divest separate title to realty but *Wilkerson* is the first case where a court actually exercised such power. See, e.g., *Schreiner v. Schreiner*, 502 S.W.2d 840, 849 (Tex. Civ. App.—San Antonio 1973, writ dism'd); *In re Marriage of McCurdy*, 489 S.W.2d 712, 718 (Tex. Civ. App.—Amarillo 1973, no writ); *Medearis v. Medearis*, 487 S.W.2d 198, 200 (Tex. Civ. App.—Austin 1972, no writ).

65. See ARIZ. REV. STAT. ANN. § 25-318 (1956).

66. 242 P.2d 537 (Ariz. 1952).

67. *Id.* at 541 (court's emphasis). The court later stated that their interpretation was inescapable due to the inclusion in the statute of the prohibition as to separate realty. *Id.* at 541. Although Texas has dropped that prohibition, the retention by the legislature of the singular "estate" can have only one logical interpretation, that is the community estate.

by the Arizona Legislature does not detract from the court's interpretation for the two words may be used interchangeably.⁶⁸

There is a further problem involved in the statutory authority for division of the estate of the parties. The Texas Constitution defines community property,⁶⁹ and this definition may not be altered by either the courts or the legislature:

We have no doubt that the people in adopting the Constitution in 1845, as in 1876, understood that it was intended to put the matter of the classes of property constituting the wife's separate estate beyond legislative control. Thereby both the wife and the husband were *given constitutional guaranty* of the status of all property Our duty is plain to give effect to the peoples' will.⁷⁰

Thus, by dividing the community estate between the parties courts create separate property, and by assigning the separate property of one spouse to the other they transform the separate property of one spouse into the property of the other. There is no provision in the Texas Constitution for creating separate property in this manner.

The legislature has previously followed the constitution by defining separate property in Section 5.01 of the Family Code and by incorporating the constitutional provision for a partition agreement into section 5.42.⁷¹ To enable section 3.63 to remain viable under the constitution and in order to retain the basic constitutional definition of community property, it is necessary to correct its present inconsistency with the Constitution. The legislature and the courts in the future should answer the constitutional question as stated by Professor McKnight:

In the light of the constitutional definition can the divorce court in dissolving a marriage go beyond partition to change community property

68. *Hedtke v. Hedtke*, 112 Tex. 404, 408, 248 S.W. 21, 22 (1923). CAL. CIV. CODE ANN. § 4800 (Deering 1972), like Texas section 3.63, makes no mention of the separate estate of either party and the California Supreme Court has held that the court in a divorce proceeding has no jurisdiction to deal with the separate property of a spouse. *Allen v. Allen*, 113 P. 160, 162 (Cal. 1911); *accord*, *Middlecoff v. Middlecoff*, 324 P.2d 669, 672 (Cal. Ct. App. 1958). Section 4800 of the California Civil Code specifically designates the community property as the only property within the jurisdiction of the court. It is submitted that, Texas uses the word estate to refer to community property and therefore without specific mention of the power of the court as to the separate estate of each party there is no jurisdiction of the court over the separate estate of either party.

69. TEX. CONST. art. XVI, § 15.

70. *Arnold v. Leonard*, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925); *accord*, *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966). *Arnold* also holds:

It is a rule of construction of constitutions that ordinarily when the circumstances are specified under which any right is to be acquired there is an implied prohibition against legislative power to either add to or withdraw from the circumstances specified.

Arnold v. Leonard, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925). Therefore the legislature may not give to a spouse a new right to the other spouse's property or create a new right (ownership) out of the community property.

71. TEX. FAMILY CODE ANN. § 5.42 (1975).

into separate property or convert the separate property of one spouse into that of the other?⁷²

DIVORCE IN THE COMMUNITY PROPERTY STATES

In searching for a practical answer to this question the legislature might consider the laws and practice in the other community property states. These seven states may be divided into four categories according to their treatment of the division of property on divorce: those which (1) allow the court discretion to divide community property but specifically prohibit divestiture of title to separate property;⁷³ (2) allow the court discretion to divide the community property with no prohibition as to divestiture of title to separate property;⁷⁴ (3) allow the court discretion to divide community property and divest title to separate property;⁷⁵ and those which (4) allow the court *no* discretion and require *equal* division of the community property with no authority over separate property.⁷⁶

The Arizona statute retains the proviso prohibiting divestiture of separate property.⁷⁷ In addition Arizona has made provision for a lien against separate property for securing payment of any equity which the other spouse may have in such property or to secure payment of any allowance for the wife or minor children.⁷⁸ Similar provisions exist within the common law in Texas.⁷⁹

Idaho recognizes no separate property except the separate homestead.⁸⁰ The Idaho statute also provides for "punishment" of the guilty spouse in a divorce suit by specifically allowing the court to assign to the "innocent" party

72. McKnight, *Matrimonial Property*, 27 Sw. L.J. 27, 39 (1973). In addressing itself to the above problem the legislature should also correct an additional flaw in that provision of section 3.63 which reads "having due regard for the rights of each party and any children of the marriage." Under the Texas Constitution and statutes which apply to community property, there is no provision granting to the children of a marriage any rights whatsoever in the property or estates of that marriage. The principle of "forced heirship" existed under the Spanish ganancial system whereby the children had a vested right to a portion of their parents' property which could not be disposed of by a testator parent. See *Budd v. Fischer*, 17 Tex. 423, 426 (1856); *Crain v. Crain*, 17 Tex. 80, 90 (1856); *Hagerty v. Hagerty*, 12 Tex. 456 (1854). Today no such provision of "forced heirship" exists within Texas law; therefore section 3.63 is untenable in this regard. The phrase in section 3.63 pertaining to the children of the marriage should be eliminated by the legislature, for it is mere surplusage which district courts may construe as a property right of the children.

73. ARIZ. REV. STAT. ANN. § 25-318 (Supp. 1972).

74. IDAHO CODE ANN. § 32-712 (Supp. 1974); NEV. REV. STAT. § 125.150 (1973).

75. N.M. STAT. ANN. § 22-7-6 (Supp. 1973); Wash. Laws 1st Extra Sess. 1973, ch. 157, § 8, at 840.

76. CAL. CIV. CODE ANN. § 4800 (Deering 1972); LA. CIV. CODE ANN. art. 2406 (West 1971).

77. ARIZ. REV. STAT. ANN. § 25-318(A) (Supp. 1972).

78. *Id.* § 25-318(D).

79. See, e.g., *Fitts v. Fitts*, 14 Tex. 444, 450 (1855).

80. IDAHO CODE ANN. § 32-712(3) (Supp. 1974).

for a limited period the separate homestead property of the guilty party.⁸¹ Although section 3.63 makes no similar provision, the principle has been applied in Texas.⁸² Nevada allows divorce courts the same discretion as Idaho except it enlarges a court's authority to the extent that any of the separate realty or personality of the husband may be "set apart" for the support of the wife or children.⁸³ The New Mexico statute vests divorce courts with discretion to award either separate property or community property to a spouse.⁸⁴ Washington in like manner allows complete discretion as to either of the estates of the parties and specifically provides "property . . . of the parties, either community or separate."⁸⁵ The Tyler Court of Civil Appeals' construction of section 3.63 in *Wilkerson v. Wilkerson*⁸⁶ construes our statute as being similar to those of Washington and New Mexico. Unlike the statutes in those two states, however, section 3.63 contains no specific reference to the separate estate of a spouse.

California and Louisiana are the only community property states that retain the basic ganancial principles of absolute equality in the property division on dissolution of the marriage. The partnership concept of marriage as propounded by the ganancial system seems to fit well in today's world where a woman is considered her husband's equal and partner. California and Louisiana do not allow the divorce court any discretion in dividing the community property of the spouses, nor does the court have jurisdiction over any of the separate property.⁸⁷ Their statutes require an equal division of the community property,⁸⁸ precisely what the ganancial system allowed.⁸⁹ Under the current California statute the discord and acrimony inherent in a divorce proceeding has been reduced due to the elimination of the incentive—unequal property division—which prompted accusations of wrongful conduct.⁹⁰

81. *Id.* Further court interpretation of this statute has emphasized the punishment aspect of the statute. See *Nielsen v. Nielsen*, 394 P.2d 625, 628 (Idaho 1964).

82. See *Hedtke v. Hedtke*, 112 Tex. 404, 411, 248 S.W. 21, 23 (1923); *McGarraugh v. McGarraugh*, 177 S.W.2d 296, 301 (Tex. Civ. App.—Amarillo 1944, writ dismissed).

83. NEV. REV. STAT. § 125.150(3) (1973).

84. N.M. STAT. ANN. § 22-7-6 (Supp. 1973).

85. Wash. Laws 1st Extra Sess. 1973, ch. 157, § 8, at 840.

86. 515 S.W.2d 52 (Tex. Civ. App.—Tyler 1974, no writ).

87. CAL. CIV. CODE ANN. § 4800 (Deering 1972); LA. CIV. CODE ANN. art. 2406 (West 1971). See also *Allen v. Allen*, 113 P. 160, 162 (Cal. 1911); *Middlecoff v. Middlecoff*, 324 P.2d 669, 672 (Cal. Ct. App. 1958); *Butler v. Butler*, 228 So. 2d 339 (La. Ct. App. 1969).

88. CAL. CIV. CODE ANN. § 4800 (Deering 1972); LA. CIV. CODE ANN. art. 2406 (West 1971).

89. Huie, *Commentary on the Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. ANN. § 1, at 2 (1960).

90. Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A.L. REV. 1306, 1309 (1970). California formerly allowed a court, when exercising its discretion as to division of the community property, to consider the amount of fault which could be attributed to either party. See *Gabler, The Impact of the ERA on Domestic Relations Law: Specific Focus on California*, 8 FAMILY L.Q. 51, 83 (1974). This resulted in strife and discord between the spouses due to their efforts

Contrary to California, Texas allows a divorce court to consider fault as a reason for awarding a disproportionate share of the community to either spouse.⁹¹

TEXAS DIVORCE AND THE ERA

The constitutional revision of the legal rights of men and women in Texas⁹² should prompt a reconsideration of some aspects of the Texas divorce practice:

A serious question arises as to the continued validity of the traditional approach of the Texas courts to the questions arising in divorce actions such as the division of property of the parties . . . in view of the adoption on November 7, 1972 of Article 1, Section 3a to the Texas Constitution, Vernon's Ann. Stat., reading: 'Equality under the law shall not be denied or abridged because of sex. . . .' Consideration must . . . be given to certain provisions of the recently enacted Family Code⁹³

Section 3.63 of the Family Code appears to be in conflict with both the proposed federal Equal Rights Amendment (ERA) and the current Texas constitutional provision for equal rights in that although section 3.63 does not literally discriminate against either spouse, its practical effect has been to burden one spouse unfairly by allowing unequal division of property.⁹⁴ Many judicial divisions of property have been unfavorable to the husband, due in part to the fact that the man has been the principle, and in most cases, the only wage earner of the family. Many court decisions have been made with this past history in mind and on the basis of compassion for a woman who had given many years to help her mate in developing his abilities to support

to convince the divorce court of their innocence in order to induce the court to award the innocent spouse the greater share of the community. See Gabler, *The Impact of the ERA on Domestic Relations Law: Specific Focus on California*, 8 FAMILY L.Q. 51, 83 (1974).

91. See *Wilkerson v. Wilkerson*, 515 S.W.2d 52, 55 (Tex. Civ. App.—Tyler 1974, no writ); *Miller v. Miller*, 463 S.W.2d 477, 480 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

92. TEX. CONST. art. 1, § 3a.

93. *Cooper v. Cooper*, 513 S.W.2d 229, 231 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

94. This might be termed de facto discrimination. As stated in *Penn v. Stumpf*, 308 F. Supp. 1238, 1244 (N.D. Cal. 1970): "A procedure may appear on its face to be fair and neutral, but if in its application a discriminatory result ensues, the procedure may be constitutionally impermissible."

Concerning the viability of the California statute under the ERA it has been said: "In terms of the ERA analysis, the no-fault equal property division provision in California appears to be a sex-neutral rule and thus passes muster under the ERA." Gabler, *The Impact of the ERA on Domestic Relations Law: Specific Focus on California*, 8 FAMILY L.Q. 51, 84 (1974). It appears that any statute which does not contain a "no-fault equal property division" provision will not pass "muster" under the ERA. Texas with its current fault oriented unequal property division statute is not within the spirit of the ERA.

the family.⁹⁵ Until recently this was a fine and noble reason for burdening the more fortunate wage earning spouse, historically the husband,⁹⁶ with the greater cost of divorce, but its vitality today is questionable in light of the approaching equality of women in all spheres of life.⁹⁷

A significant 1974 decision of the Texas Supreme Court illustrates the type of change which is necessary to render status involving husband and wife viable under the ERA provisions of the Texas and Federal Constitutions. Without alluding to the existence of the ERA the Texas Supreme Court in *Cooper v. Texas Gulf Industries, Inc.*⁹⁸ concluded that the wife is now her husband's equal with regard to the management of community property.⁹⁹ This conclusion was based on the belief that the Family Code abolished any sex discrimination in this regard.¹⁰⁰ *Cooper* finalized the legislative mandate for equality of the spouses regarding community property management.¹⁰¹ The legislature and the supreme court have improved the community property system with respect to the only inequality which can be alleged to exist within the system—the unequal management provisions.¹⁰² Yet neither has incorporated the provision for equal division of marital property, a concept which is the very cornerstone of the system.¹⁰³

REVISING SECTION 3.63

*Wilkerson v. Wilkerson*¹⁰⁴ has created an urgent situation. It is well settled that a court of civil appeals, as an intermediary court, has the duty to follow settled law until such time as it is changed by the supreme court.¹⁰⁵ However, a suit for divorce in Texas generally does not come within the jurisdiction of the supreme court.¹⁰⁶ Therefore, if civil appeals courts follow

95. See, e.g., *Hudson v. Hudson*, 308 S.W.2d 140 (Tex. Civ. App.—Austin 1957, no writ); *Stanley v. Stanley*, 294 S.W.2d 132 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.); *Bagby v. Bagby*, 186 S.W.2d 702 (Tex. Civ. App.—Amarillo 1945, no writ); One court has held that the loss of an advantageous marriage can sustain an unequal division. See *Roberson v. Roberson*, 420 S.W.2d 495, 503 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.).

96. But see *Earnest v. Earnest*, 223 S.W.2d 681 (Tex. Civ. App.—Amarillo 1949, no writ) (a husband was favored in the unequal division).

97. *Cooper v. Cooper*, 513 S.W.2d 229, 231 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

98. 513 S.W.2d 200 (Tex. 1974).

99. *Id.* at 202.

100. *Id.* at 202.

101. Note, 6 ST. MARY'S L.J. 933 (1974).

102. Discussion and authorities cited note 14 *supra*.

103. Huie, *Commentary on the Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. ANN. § 1, at 2 (1960).

104. 515 S.W.2d 52 (Tex. Civ. App.—Tyler 1973, no writ).

105. See, e.g., *Schooler v. Tarrant County Med. Soc'y*, 457 S.W.2d 644, 647 (Tex. Civ. App.—Fort Worth 1970, no writ).

106. The supreme court has jurisdiction only if there is a disagreement among appellate courts on a question of law which is material to the decision or if an appellate

Wilkerson in the future, section 3.63 will continue to be interpreted in a manner contrary to the legislative intent—to allow a court power to divest title to separate realty.¹⁰⁷

Reinstating the old prohibition of article 4638 would resolve only part of the dilemma created by section 3.63. The power of a divorce court to alter the definition of community property would still be unresolved. The present constitution might possibly be amended in order to give constitutional authority for the legislative provision that courts may, on divorce, alter the nature of the marital property, creating separate property out of the community estate.¹⁰⁸

The other constitutional issue which was created by addition of the equal rights proviso, could easily be eliminated by the adoption of the California-Louisiana model statute.¹⁰⁹ Section 3.63 would become viable under the ERA if the legislature were to require an equal division of community property, allowing no judicial discretion, and add a provision prohibiting divestiture of title to *any* separate property.

Any prohibition which the legislature inserts in section 3.63 concerning divestiture of title to separate property must include *all* separate property, both personal and real. Divestiture of title to personalty has historically been permitted due to what has been described as ancient legislative oversight.¹¹⁰ The original definition of separate property in the constitution was phrased in terms of land and slaves; therefore, the original divorce statute prohibited

court holds differently from a prior decision of an appellate court or the supreme court. TEX. REV. CIV. STAT. ANN. art. 1821(3), (6) (1964). In addition, the supreme court may obtain jurisdiction of a divorce suit when there has been a dissenting opinion filed by one of the justices of the court of civil appeals. *Continental Cas. Co. v. Street*, 364 S.W.2d 184, 185-86 (Tex. 1963). The decision of the appellate court is conclusive in a divorce suit except in the circumstances mentioned. *Id.* at 185-86; TEX. REV. CIV. STAT. ANN. art. 1821(3), (6) (1964).

107. In addition to *Wilkerson*, dicta in other recent civil appeals decisions has supported the interpretation that the court's discretion is not limited to community realty. See *Schreiner v. Schreiner*, 502 S.W.2d 840 (Tex. Civ. App.—San Antonio 1973, writ *dism'd*); *In re Marriage of McCurdy*, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973, no writ); *Medearis v. Medearis*, 487 S.W.2d 198 (Tex. Civ. App.—Austin 1972, no writ).

108. The constitution has previously been amended to allow for the creation of separate property in a manner different from the original constitution. On November 2, 1948, Texas voted to amend the constitution to allow for partition of community property and in 1949 the 51st Legislature "passed article 4624a to implement the amendment." Olds, *Partition of Family Property*, 20 TEX. B.J. 573, 574 (1957). Prior to that amendment partition of community property by agreement of spouses was not permitted. See *Cox v. Miller*, 54 Tex. 16, 25 (1880); *Bruce v. Permian Royalty Co.* No. 2, 186 S.W.2d 686, 687 (Tex. Civ. App.—Galveston 1945, *ref'd w.o.m.*); *McDonald v. Stevenson*, 245 S.W. 777, 779 (Tex. Civ. App.—Beaumont 1922, writ *ref'd*).

109. CAL. CIV. CODE ANN. § 4800 (Deering 1972); LA. CIV. CODE ANN. art. 2406 (West 1971).

110. McKnight, *Matrimonial Property*, 27 Sw. L.J. 27, 38 (1973).

divestiture as to these two items of separate property.¹¹¹ Later in 1845 when the constitutional definition of separate property was altered to include not only land and slaves but all types of property, the divorce statute was not similarly amended.¹¹² This oversight has never been corrected to correspond to what appears to be the intent of the drafters of the original divorce statute; that is, to prohibit the divestiture of title to that which is defined as separate property by the Texas Constitution.¹¹³

There are other reasons why the legislature should adopt a California or Louisiana type statute. In addition to reducing or eliminating the acrimony involved in a divorce suit, a guaranteed equal division of the community property will assure each spouse of retaining his or her share as provided by the Texas Constitution.¹¹⁴

It is an anomaly that the legislature and the courts guarantee a deceased partner of a marriage more rights than the living partner of a dissolved marriage. Under the Probate Code a deceased's heirs are entitled to his property and undivided one-half interest in the community property.¹¹⁵ This occurs as a matter of law even if the surviving spouse was ill treated by the deceased throughout the marriage, had no education, or was old and incapacitated. These are the same factors which a divorce court considers when making a division of the property of the spouses upon divorce.¹¹⁶ Unlike a divorce court, however, a probate court is not permitted to consider these factors and exercise its discretion even if the parties were contemplating a divorce due to the invidious conduct of the deceased. If a spouse is denied the right to his partner's vested estates under the Probate Code, even though the parties were contemplating a divorce, then a spouse should be denied the right to his partner's vested estates upon divorce.

Another factor which the legislature should consider in revising section 3.63 is that a California-Louisiana type statute would be in the public interest regarding the alienability of land.¹¹⁷ Under the current statute divorce courts are permitted to award a spouse a determinable fee in the separate estate

111. *Fitts v. Fitts*, 14 Tex. 443, 449-50 (1855); McKnight, *Matrimonial Property*, 27 Sw. L.J. 27, 38 (1973).

112. *Fitts v. Fitts*, 14 Tex. 443, 449-50 (1855); McKnight, *Matrimonial Property*, 27 Sw. L.J. 27, 38 (1973).

113. TEX. CONST. art. XVI, § 15.

114. *Id.*

115. This is subject to the provisions found in the TEX. PROB. CODE ANN. §§ 38, 45 (1973) which specify the fractional amounts the heirs receive.

116. Some of the factors which a court may consider in exercising its discretion are: [t]he age and physical condition of the parties, their relative need for future support, fault in breaking up the marriage, benefits the innocent spouse would have received from a continuation of the marriage, the size of the estate and the relative abilities of the parties.

Wilkerson v. Wilkerson, 515 S.W.2d 52, 55 (Tex. Civ. App.—Tyler 1974, no writ).

117. Comment, *Permanent Alimony in Texas*, 6 TEXAS L. REV. 344, 349 (1928).

of the other spouse.¹¹⁸ An award of a life estate can tie up land for the life of the other spouse so that the holder of the title cannot dispose of the land.¹¹⁹ It is difficult to comprehend how the courts have ever justified awarding a life estate in the separate realty of one spouse to the other spouse and still have believed that they were adhering to the prohibition of article 4638 which prohibited divestiture of title to realty. The Texas Supreme Court recognized in *Spann v. City of Dallas*¹²⁰ that a property right consists not merely of ownership and possession but also of the unrestricted rights of enjoyment and use.¹²¹ Without these, the property right is to some extent destroyed because the value of property lies in its use. If the right of use is denied the value of the property is annihilated and ownership is no more than a "barren right."¹²²

Adoption of the California-Louisiana model would also eliminate another inconsistency in the Texas divorce laws. Texas is unique in that it does not allow for the award of permanent alimony to either spouse.¹²³ The courts of this state, however, have repeatedly awarded what appears to be alimony by another name,¹²⁴ in that the separate property of the husband has often been burdened with the support of his divorced wife.¹²⁵ It is difficult to understand how this is not court ordered periodic payments upon a divorce—alimony.¹²⁶ This inconsistency would also be cured by enacting a statute requiring an equal division of the community estate and allowing no jurisdiction over the separate estate of either spouse.

A consideration which should be uppermost in the minds of the legislature is contained within the principles of the Spanish ganancial system. The foundation of that system is an equality of the spouses approximating the situation in a partnership.¹²⁷ As in a partnership the assets of the marriage are divided equally on dissolution of the marriage.¹²⁸ This partnership concept was nowhere more pertinent than in the western states, which in their infancy adopted the community property system because

118. See, e.g., *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W. 21 (1923) (life estate awarded to the wife); *Bush v. Bush*, 237 S.W.2d 708 (Tex. Civ. App.—Amarillo 1950, no writ); *Farris v. Farris*, 15 S.W.2d 1083 (Tex. Civ. App.—San Antonio 1929, no writ).

119. Comment, *Permanent Alimony in Texas*, 6 TEXAS L. REV. 344, 349 (1927).

120. 111 Tex. 350, 235 S.W. 513 (1921).

121. *Id.* at 355-56, 235 S.W. at 514-15.

122. *Id.* at 356, 235 S.W. at 514-15.

123. Discussion and cases cited note 5 *supra*.

124. See Comment, *Permanent Alimony in Texas*, 6 TEXAS L. REV. 344 (1927).

125. *Id.* at 344.

126. For a judicial definition of alimony in Texas see *Francis v. Francis*, 412 S.W.2d 29, 32 (Tex. 1967).

127. Huie, *Commentary on the Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. ANN. § 1, at 2 (1960); Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 26, 40 (1967).

128. Huie, *Commentary on the Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. ANN. § 1, at 2 (1960).

the factors which originally produced it [the community property system] were closely approximated. The *women worked side by side* with their husbands to provide the necessities of life for the family . . . [and] to see that their marital partnership prospered and succeeded.¹²⁹

With the approaching equality of women, which may be enhanced by passage of the ERA in the near future, the marriage relationship assumes an even greater resemblance to a partnership.¹³⁰ Therefore like a partnership the assets or fruits of that partnership should be equally divided upon dissolution.¹³¹

CONCLUSION

Texas should enact a divorce statute which provides for a division of the spouses' property in an equal, rather than an "equitable," manner. Such a statute would not necessarily abolish all judicial discretion in this area since property division should not always require a physical equality such as dividing one parcel of realty into two equal parcels. It should effect as nearly as practicable a substantially equal division of the property.¹³² For example, when a court is asked to divide the property of a marriage which contains a profitable business which is community property, the court should award the property to one spouse and compensate the other spouse for the value of his share in the property. Such action by the court will avoid a forced sale of a profitable venture. The compensation for the one spouse can come from the other spouse's property so as to effect an equal division based on the value of the estates divided.

The Texas Constitutional provision for equal rights requires a revision of

129. W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 11.1, at 25 (2d ed. 1971) (emphasis added).

130. See, e.g., *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200 (Tex. 1974). As a result of the Texas Supreme Court's decision in that case, which granted the wife total equality in managing the community property, a Texas marriage appears to be more like a partnership than its predecessor in the Spanish ganancial system.

131. The partnership concept has been proposed as a model for the entire United States. See Note, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Distribution*, 26 U. FLA. L. REV. 221, 234-35 (1974). The proposal is sound in light of present day realities:

The emerging view of the marital relationship disregards the unified entity concept [common law theory] and perceives the marriage as a bifurcated structure, with the husband and wife acting within their respective roles toward achievement of a common purpose.

Id. at 226. The effect of a dissolution of a marriage under the implied partnership theory would have the same effect as a dissolution within Texas under a California-Louisiana model:

The UPA is replete with references to the equality of partners as regards rights to specific partnership property. Furthermore, recent decisions of Florida courts [like Texas] have recognized that husband and wife are to be placed on equal footing in the eyes of the law. Consequently, upon dissolution . . . in the absence of any specific agreement . . . distribution of the partnership property should be in equal shares as nearly as practicable.

Id. at 234-35.

132. See, e.g., CAL. CIV. CODE ANN. § 4800(b)(1) (Deering 1972).

Section 3.63 of the Family Code, and if the ERA is adopted as part of the Federal Constitution, such a revision may be required by federal law. Unless the legislature acts to remedy this situation,

[h]usbands and wives will never be truly equal in the eyes of the law, and wives will continue to rely on judicial grace in the form of alimony [or unequal property division] as compensation for efforts tendered during years of coverture unless such a method of property distribution, or its equivalent, is used when a marital relationship is dissolved.¹³³

The adoption of the California-Louisiana model statute will guarantee a wife property rights which are already hers under the Texas Constitution and, conversely, will treat husbands in a more just manner.

133. Note, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Distribution*, 26 U. FLA. L. REV. 221, 234-35 (1974).