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PRELIMINARIES TO DIVORCE

Temporary Orders

A successful presentation of facts to support a favorable division of property on divorce and the preservation of the marital property pending divorce are often dependent upon the use of remedies available to litigants during the sixty-day waiting period prior to divorce.[1] Under the Divorce Act of 1841,[2] which still governs Texas divorce practice

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1. TEX. FAMILY CODE ANN. § 3.60 (1975).

2. Tex. Laws 1841, An Act Concerning Divorce and Alimony §§ 1-14, at 19-22, 2 H. GAMMEL, LAWS OF TEXAS 483-86 (1898).

to a considerable degree, the divorce court may make such temporary orders as it deems necessary and equitable while the divorce proceedings are pending. In addition to ordinary means of discovery,[3] the Family Code specifically provides that the court may require an inventory and appraisal of property in the possession of either party.[4] Injunctive relief with respect to disposition of the community estate may also be granted[5] and may be directed to any party including third parties.[6] Such an order is enforceable by contempt proceedings[7] but is

3. *See* TEX. R. CIV. P. 167; Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH. L. REV. 645-46 (1974). It was pointed out in Hopkins v. Hopkins, 540 S.W.2d 783, 788-89 (Tex. Civ. App.—Corpus Christi 1976, no writ), that a party need not be required to produce documents in the possession of another.

Both spouses are competent to testify for or against each other throughout the proceeding. TEX. FAMILY CODE ANN. § 3.62 (1975).

4. TEX. FAMILY CODE ANN. § 3.56 (1975) Third persons joined in the divorce proceeding may also be affected by such orders.

5. *Id.* § 3.56. A court might in some instances restrain the disposition of separate property, but instances when courts have been petitioned to do so are very rare. Judicial standards frequently employed in granting injunctive relief are discussed in Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 646-47 (1974). The court is permitted to dispense with a bond when injunctive relief is sought by one spouse against the other. TEX. R. CIV. P. 693a. A bond is required, however, when such relief is sought against third parties. TEX. R. CIV. P. 684. *See* Goodwin v. Goodwin, 456 S.W.2d 885 (Tex. 1970); Hopkins v. Hopkins, 539 S.W.2d 242, 246 (Tex. Civ. App.—Fort Worth 1976, no writ); Couch Mortgage Co. v. Hughes, 536 S.W.2d 70, 72 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

6. *See* Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 647 (1974). "Frequently the use of injunctions against third parties is more effective than temporary injunctive relief against the other spouse. Jurisdiction must be obtained by making that person or firm a party to the suit." *Id.* at 647. Mr. Rudberg offers many other valuable insights and suggestions in planning divorce litigation with a view toward discovery and effective enforcement of the ultimate decree as well as temporary orders. *Id.* at 645-48. *See also* Hopkins v. Hopkins, 539 S.W.2d 242, 243-48 (Tex. Civ. App.—Fort Worth 1976, no writ).

In the discovery process inquiry should be made with respect to transfers that may have been fraudulent, constructively fraudulent, or illusory. *See* McKnight & Dorsaneo, *Management and Liability of Community Property and the Joinder of Spouses in Suits* in INSTITUTE ON TEXAS FAMILY LAW F-1, F-6 to -8 (State Bar of Texas 1976); McKnight, *Management, Control and Liability of Marital Property* in INSTITUTE ON TEXAS FAMILY LAW AND COMMUNITY PROPERTY 159, 167-69 (J. McKnight ed. 1975). *See also* Carnes v. Meador, 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

With respect to the use of masters as fact finders in the process of property division, *see* TEX. REV. CIV. STAT. ANN. art. 2338-9b.2 (Supp. 1976) (Dallas County Domestic Relation Courts); TEX. R. CIV. P. 171. *See also* Bell v. Bell, 540 S.W.2d 432, 437-38 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ), for a discussion of rule 171 and TEX. ATT'Y GEN. OP. No. H-609 (1975). The case of Roberson v. Roberson, 420 S.W.2d 495 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.), was also discussed. 540 S.W.2d at 439.

7. Dickson v. Dickson, 516 S.W.2d 28, 31 (Tex. Civ. App.—Austin 1974, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 72 (1975).

appealable.[8] The leading case in point is *Ex parte Preston.*[9] There the husband had been ordered not to dispose of particular community realty pending the final hearing of the divorce. In defiance of the court order, the husband sold the property for $20,000. When called on to account for the proceeds, he testified that he no longer had the money. He further elaborated that he was so angered by the court's order that he had flushed it down the toilet. The trial court refused to believe this testimony and held the husband in contempt to compel compliance with the court's order. The supreme court upheld the citation for civil contempt.[10]

In order to collect and conserve the marital property, the court may appoint a receiver;[11] however, in *Keton v. Clark*[12] the court said that it would be too extreme a remedy to appoint a receiver to collect the wages of one spouse for disbursement to the other. In *Couch Mortgage Co. v. Hughes*[13] the court was held lacking in authority to appoint a receiver of corporate property in the possession of the corporation, even though the corporation was substantially owned by the spouses, unless it were shown "that the corporation [is] the alter ego of one

8. Wells v. Wells, 539 S.W.2d 220, 222-23 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd).

9. 162 Tex. 379, 347 S.W.2d 938 (1961). For a further discussion of the scope of *Preston, see* notes 350-54 *infra* and accompanying text.

10. *Id.* at 384, 347 S.W.2d at 940-41. *See also Ex parte* Butler, 523 S.W.2d 309 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). With respect to a judge sitting for another in connection with temporary matters, see *Ex parte* Lowery, 518 S.W.2d 897, 902 (Tex. Civ. App.—Beaumont 1975, no writ). For a discussion of these and other authorities *see* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 74 (1976). For a discussion of the enforcement of a court order through the use of the contempt powers *see* notes 350-54 *infra* and accompanying text.

11. TEX. FAMILY CODE ANN. § 3.58 (1975). Under prior law courts occasionally appointed receivers of marital property, but receivership has always been a somewhat unusual remedy in the divorce process. *See* Gunther v. Gunther, 283 S.W.2d 826, 828 (Tex. Civ. App.—Dallas 1955, writ dism'd); Kinsey v. Kinsey, 77 S.W.2d 881, 882 (Tex. Civ. App.—Dallas 1934, no writ). *See also* First S. Properties, Inc. v. Vallone, 533 S.W.2d 339 (Tex. 1976); Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 647 (1974). "Receivership may be required when a blanket injunction against the other spouse is appropriate if someone must be in a position to collect and pay out assets. Based on the writer's experience, a receivership is generally an unsatisfactory experience and should be used only in extreme cases." *Id.* at 647. Mr. Rudberg, however, goes on to recommend the "seldom used method of safeguarding cash, securities, jewelry and other assets occupying comparable amounts of space . . . by requiring the delivery of such assets into the registry of the court . . . ." *Id.* at 648.

12. 67 S.W.2d 437, 439 (Tex. Civ. App.—Waco 1934, writ ref'd).

13. 536 S.W.2d 70 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). For a further discussion of receivership, *see* McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 339 (1974).

of the parties."[14] The appointment of auditors and the requirement of accountings are also available as ancillary remedies under the Texas Rules of Civil Procedure,[15] but these devices are rarely used.

The court may go further in dealing with the marital property by fixing payments for child support and temporary alimony.[16] In fact, the court may take almost any action which it deems just, although it cannot issue temporary orders concerning the payment of attorney's fees.[17] In spite of the Texas Supreme Court's holding in *Wallace v. Briggs*[18] with respect to the court's lack of authority to grant temporary attorney's fees, it is not unknown for courts to make what is, in effect, an allowance in advance for attorney's fees and some of their expenses incurred in preparing for trial. This is particularly true when there is some degree of agreement on the point between the parties and their counsel. Pending the final hearing on the divorce, the court may restrain the transfer of property and the incurring of indebtedness[19] against the property and may order one of the spouses to vacate certain premises or to maintain certain property.[20]

Transfers of Property Pending Divorce

Section 3.57 of the Family Code, which has its antecedents in the Divorce Act of 1841, provides that if, pending divorce, a spouse makes a transfer of community property or incurs a community debt with the intent to injure the other spouse and the person with whom that spouse is dealing has notice of that intent, such transfer or debt is void as to the other spouse.[21] This section is, therefore, a species of fraudulent

14. Couch Mortgage Co. v. Hughes, 536 S.W.2d 70, 72 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

15. TEX. R. CIV. P. 172.

16. TEX. FAMILY CODE ANN. §§ 3.58, 3.59 (1975).

17. From time to time it has been suggested that section 3.58 of the Family Code be amended to allow an award of attorney's fees pending final judgment. However, many attorneys have opposed the reform on the ground that a temporary award might jeopardize the magnitude of the ultimate fee and would not really compensate counsel effectively for time and expense devoted to the matter pendente lite.

18. 162 Tex. 485, 488, 348 S.W.2d 523, 525 (1961).

19. TEX. FAMILY CODE ANN. § 3.57 (1975).

20. *See Ex parte* Valdez, 521 S.W.2d 724, 727 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

21. Goodwin v. Goodwin, 451 S.W.2d 532, 534 (Tex. Civ. App.—Amarillo), *rev'd on other grounds*, 456 S.W.2d 885 (Tex. 1970), *noted in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 SW. L.J. 34, 41 n.53 (1971).

Notice, of course, is irrelevant in the case of voluntary recipients. *See, e.g.*, Herring v. Blakeley, 385 S.W.2d 843, 846-47 (Tex. 1965), *noted in* 19 SW. L.J. 370 (1965); National Maritime Union v. Augustine, 458 S.W.2d 832, 833 (Tex. Civ. App.—

conveyance statute designed to protect the deprived spouse pendente lite.[22]

Designed for general use in situations involving a claimant of an interest in land, filing notice of *lis pendens* may also be utilized by a party for protection against disposition of real property by another party pending divorce. Notice of *lis pendens* may therefore be filed with respect to *particular* property, the disposition of which is put in issue, in order to give notice to any prospective purchaser.[23] In *Fannin Bank v. Blystone*[24] the Waco Court of Civil Appeals made some misleading

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Beaumont 1970, no writ) Both cases involved change of beneficiary for employee benefits. For acts of fraud committed pendente lite with a paramour, see Roye v. Roye, 404 S.W.2d 92, 96 (Tex. Civ. App.—Tyler 1966, no writ) (involving release of security for a loan). With respect to fraud, constructive fraud, and illusory transfers as to the other spouse in general, see McKnight & Dorsaneo, *Management and Liability of Community Property and the Joinder of Spouses in Suits* in INSTITUTE ON TEXAS FAMILY LAW F-6 to -8 (State Bar of Texas 1976); *cf.* Teas v. Republic Nat'l Bank, 460 S.W.2d 233, 242 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.). *Teas*, however, may need reexamination in the light of Hawes v. Central Tex. Prod. Credit Ass'n, 492 S.W.2d 714, 716 (Tex. Civ. App.—Austin), *aff'd*, 503 S.W.2d 234, 236 (Tex. 1973). *National Maritime* and *Teas* are discussed in McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 SW. L.J. 34, 46-47 n.89 (1971). *See also Ex parte* Harvill, 415 S.W.2d 174 (Tex. 1967), *noted in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 SW. L.J. 129, 139 (1968) (attorney as an apparent fraudulent transferee); Bridges v. Bridges, 404 S.W.2d 48 (Tex. Civ. App.—Beaumont 1966, no writ), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 SW. L.J. 39, 46-47 (1967).

For contractual liability incurred pending divorce and its effect under a property settlement agreement, *see* Morgan v. Morgan, 406 S.W.2d 347, 351 (Tex. Civ.App.—San Antonio 1966, no writ), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 SW. L.J. 129, 143-44 (1968). For tortious liability and its impact on a community insurance contract pendente lite, *see* Firemen's Ins. Co. v. Burch, 426 S.W.2d 306, 308-09 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 442 S.W.2d 331, 335 (Tex. 1968), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 SW. L.J. 44, 51 (1969). Courts frequently restrain a spouse from incurring debts or making transfers "except in the ordinary course of business." As to the equivocal nature of such language, see *Ex parte* Butler, 523 S.W.2d 309, 312 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). Mr. Rudberg prefers the blanket temporary restraining order, putting the burden on the restrained spouse to seek a modification in case of emergency. Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 647 (1974).

22. A merely capricious or excessive disposition that constitutes a constructive fraud will not suffice to satisfy the terms of section 3.57. *See* Carnes v. Meador, 533 S.W.2d 365, 372 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.). As in the case of TEX. BUS. & COMM. CODE ANN. § 24.02 (1968), one who is not the object of the fraud cannot claim that the transaction is void. Herndon v. Reed, 82 Tex. 647, 652, 18 S.W. 665, 666 (1891). Section 3.57 of the Family Code is very similar to section 24.02 of the Business and Commerce Code, though the arrangement of language in the respective sections is not identical. *See* McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 333-34 (1974).

23. TEX. REV. CIV. STAT. ANN. art. 6640 (1969).

24. 417 S.W.2d 502 (Tex. Civ. App.—Waco 1967), *writ ref'd n.r.e. per curiam*, 424 S.W.2d 626 (Tex. 1968).

remarks in this respect by holding that anyone who buys realty from a spouse involved in divorce proceedings is on notice of those proceedings as a matter of law.[25] In holding that the purchaser had actual knowledge of the divorce proceeding and was, therefore, charged with the consequences thereof,[26] the supreme court did not correct this misleading conclusion. The holding of the Waco Court of Civil Appeals would require a buyer to search the records of every county in Texas to be sure that a person offering realty for sale was not involved in a suit for divorce in which disposition of the realty was in issue. As a consequence, an inordinate burden would be put on any purchaser. In *First Southern Properties, Inc. v. Gregory*[27] it was held that in the absence of a *lis pendens* filing, a purchase of the separate property of a spouse is not affected by constructive notice of a pending divorce.[28] Hence, in spite of what is said in the *Fannin* opinion, filing a notice of *lis pendens* is the appropriate means of protecting one's client from disposition of real property to innocent third-party purchasers.[29]

Recently the Supreme Court of Texas was faced with a related but somewhat different problem in *First Southern Properties, Inc. v. Vallone*.[30] There a receiver was appointed by the court, but he failed to file *lis pendens* notice with respect to the property placed in receivership. A dispute later arose between the receiver and an innocent purchaser of the property at a foreclosure sale that was conducted by the trustee of a deed of trust upon default by the spouse holding record title. The supreme court concluded that *a receiver* need not file *lis pendens* notice in order to protect his purchaser but recommended that the legislature enact such a requirement.[31]

Property Settlement Agreements

Regardless of the amounts of property involved, the overburdened courts strongly urge the parties to settle their differences with respect to property division by entering into property settlement agreements.[32]

25. *Id.* at 503. The cases relied on by the Waco court were those which prompted the enactment of the *lis pendens* statute in 1905.

26. Fannin Bank v. Blystone, 424 S.W.2d 626, 627 (Tex. 1968).

27. 538 S.W.2d 454 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

28. *Id.* at 458.

29. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 138-39 (1968). *See also* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 52 n.53 (1969).

30. 533 S.W.2d 339 (Tex. 1976).

31. *Id.* at 343.

32. *See* O'Benar v. O'Benar, 410 S.W.2d 214, 217 (Tex. Civ. App.—Dallas 1966,

Parties are free to enter into such agreements to settle their property interests as they deem advisable. For many years the courts of civil appeals have struggled with the question of whether or not these agreements, made in anticipation of divorce and regardless of whether the petition has been filed, affect assets acquired pending divorce, but which after the date of the agreement would be *community* assets in the absence of such an agreement. Five decisions have been rendered on this issue with three of them holding that such agreements are valid.[33] *Jernigan v. Scott*[34] dealt with a situation in which an agreement was entered into, but no divorce followed although the spouses lived apart for the succeeding twenty years. The San Antonio Court of Civil Appeals held that the spouses' agreement with respect to subsequent acquisition of what would have been community property was, nonetheless, binding though there was no ultimate division on divorce.[35]

The problem is essentially a conceptual one: If the Texas Constitution defines separate property and, therefore, by exclusion community property,[36] can spouses vary the nature of their marital property by agreement or contact[37] and, if so, can such a change be effected prior to the acquisition of the property? Historically, the answer to this question has been associated with answers to similar inquiries concerning the validity of prospective spouses' contracts purporting to establish the nature of property to be acquired during marriage[38] and of agreements between married couples partitioning community property as separate property.[39] Partition in anticipation of divorce is merely a species of

writ dism'd) (agreement entered into in open court and transcribed by court reporter). For an instance in which a foreign property settlement was before a court, *see* Dicker v. Dicker, 434 S.W.2d 707, 714 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.). Each party should, of course, be represented by independent counsel, but lack of counsel does not necessarily vitiate the agreement. *See* notes 334-36 *infra* and accompanying text.

33. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 32 (1972); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 134 n.36 (1968).

34. 518 S.W.2d 278 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

35. *Id.* at 284.

36. TEX. CONST. art. XVI, § 15; *see* TEX. FAMILY CODE ANN. § 5.01 (1975) (definition in more precise terms); McKnight, *Texas Community Property Law—Its Course of Development and Reform* in ESSAYS IN THE LAW OF PROPERTY PRESENTED TO CLYDE EMERY 30, 43-44 (Southern Methodist University 1975). *See also* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 35 (1972).

37. Either may, of course, do so by gift. But a transaction overtly couched as an agreement or contract will not be construed as a gift. Hilley v. Hilley, 161 Tex. 569, 576, 342 S.W.2d 565, 569 (1961).

38. *See* McKnight, *Texas Community Property Law—Its Course of Development and Reform* in ESSAYS IN THE LAW OF PROPERTY PRESENTED TO CLYDE EMERY 30, 45-48 (Southern Methodist University 1975). *See also* Castro v. Illies, 22 Tex. 479 (1858).

39. *See* McKnight, *Texas Community Property Law—Its Course of Development*

community property partition, a practice established beyond question since the *Rains v. Wheeler*[40] decision in 1890. But partition of community property under ordinary marital conditions was condemned until sanctioned by constitutional amendment in 1948.[41] Partitions of future acquisitions have, however, given rise to some judicial uneasiness. As long as the rule allowing a partition of community property in anticipation of divorce was itself an exception to the general rule forbidding partition,[42] it may have seemed to strain the exception too much to allow a partition of future acquisitions.[43] But in 1948 the general rule was disposed of by constitutional amendment. Although the general rule forbidding partitions was abolished, a further uncertainty was introduced by the language of the amendment specifically authorizing partitions of "existing community property."[44] The inference may therefore be drawn that a partition of nonexistent community property is forbidden. Nonetheless, the weight of authority allows such partitions.[45] Consequently, the doctrine of *Rains v. Wheeler*[46] has achieved the status of a rule of law independent of the now-superseded rule to which it was originally attached as an exception. Partitions in anticipation of divorce do, however, seem to fall within the purview of the constitutional amendment and section 5.42 of the Family Code,[47] both of which require that such agreements be in writing.[48]

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and Reform in ESSAYS IN THE LAW OF PROPERTY PRESENTED TO CLYDE EMERY 30, 46 n.110 (Southern Methodist University 1975) (on converting community property to separate property). Concerning the conversion of separate property to community, *see* Tittle v. Tittle, 148 Tex. 102, 110, 220 S.W.2d 637, 642 (1949); Weaver v. Citizens Nat'l Bank, 490 S.W.2d 887, 891 (Tex. Civ. App.—Waco 1973, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 74 (1974).

40. 76 Tex. 390, 395, 13 S.W. 324, 326 (1890).

41. TEX. CONST. art. XVI, § 15.

42. Other arguments than the constitutional one were made for invalidity of partitions in general: (1) an inherent fraud on creditors who might look to the whole corpus of the community to seek satisfaction for debt; (2) the suspicion of fraud being perpetrated on the wife; and (3) the wife's former disability of coverture under which she would lack ability to contract. *See* McKnight, *Texas Community Property Law—Its Course of Development and Reform* in ESSAYS IN THE LAW OF PROPERTY PRESENTED TO CLYDE EMERY 30, 45-48 (Southern Methodist University 1975).

43. Some conceptual uneasiness may be perceived in the difficulty of conceiving of a partition of an expectancy. But the Supreme Court of Texas long ago rejected that argument with respect to the assignment or sale of an expectancy. Hale v. Hollon, 90 Tex. 427, 429, 39 S.W. 287, 288 (1897).

44. *See* TEX. CONST. art. XVI, § 15.

45. *See* note 33 *supra*.

46. 76 Tex. 390, 13 S.W. 324 (1890).

47. *See* TEX. CONST. art. XVI, § 15; TEX. FAMILY CODE ANN. § 5.42(a) (1975).

48. Amarillo Nat'l Bank v. Liston, 464 S.W.2d 395, 399 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.). *See also* Wilson v. Wilson, 507 S.W.2d 916 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (*semble*). Prior to the *Liston* decision it was

The negotiations attending the formulation of the partition agreement must not involve fraud or misrepresentation since an agreement tainted with fraud is subject to being set aside.[49] Only infrequently will a court refuse to enter an order based on a property settlement agreement; however, if it is shown that fraud or misrepresentation may have attended the agreement, the court may refuse to give effect to the spouses' purported settlement.[50] Moreover, a party to such an agreement cannot seek rescission of it following divorce without first offering to restore the benefits received under it or making a sufficient explanation for failure to do so.[51] A decree based on a property settlement agreement is not subject to later modification because of the changed financial circumstances of the parties.[52]

Regardless of the amount of the spouses' income, federal tax consequences should be a major consideration in reaching any property settlement on divorce.[53] In *United States v. Mooney*[54] the spouses had agreed in a divorce settlement that a tax refund would be split between

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generally agreed that such agreements need not be in writing. *See* Callicoatte v. Callicoatte, 417 S.W.2d 618, 621 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 136 (1968). *See also* Goetz v. Goetz, 534 S.W.2d 716, 719 (Tex. Civ. App.—Dallas 1976, no writ), where the court held that admission of evidence of an oral partition constituted error.

49. *See, e.g.*, McFarland v. Reynolds, 513 S.W.2d 620, 626 (Tex. Civ. App.—Corpus Christi 1974, no writ); Myers v. Myers, 503 S.W.2d 404, 406 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ dism'd); Bell v. Bell, 434 S.W.2d 699, 700-01 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.); Eldridge v. Eldridge, 259 S.W. 209, 214 (Tex. Civ. App.—San Antonio 1924, no writ); Swearingen v. Swearingen, 193 S.W. 442, 450 (Tex. Civ. App.—San Antonio 1917, writ ref'd). For an instance of a foreign property settlement allegedly involving fraud concerning Texas land, *see* Cole v. Lee, 435 S.W.2d 283, 286-87 (Tex. Civ. App.—Dallas 1968, writ dism'd). *See also* notes 305-07 *infra* and accompanying text.

50. *See* Myers v. Myers, 503 S.W.2d 404, 406 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ dism'd).

51. Guion v. Guion, 475 S.W.2d 865, 869 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).

52. Cocke v. Cocke, 408 S.W.2d 348, 350 (Tex. Civ. App.—Waco 1966, writ dism'd). But inability to make periodic payments agreed and ordered (as opposed to refusal to pay when able to do so) cannot lead to imposition of sanctions for civil contempt.

53. *See generally* Bailey, *Tax Aspects of Texas Divorce*, 6 HOUS. L. REV. 148 (1968); Vaughan, *Texas Divorce: Planning the Tax Results*, 38 TEX. B.J. 1035 (1975). *See also* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 87 nn.139-42 (1976); McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 78 n.79, 83 nn.123-26 and accompanying text (1974). Of course, the spouses are not capable of binding the federal government by their agreement.

54. 400 F. Supp. 98 (N.D. Tex. 1975). *See also* Lange v. Phinney, 507 F.2d 1000 (5th Cir. 1975); McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 77 n.79 (1974).

them even though their earnings differed widely since the wife had a much larger taxable income than the husband. This agreement did not affect the Internal Revenue Service in pursuing the husband, who had produced the disproportionately smaller amount of earnings for the past year.[55] In order to avoid future dispute,[56] the possibility of the assessment of a tax deficiency, as well as a refund, should be anticipated. If one spouse is to be obligated to pay the tax liability of the other with respect to community income, the mode of computation should be specifically agreed upon.[57] Other problems which must be taken into consideration when dividing property on divorce are tax-free exchanges and the question of whether future periodic payments constitute alimony under the Internal Revenue Code.[58]

Section 3.59 of the Texas Family Code, an enactment which dates from 1841, only provides for court-ordered *temporary* alimony.[59] At least *initially*, then, Texas' failure to provide for *permanent* alimony was not a consequence of the community property doctrine. Texas is, however, the only community property state which does not make some provision for permanent alimony. Texas law in this regard is a consequence of interpretation of the statutory language in accordance with the maxim *inclusio unius est exclusio alterius*: only temporary alimony may be awarded under the statute and, therefore, permanent alimony may not.[60] Nevertheless, spouses may contract for future periodic payments by one spouse to the other;[61] their agreement is referred to as "contractual alimony" and is commonly incorporated in the divorce decree. The judicial effect of such incorporation is not, however, altogether clear. It has been said that an ex-wife who has

55. United States v. Mooney, 400 F. Supp. 98, 99 (N.D. Tex. 1975).

56. *See* Adwan v. Adwan, 538 S.W.2d 192, 197 (Tex. Civ. App.—Dallas 1976, no writ).

57. Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645 (1974). "[S]everal methods of computation are available. Assuming that the obligee has noncommunity income, is the tax on community income to be computed before taking the other into consideration, after taking the other into consideration, or by yet some third method? The result can vary substantially and the intensity of the dispute generated is directly proportional to the variance." *Id.* at 651. *See also* McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 77 n.79 (1974); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 37 nn.81-83 and accompanying text.

58. *See* Rev. Rul. 76-83, 1976 CUM. BULL. 9. *See also* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 SW. L.J. 31 n.4 (1972); Note, 28 SW. L.J. 1073 (1974).

59. TEX. FAMILY CODE ANN. § 3.59 (1975).

60. *See* McKnight, Book Review, 11 SW. L.J. 272, 274 (1957).

61. Francis v. Francis, 412 S.W.2d 29, 33 (Tex. 1967); *see* McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH. L. REV. 281, 341-42 (1974).

not received alimony payments under a property settlement is left to her contractual remedy,[62] but some courts now seem to treat decrees incorporating such agreements as virtually equivalent to decrees entered by consent.[63] It was recently concluded that a husband's assertion of a contractual defense in a suit for failure to pay contractual alimony constituted a collateral attack on the prior decree.[64] Often the spouses will agree that the husband make periodic payments to the wife, for example, when a business enterprise or other property is agreed to be awarded to the husband. In such instances an award to the wife in accordance with the agreement does not constitute permanent alimony but is merely an agreed means by which the property division can be reasonably and fairly achieved.[65] If the contract is not

62. Francis v. Francis, 412 S.W.2d 29, 33 (Tex. 1967), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 136-38 (1968). *See also* Republic Nat'l Bank v. Beaird, 475 S.W.2d 344 (Tex. Civ. App.—Beaumont 1971, writ ref'd). The wife must, of course, prove the amount in arrears in order to recover a money judgment.

63. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 86 n.138 (1976); *cf.* O'Benar v. O'Benar, 410 S.W.2d 214, 217 (Tex. Civ. App.—Dallas 1966, writ dism'd) (a pre-*Francis* case involving a property settlement agreement entered into in open court, transcribed by court reporter, and approved by the trial court). *See also* Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 648, 653-55 (1974); notes 111, 348-50 *infra* and accompanying text.

64. Peddicord v. Peddicord, 522 S.W.2d 266, 267 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 86 (1976).

65. Francis v. Francis, 412 S.W.2d 29, 33 (Tex. 1967); Griffin v. Griffin, 535 S.W.2d 42, 43 (Tex. Civ. App.—Austin 1976, no writ); *In re* Marriage of Jackson, 506 S.W.2d 261, 266 (Tex. Civ. App.—Amarillo 1974, writ dism'd); Miller v. Miller, 463 S.W.2d 477, 479 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.); *cf. In re* Parnass, No. BK 3-3473F (N.D. Tex., Oct. 24, 1974) (bankruptcy case). *See also* Gregory v. Gregory, 404 S.W.2d 657 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.) (pre-*Francis* case).

Unless it is specifically provided that periodic payments will cease on the death of the payee (or that of the payor), the contractual right to receive such payments extends beyond the payee's death (or that of the payor) and constitutes an asset of the payee's estate. McKnight, *Family Law, Annual Survey of Texas Law*, 24 Sw. L.J. 49, 53-54 (1970).

Two recent cases have distinguished periodic payments of "alimony" from elements of a property division as those payments not referable to property in existence at the time of divorce. *In re* Marriage of Long, 542 S.W.2d 712, 715-16 (Tex. Civ. App.—Texarkana 1976, no writ); Benedict v. Benedict, 542 S.W.2d 692, 699 (Tex. Civ. App.—Fort Worth 1976, writ dism'd). But such a formulation is merely a restatement of the old distinction between that which is a spouse-support agreement independent of the property division and a periodic payout based on marital property division (including rights of reimbursement which may have arisen from past dealings in marital property). It seems unduly restrictive of the spouses' contractual powers to require that enforceable periodic payments be referrable to liquidation of particular assets on hand at the time

a part of a property settlement agreement, as when there is no property to divide, the court would lack jurisdiction to make an order with regard to future payments. But such a situation is more theoretical than real since the courts have been unusually liberal in finding consideration to support such contracts, however thinly demonstrated.[66] In this regard the El Paso Court of Civil Appeals has found the wife's acceptance of a division as requested by the husband to be sufficient consideration for a binding agreement.[67] The husband has also been said to be estopped to attack the decree on the ground that the consideration was the cost of "buying the divorce" since such an argument would show that he had worked a fraud on the trial court.[68]

In drafting the terms of a property settlement, very precise and clear language must be used. In order to take advantage of the means available to enforce the agreement in the future, the spouses must agree on matters relating to transfers of specific property, division and disposition of present and future assets, and payment of liabilities. These terms must be set out *precisely* in the agreement, despite the good intentions of the spouses to abide by the general terms of any such agreement.[69] The court should be called upon to make a determina-

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of divorce or income from such assets which may somehow represent a part of the value or those assets at divorce.

It must be noted that merely calling an award "alimony" in the property settlement agreement to beguile the Internal Revenue Service is not sufficient to cause it to be treated as such as a matter of state law. Nordstrom v. Nordstrom, 515 S.W.2d 14, 19 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.). For another situation in which tax considerations were involved in the interpretation of a property settlement agreement, *see* Motheral v. Motheral, 514 S.W.2d 475, 478 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

66. *See* Leopold, *Contracts for Support of a Spouse After Divorce, The Question of Consideration*, TEX. TRIAL LAW. F., Vol. 6, No. 1, at 11, 34-35 (July-Dec. 1971). *See also* Mahrer v. Mahrer, 510 S.W.2d 402 (Tex. Civ. App.—Dallas 1974, no writ); Lampkin v. Lampkin, 480 S.W.2d 35 (Tex. Civ. App.—El Paso 1972, no writ); Miller v. Miller, 463 S.W.2d 477 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.). The authorities are discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 77-78 (1975); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 37 (1973); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31-32 (1972); McKnight, *Family Law, Annual Survey of Texas Law*, 24 Sw. L.J. 49, 53-54 (1970).

Like any other contract a property settlement agreement is subject to judicial interpretation. *See, e.g.*, Morgan v. Morgan, 406 S.W.2d 347, 350 (Tex. Civ. App.—San Antonio 1966, no writ) (with respect to a provision for the payment of debts), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 143-44 (1968).

67. Lampkin v. Lampkin, 480 S.W.2d 35, 37 (Tex. Civ. App.—El Paso 1972, no writ).

68. Andrews v. Andrews, 441 S.W.2d 244, 247 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.).

69. *See generally* Lifson v. Dorfman, 491 S.W.2d 198 (Tex. Civ. App.—Eastland

tion of any point upon which the parties cannot agree, and such determination should be spelled out with equal clarity in the decree approving and embodying all the terms of the agreement. If the community family home is not to be awarded to one spouse, the terms of its maintenance and future sale should be carefully provided for in the agreement.[70]

Contractual provisions for the payment of debts *inter se*[71] and fixing obligations for child support may also be entered into as incidents of the property settlement. In spite of such a contract, the court should make its award for child support only after hearing the evidence and making a finding of what is reasonable under the circumstances even though the result might coincide with the agreement of the parties. Whether or not the court enters such an order for payment of child support, the parties are still bound by their contract.[72] As an exercise

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1973, writ ref'd n.r.e.); Dauray v. Gaylord, 402 S.W.2d 948 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.)

Further guidance is given in Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH. L. REV. 645 (1974), where he states that the terms of the settlement agreement

> must be comprehensive and take into consideration the nature of assets involved. Typical examples are transfers of title to real estate, transfer of title to chattels registered under certificate of title acts, transfer of securities, and transfer of life insurance policies. In those instances where cooperation in effectuating appropriate transfers can be relied upon, collateral documents such as special warranty deeds, deeds of trust, stock powers with signatures guaranteed, change of beneficiary and change of ownership forms will ordinarily be used. Otherwise, the [agreement] itself must contain specific [undertakings] as to such documents which are to be executed. Good practice [in that case] would dictate the reproduction of the form of such document within the [agreement] . . . .

Id. at 650. A number of other useful suggestions are made by Mr. Rudberg such as spelling out specifically the time of performance for certain acts to be performed. *Id.* at 648-51. Some further pitfalls to be avoided in drafting are suggested by Adwan v. Adwan, 538 S.W.2d 192, 196-97 (Tex. Civ. App.—Dallas 1976, no writ) (attorney's overlooking some notes and stocks and a joint tax refund); Brooks v. Brooks, 515 S.W.2d 730, 733 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.) (overlooking wife's separate income tax obligation); Dessommes v. Dessommes, 505 S.W.2d 673, 678-79 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) (overlooking a pension plan).

70. *See* Starkey v. Holoye, 536 S.W.2d 438, 441 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); Miller v. Two Investors, Inc., 475 S.W.2d 610, 612 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e).

71. But such an agreement will not affect the rights of creditors in the absence of a novation. *See also* McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 83 nn.123, 125 and accompanying text (1975).

72. Lee v. Lee, 509 S.W.2d 922, 926 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.); *cf. In re* McLemore, 515 S.W.2d 356, 359 (Tex. Civ. App.—Dallas 1974, no writ). Both cases are discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 107-08 (1975). *See also* Adwan v. Adwan, 538 S.W.2d 192 (Tex. Civ. App.—Dallas 1976, no writ); Doss v. Doss, 521 S.W.2d 709 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). In *Doss*, the court pointed out that unless a property settlement agreement so provides, it is improper for the court to order a formula

of its continuing jurisdiction of the parent-child relationship, the court may change the amount of its award in light of future changed circumstances. Reduction of the amount ordered to be paid, however, will only affect the power of the court to order enforcement by contempt and will not in any way affect the right of the obligee-spouse to sue for a higher amount under the contractual terms of the settlement.[73] Since a suit to enforce contractual terms for child support under a property settlement agreement is not a matter of the parent-child relationship under the Family Code, the divorce court does not have continuing jurisdiction of such a suit.[74] But in an order to enforce the decree's terms as those of a contract, the agreement must so provide.[75]

DIVISION OF PROPERTY ON DIVORCE

Interests Not Subject to Division

On a case-by-case basis the courts have attempted to develop a definable category of property not susceptible to division on divorce. Once that species of property is defined, the remaining property is more easily dealt with. The test used in many past instances has been one of determining whether an interest is "vested" as opposed to "unvested." The most common subject matter in issue has been retirement benefits. The supreme court's analysis of such interests in *Cearley v. Cearley*[76] provides a new test. The court held that while mere expectancies are not divisible on divorce, there are interests, such as contingent benefits under both public and private retirement

for child support based on a fixed percentage of the parent's gross income. 521 S.W.2d at 713.

What is said with respect to the precision of language in the decree in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 93 nn.207-210 and accompanying text (1974), is equally applicable to the wording of an agreement. *See also* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 105 n.302 (1976).

73. Clark v. Clark, 496 S.W.2d 659, 662 (Tex. Civ. App.—Waco 1973, no writ); Alford v. Alford, 487 S.W.2d 429, 433 (Tex. Civ. App.—Beaumont 1972, writ dism'd); Myrick v. Myrick, 478 S.W.2d 859, 860-61 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ dism'd); *see* Walley, *Contractual Aspects of Child Support Agreements*, 36 TEX. B.J. 107, 108 (1973). *See also* Kolb v. Kolb, 479 S.W.2d 81, 83 (Tex. Civ. App.—Dallas 1972, no writ), to the effect that no alteration may be had in the terms of the agreement with respect to which parent may claim the children as dependents for federal income tax purposes.

74. TEX. FAMILY CODE ANN. § 14.06(d) (1975); *see* Adwan v. Adwan, 538 S.W.2d 192, 194-95 (Tex. Civ. App.—Dallas 1976, no writ).

75. TEX. FAMILY CODE ANN. § 14.06(d) (1975).

76. 544 S.W.2d 661 (Tex. 1976).

schemes, which amount to more than mere expectancies and are subject to division.[77] Independent of this analysis, there are other definable aspects of property interests with connotations of value, which are nonetheless treated as beyond the power of the divorce courts to divide.

The enactment of the Pension Reform Act of 1974[78] will cause us to encounter with less frequency than in the past claims for pension and retirement benefits that have not *accrued* to the employee because of his short period of employment. In recent years, however, such contingent rights have been before the courts on a number of occasions, and it was concluded that if the requisite time of employment had not been satisfied, the interest was not *vested* for purposes of division between the spouses.[79] This conclusion has been reached in spite of the fact that there were other contingencies to absolute vesting—the possibility of termination of employment causing loss of benefits which might be determined by the employer or the employee or by the latter's death prior to accrual or maturation of benefits. In *Herring v. Blakeley*[80] the supreme court held that retirement benefits, accrued but not yet payable, constituted a community property interest divisible on divorce. This conclusion with respect to the nature of the interest was reiterated in *Busby v. Busby*,[81] which concerned vested pension rights undivided on divorce and thus subject to partition. In *Cearley v. Cearley*[82] the supreme court rationalized the test for divisibility of such interests by shifting the emphasis from *vesting* to a recognition of unaccrued benefits as *contingent property interests* earned as a form of deferred compensation on a month-to-month basis.[83]

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77. *Id.* at 665-66.

78. *See* Employee Retirement Income Security Program, 29 U.S.C. §§ 1001, 1051-1061 (Supp. V, 1975); Ray, *Trusts and Pensions*, in TEXAS FAMILY LAW AND COMMUNITY PROPERTY 183 (J. McKnight ed. 1975) (including effects of Pension Reform Act of 1974). But since we will less frequently encounter *unvested* pension rights as a result of the act, we must be more mindful of the *earned* ones so that they will not be overlooked on division and, if community property, become tenancies in common on divorce by operation of law. Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976); Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970). Federal and religious pension plans are, however, exempt from coverage by the act. *See generally* 29 U.S.C. §§ 1001, 1002(32)(33) (Supp. V, 1975).

79. Bright v. Bright, 531 S.W.2d 440 (Tex. Civ. App.—San Antonio 1975, no writ); Lumpkins v. Lumpkins, 519 S.W.2d 491, 493 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); Davis v. Davis, 495 S.W.2d 607, 613 (Tex. Civ. App.—Dallas 1973, writ dism'd).

80. 385 S.W.2d 843, 846-48 (Tex. 1965).

81. 457 S.W.2d 551, 554 (Tex. 1970).

82. 544 S.W.2d 661, 666 (Tex. 1976).

83. The concept of vested rights may still be a useful one in some context, however. For example, if pension rights are vested when the prospective pensioner is single, and

In reaching its decision in *Cearley*, the Texas Supreme Court relied heavily on a similar conclusion reached by the California Supreme Court.[84] This decision was reached despite underlying fundamental differences in approach in Texas and California with respect to property division on divorce.[85] But Texas courts must be particularly mind-

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he thereafter marries, they constitute separate property. McCurdy v. McCurdy, 372 S.W.2d 381, 383-84 (Tex. Civ. App.—Waco 1963, writ ref'd) (acquisition of insurance policy while single). But to characterize military *disability* retirement benefits as separate property as they were in Ramsey v. Ramsey, 474 S.W.2d 939, 941 (Tex. Civ. App. —Eastland 1971, writ dism'd), is misguided. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 31 (1973); *cf.* Martin v. General Elec. Co., Civil No. 7487 (E.D. Tex., Nov. 27, 1973), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 71-72 (1974). Separate and community elements of personal injury recovery were there delineated for the purpose of division on divorce. *See also In re* Marriage of Butler, 543 S.W.2d 147 (Tex. Civ. App.—Texarkana 1976, no writ); Marshall v. Marshall, 511 S.W.2d 72 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ), *commented on in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 75 (1975); Dominey v. Dominey, 481 S.W.2d 473 (Tex. Civ. App.—El Paso), *cert. denied*, 409 U.S. 1028 (1972).

The favorable federal income tax treatment to which a recipient of federal disability payments is entitled does not appear to have been considered in making a division on divorce in any reported case. *See* INT. REV. CODE OF 1954, §§ 104(a)(4), 105(d), 122; Treas. Reg. §§ 1.122-1(b)-(d) (1970). For an example of computation *see* 1 CCH 1976 STAND. FED. TAX REP. ¶ 1197B.

84. *In re* Marriage of Brown, 126 Cal. Rptr. 633, 634-35 (1976). In a sense, the California approach is to treat unvested pension rights as equivalent to vested rights subject to divestiture on occurrence of a condition subsequent in traditional real property parlance.

85. Contrary to Texas practice, permanent alimony may be awarded in California. Recent California legislation directs equal division of the community. CAL. CIV. CODE § 4800 (Deering 1972); *see* Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 220-21 (1975). In Texas community property is subject to discretionary division absent any constitutional impediment requiring equal division of the community. *See* McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 337, 351-53 (1974); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 38-39 (1973). *See also* Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 218-19 (1975). In California the legislation referred to does not allow division of separate real or personal property, whereas, in Texas separate personalty has been *generally* regarded as subject to discretionary division in spite of the constitutional argument alluded to which would prohibit divestiture of title to *any* separate property. By a literal interpretation of the term "estate of the parties" in TEX. FAMILY CODE ANN. § 3.63 (1975), the court's discretionary power of division is limited to the community estate of the spouses because that is the only "estate" they share. *See* McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 338 (1974). *See also* Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 216-17 (1975).

An even more radical view has also emanated from California: federal pension rights are not, or should not be, characterized as community property at all. Goodman, *A Community Property Citizen's Plea to Congress*, 61 A.B.A.J. 1495, 1497 (1975); Goldberg, *Is Armed Services Retired Pay Really Community Property?*, 48 CAL. ST. B.J. 12 (1973). But though the doctrine of federal supremacy may be asserted to support that argument, the Supreme Court of the United States seems to have backed away from its earlier espousal of the supremacist point of view as exemplified by Free v. Bland, 369

ful of the powerful argument which militates against immediate division of a property right to be fixed (if ever) in the future since that argument is founded on the nature of the court's *equitable* powers to divide the property. Since the court cannot know what the situation of the parties may be at that future time when there *may* be a property interest to divide, the court cannot very well exercise its *present* equitable discretion concerning the matter.[86] The Texas Supreme Court, therefore, indicated a clear preference for the "if-and-when" decree in dealing with unaccrued retirement benefits, and that approach is equally appropriate to the division of any interest not absolutely vested since the risk of ultimate non-vesting is divided equally between the parties.[87]

A right in real property which will ripen by adverse possession seems beyond the scope of *Cearley*. The division of such an unaccrued interest seems beyond the power of a divorce court although the issue has never been presented for appellate review. This conclusion follows whether the claim is based on color of title or naked trespass, even though the two situations are treated differently in applying the inception of title doctrine to determine the separate or community character of the property.[88] The "property interest" involved seems too fragile to support an "if-and-when" order relating to what is not yet vested, regardless of whether vesting ultimately relates back to a time while the marriage subsisted. But in this and similar instances involving contingent interests, the Texas divorce court's division of community property is *discretionary* and its equitable authority should be exer-

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U.S. 663, 666 (1962), and Wissner v. Wissner, 338 U.S. 655, 659 (1950). *See* United States v. Yazell, 382 U.S. 341, 352 (1966); Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964). In *Yazell* Mr. Justice Fortas made this striking comment:

> Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect to such state interests, will suffer major damage if the state law is applied.

United States v. Yazell, 382 U.S. 341, 352 (1966). *See also* Sage, *Military Retired Pay in Texas: A New Outlook*, 7 ST. MARY'S L.J. 28 (1975).

86. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 29-31 (1973).

87. Cearley v. Cearley, 544 S.W.2d 661, 664 (Tex. 1976), *quoting In re* Marriage of Brown, 126 Cal. Rptr. 633 (1976).

88. *See* Strong v. Garrett, 148 Tex. 265, 271-72, 224 S.W.2d 471, 474 (1949); McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEXAS TECH L. REV. 281, 349 (1974).

More difficult problems of characterization are encountered with respect to realty in other jurisdictions. *See* Tirado v. Tirado, 357 S.W.2d 468, 471 (Tex. Civ. App.—Texarkana 1962, writ dism'd); notes 215-17, 337-44 *infra* and accompanying text.

cised cautiously. California courts, on the other hand, divide community property equally on divorce.[89] Hence, California courts are sometimes forced to make hard judgments as to characterization and division which Texas courts may avoid. Thus when cited as "convincing authority," many California cases dealing with division of marital property on divorce must be treated with great wariness by Texas courts.[90]

Mere expectations of any kind are very difficult to deal with on divorce, although for certain purposes expectancies are properly the subject matter of present jural relationships.[91] It would rarely, if ever, be appropriate for a divorce court to deal with an anticipated interest; however, in a few instances courts have alluded to an expectancy as one of several factors supporting an unequal division of community property.[92] In *In re Rister*[93] the court concluded that a divorce court could not consider the anticipated increase in *amount* of pension benefits due to an employee's continued employment after divorce;[94] likewise, the *possibility* of future unemployment is not properly a factor to be considered.[95]

Undistributed income subject to a discretionary trust for the benefit

89. CAL. CIV. CODE § 4800 (Deering 1972).

90. For an instance of caution on the part of California courts in this area, *see In re* Marriage of Skaden, 132 Cal. Rptr. 524 (Ct. App. 1976); *cf. In re* Marriage of Freiberg, 127 Cal. Rptr. 792 (Ct. App. 1976).

91. Hale v. Hollon, 90 Tex. 427, 429, 39 S.W. 287, 288 (1897) (expected inheritance might be subject matter of present sale).

92. Whittenburg v. Whittenburg, 523 S.W.2d 797, 798 (Tex. Civ. App.—Austin 1975, no writ). The propriety of considering an expectancy such as an anticipated inheritance seems dubious at best. In Garrett v. Garrett, 534 S.W.2d 381, 382-83 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ), the appellate court appears to have approved the trial court's considering the possibility that realty awarded to the husband would appreciate in value, although the court may have been alluding to speculative value as a factor in determining *present* value of the realty. In Horlock v. Horlock, 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd), the appellate court said that "the [trial] court may consider the fact that the parties' estate primarily consists of equitable interests in real property, much of which is unimproved, and the fact that the *prevailing economic* conditions constitute a threat to the community estate as an entirety." Id. at 61 (emphasis added). In Means v. Means, 535 S.W.2d 911, 915 (Tex. Civ. App.—Amarillo 1976, no writ), contingent liabilities were regarded as properly considered along with other factors in making an equitable division. *See also* Horlock v. Horlock, 533 S.W.2d 52, 61 (Tex. Civ. App.—Houston 14th Dist. 1975, writ dism'd) (contingent liabilities).

93. 512 S.W.2d 72 (Tex. Civ. App.—Amarillo 1974, no writ). The court can only consider earned value of pension interest at date of divorce.

94. *Id.* at 74.

95. Thomas v. Thomas, 525 S.W.2d 200, 202 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). But the prospect of increased earning power is a proper factor to consider in fixing child support payments. Goren v. Goren, 531 S.W.2d 897, 900 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism'd).

of one spouse is another factor that may not be considered.[96] In *Currie v. Currie*[97] undistributed income of a trust was accumulated and added to the corpus in which the spouse would share on the death of the life tenant. The court defined this interest as *"contingent"* in applying the test of *vested* interests then regarded as subject to division.[98] It may also be said that income is but part of the subject matter of the gift of the settlor of the trust and, therefore, is separate property. If by the terms of the trust, income not subject to distribution is added to and becomes a part of the corpus, it *is* corpus when received by the beneficiary and, therefore, his separate property.[99] But spendthrift provisions by which an interest is protected from the claims of creditors does not constitute a bar to division of the interest,[100] and it seems generally agreed that interests subject to other restraints on alienation are, nevertheless, subject to division on divorce.[101] *Gillis v. Gillis*[102] dealt

96. Buckler v. Buckler, 424 S.W.2d 514, 516 (Tex. Civ. App.—Fort Worth 1967, writ dism'd).

97. 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ dism'd).

98. *Id.* at 390. For a criticism of this conclusion *see* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 76-77 (1975). In *Currie* the settlor of another trust directed that net income of the trust become part of the corpus of the trust for the benefit of one of the spouses. The trustee had full discretion to determine what constituted net income. The settlor also empowered the trustee to pay estate taxes on the estate of the settlor, as well as expenses of trust administration, from the income of the trust. The beneficiary's spouse asserted that the community was entitled to reimbursement for income so expended by the trustee. This contention was rejected on the ground that the trustee's expenditures were made *before* any interest accrued to the beneficiary and, hence, that there was no community interest in the funds expended. Currie v. Currie, 518 S.W.2d 386, 390 (Tex. Civ. App.—San Antonio 1974, writ dism'd).

99. *See In re* Marriage of Long, 542 S.W.2d 712, 717-18 (Tex. Civ. App.—Texarkana 1976, no writ).

100. Angott v. Angott, 462 S.W.2d 73, 74 (Tex. Civ. App.—Waco 1970, no writ); *see* Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 652 (1974).

101. Interests subject to anti-assignment statutes or other prohibitions against transfer have received some attention from the courts. Allen v. Allen, 363 S.W.2d 312, 314-15 (Tex. Civ. App.—Houston 1962, no writ) (Railroad Retirement Act a federal statute that would deprive the court of power to assign or to partition the anticipated benefits), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 44-45 (1969), represented the prior view that division was improper. *Cf.* Phillipson v. Board of Administration Pub. Employees' Retirement Sys., 89 Cal. Rptr. 61, 68 (1970); Berg v. Berg, 115 S.W.2d 1171, 1172 (Tex. Civ. App.—Fort Worth 1938, writ dism'd).

But the *Allen* case was distinguished in Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd). The *Mora* case was later explicitly approved in Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970), and represents the present view. *See* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 40 (1971); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 44-45 (1969).

102. 435 S.W.2d 171 (Tex. Civ. App.—Fort Worth 1968, writ dism'd), *discussed in*

with contracts to manage mutual insurance companies which by statute are not transferable. Despite this fact, it was shown that such contracts are often transferred and that they represent substantial interests in property although not, strictly speaking, property interests themselves. The court determined that their worth should be assessed at a fair market value and taken into consideration in making a division of property on divorce.[103]

Other examples of non-property interests are not readily classified. In *Nail v. Nail*[104] the Supreme Court of Texas held that the goodwill of a *professional* practice was not a property interest subject to division, but one must not assume that all types of goodwill shall be so treated. The goodwill of a legal practice should fall within the rule in *Nail*, but not that of an ordinary business. In *Miguez v. Miguez*[105] the Beaumont court held that a federal agricultural allotment was not property subject to actual division but that the divorce court could order the spouse controlling the allotment to dispose of it as directed by the court.[106] There is no Texas case dealing specifically with intellectual property in the context of division on divorce although the question was considered and inconclusively treated in *Rose v. Hatten*.[107] How such matter will be considered when brought before a divorce court is still an open question. Guidance regarding such matters as patents, copyrights, musical scores, half-finished novels, and similar interests is, however, found in academic sources.[108]

McKnight, *Family Law, Annual Survey of Texas Law*, 24 Sw. L.J. 49, 52 (1970); *see* TEX. INS. CODE ANN. art. 14.39 (1963).

103. Gillis v. Gillis, 435 S.W.2d 171, 173-75 (Tex. Civ. App.—Fort Worth 1968, writ dism'd).

104. 486 S.W.2d 761, 764 (Tex. 1972).

105. 453 S.W.2d 514 (Tex. Civ. App.—Beaumont 1970, no writ).

106. *Id.* at 517-20. The court leaves a clear inference that the trial court's contempt powers are available to enforce its order. In the context of federal agricultural allotments the courts have displayed a breadth of ambivalence not ordinarily encountered in a narrow subject matter. *See In re* Adams, 357 F. Supp. 1184, 1187 (S.D. Tex. 1973) (interest treated as property for purposes of bankruptcy). *But see* Babb v. United States, 349 F. Supp. 792, 794 (S.D. Tex. 1972) (like interest not so treated for estate tax purposes).

With respect to an airplane subject to control of a federal agency, *see* Goodwin v. Goodwin, 451 S.W.2d 532, 534 (Tex. Civ. App.—Amarillo), *rev'd on other grounds*, 456 S.W.2d 885 (Tex. 1970).

107. 417 S.W.2d 456, 458 (Tex. Civ. App.—Houston 1967, no writ), *noted in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 139-140 n.55 (1968).

108. Davis, *A Consideration of Separate and Community Property Aspects of Inventions and Patents* in ESSAYS IN THE LAW OF PROPERTY PRESENTED TO CLYDE EMERY 1 (Southern Methodist University 1975); McKnight, *Dealing With Unique Marital Proper-*

Division as the Court Deems Just and Right

A. Criteria, Standards, and Devices

The power of the divorce court to divide the estate of the parties "as the court deems just and right" is originally found in the language of the 1841 statute.[109] It is important to remember that our present constitutional definitions of separate and community property were not adopted until 1845.[110] Thus, the fact that statutory provisions for division of property on divorce antedate the constitutional definitions of separate and community property may have some bearing on the meaning of those provisions.[111]

Prior to the introduction of no-fault divorce through the enactment of the Family Code in 1969,[112] the courts had long held—and in some instances today still hold—that in making a division of property it is proper to consider the following factors: the guilt or innocence of the spouses,[113] the benefits an innocent spouse might derive from the continuation of marriage,[114] the disparity of earning power of the spouses and their ability to support themselves,[115] comparative conditions of health,[116] the value of a particular asset to a particular

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ty Rights in INSTITUTE ON TEXAS FAMILY LAW AND COMMUNITY PROPERTY 12, 17-18 (J. McKnight ed. 1973). *See also* Batlle, *El Derecho de Autor y la Sociedad de Gananciales* in 1 ESTUDIOS JURIDICOS EN HOMENAJE AL PROFESOR FEDERICO DE CASTRO 137 (Madrid 1976).

109. Tex. Laws 1841, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898).

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

111. *See* TEX. FAMILY CODE ANN. § 3.63 (1975), which provides that "[i]n 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."

112. There were two no-fault grounds for divorce prior to 1970—living apart and confinement in a mental hospital. These are still provided for, respectively, in somewhat altered form, in TEX. FAMILY CODE ANN. §§ 3.06, 3.07 (1975). *See* McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH. L. REV. 281, 322-23 (1974).

113. Hooper v. Hooper, 403 S.W.2d 215, 217 (Tex. Civ. App.—Amarillo 1966, writ dism'd).

114. Hedtke v. Hedtke, 112 Tex. 404, 409, 248 S.W. 21, 22 (1923); Hopkins v. Hopkins, 540 S.W.2d 783, 787 (Tex. Civ. App.—Corpus Christi 1976, no writ) (medical benefits which would be lost).

115. Means v. Means, 535 S.W.2d 911, 914 (Tex. Civ. App.—Amarillo 1976, no writ); Garrett v. Garrett, 534 S.W.2d 381, 383 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); Cravens v. Cravens, 533 S.W.2d 372, 375 (Tex. Civ. App.—El Paso 1975, no writ); Merrell v. Merrell, 527 S.W.2d 250, 255 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.). In Roberts v. Roberts, 535 S.W.2d 373, 374 (Tex. Civ. App.—Tyler 1976, no writ), the court attached some significance to the fact that the wife was more than twenty years older than the husband.

116. Fitts v. Fitts, 14 Tex. 443, 451 (1855); Dobbs v. Dobbs, 449 S.W.2d 119, 120

spouse,[117] the liabilities of the spouses,[118] the spouse to whom custody of the children is granted,[119] and the needs of the children of the marriage.[120] Courts have continued to consider these factors even though fault is no longer asserted as a ground for divorce[121] and the pleadings do not allege fault as a ground for an unequal division of the community estate or a divestiture of title to separate property. It is certainly better practice, however, that pleadings allege fault with respect to property division, if only out of an abundance of caution.[122]

(Tex. Civ. App.—Tyler 1969, no writ). Comparative age and condition of health should be considered as mere elements in determining the spouses' ability to support themselves.

117. Goren v. Goren, 531 S.W.2d 897, 900 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism'd) (dealing with husband's interest in his medical practice); *see* note 131 *infra* and accompanying text.

118. Means v. Means, 535 S.W.2d 911, 917 (Tex. Civ. App.—Amarillo 1976, no writ); Horlock v. Horlock, 533 S.W.2d 52, 56-58 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd); Goren v. Goren, 531 S.W.2d 897, 900 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism'd).

119. Boriack v. Boriack, 541 S.W.2d 237, 243 (Tex. Civ. App.—Corpus Christi 1976, writ dism'd).

120. Rice v. Rice, 21 Tex. 58, 60-61 (1858); McKnight v. McKnight, 535 S.W.2d 658, 661 (Tex. Civ. App.—El Paso), *rev'd on other grounds*, 543 S.W.2d 863 (Tex. 1976); Horlock v. Horlock, 533 S.W.2d 52, 54-55 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd). Until the recent *McKnight* case, the reference in TEX. FAMILY CODE ANN. § 3.63 (1975) to "the rights of . . . any children of the marriage" was viewed merely as the last vestige of Texas forced heirship statute repealed in 1856. *See* McKnight, *Texas Community Property Law—Its Course of Development and Reform* in ESSAYS IN THE LAW OF PROPERTY PRESENTED TO CLYDE EMERY 30, 46 (Southern Methodist University 1975). But in *McKnight* the provision is given substantive effect. *See* note 135 *infra* and accompanying text. *See also* Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 219 n.72 (1975).

121. The trial court commits error in striking fault allegations. Bell v. Bell, 540 S.W.2d 432, 436 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). The error was, however, deemed harmless in that instance.

122. Even if fault is not alleged as a ground for divorce, the court should be advised of the "cause of the parties' inability to live together as husband and wife, or conduct that contributed to the divorce." Harrington v. Harrington, 451 S.W.2d 797, 800 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ). General allegations in the pleadings rather than specific terms should suffice.

In drafting the decree the same care must be taken as in drafting the pleadings or a property settlement agreement. See notes 53-72 *supra* and accompanying text. In his article Mr. Rudberg said that

> [t]he judgment must be specific to the extent that the subject matter of the decree can be determined, either from the recitals of the judgment itself or by reference to other portions of the record. Better practice dictates that the subject matter be clearly determinable from the . . . judgment itself without the necessity of resorting to other portions of the record. Where there must be resort to matters outside the record for identification of property, the judgment . . . is totally ineffectual and may be subject to reversal.

Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 648-49 (1974). *See also* Constance v. Constance, 537 S.W.2d 488 (Tex. Civ. App.—Austin), *rev'd*, 544 S.W.2d 659 (Tex. 1976).

In the vast majority of cases today, the no-fault ground of insupportability is alleged as the sole ground for dissolution of the marriage; thus, it has been questioned whether the old standards associated with fault divorces are still suitable for dealing with division of property in a no-fault scheme.[123] In *Cooper v. Cooper*[124] the court pointed out that the wife's attorney's fees need not be assessed against the husband, nor should the court attempt to equalize the wealth of the spouses in achieving a division of property.[125] It has been cogently argued, however, that it is inappropriate in a case of no-fault divorce to divide the community property unequally or to award any of the separate property to one other than its owner.[126]

Since the standard for dividing property is one based on equitable considerations and the trial court has had the benefit of hearing the evidence presented, appellate courts are most reluctant to find an abuse of discretion on the part of the trial court in exercising its equitable powers to effect a division of the marital property.[127] To find an abuse of discretion, the appellate court must find that the award of the trial court was "manifestly unjust and unfair."[128] Only rarely has such a finding been made. An older case illustrative of this point is *Reasonover v. Reasonover*[129] where the trial court made a disproportionately large award in favor of the wife and the appellate court found

123. McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 80 (1975); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 36-37 (1973). *But see* Goren v. Goren, 531 S.W.2d 897 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ dism'd).

124. 513 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

125. *Id.* at 234.

126. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 80 nn.104-06 and accompanying text (1975); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 36-37 nn.72-73 and accompanying text (1973); McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 42-43 (1971). *See also In re* Williams, 199 N.W.2d 339 (Iowa 1972).

The court concluded in Thomas v. Thomas, 525 S.W.2d 200, 202 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ), that the possibility of lack of future earning power should not be considered in making a division of property. This conclusion suggests that fault bases for property division are in the course of reexamination.

127. Hedtke v. Hedtke, 112 Tex. 404, 411, 248 S.W. 21, 23 (1923); McKnight v. McKnight, 535 S.W.2d 658, 659 (Tex. Civ. App.—El Paso), *rev'd on other grounds*, 543 S.W.2d 863 (Tex. 1976); Edwards v. Edwards, 534 S.W.2d 740, 742 (Tex. Civ. App.—Austin 1976, no writ). Stated a little differently, there is "a presumption on appeal that the trial court correctly exercised its discretion." Roberts v. Roberts, 535 S.W.2d 373, 374 (Tex. Civ. App.—Tyler 1976, no writ). *See also* Williams v. Williams, 537 S.W.2d 107, 109 (Tex. Civ. App.—Tyler 1976, no writ).

128. Thomas v. Thomas, 525 S.W.2d 200, 202 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); *see* Bell v. Bell, 513 S.W.2d 20, 22 (Tex. 1974).

129. 59 S.W.2d 887 (Tex. Civ. App.—San Antonio 1933, no writ).

nothing in the record to justify the decree.[130] Such a conclusion is unusual, but there are a few recent cases in which similar results have been reached. For example, in *Hooper v. Hooper*[131] the appellate court found that the record demonstrated no sound reason for awarding the wife eighty-five percent of the marital property. In *Thomas v. Thomas*[132] a disproportionately large award was made to the husband. The court determined that the possibility that the husband might lose his job and have difficulty finding another one of the same type did not justify such an award.[133] More recently, the Dallas Court of Civil Appeals held that it was an abuse of discretion to divide the property in a way that left one spouse with substantial federal income tax liabilities and no assets with which to pay them.[134] In that instance, the award was disproportionately large in favor of the husband on the assumption that he would pay the taxes; however, both husband and wife were *liable* for payment of the taxes. In *McKnight v. McKnight*[135] the El Paso court held that the rights of the children, including those over eighteen years of age, had been infringed by the court's order, which stripped their father of all his cash and his working capital and left him burdened with debt.[136]

The appellate courts have usually sustained the finding of the trial court if they find some legitimate basis in the record to support the division.[137] A Tyler court case, *Dobbs v. Dobbs*,[138] is a useful example. The division of property was disproportionately large in favor of the

130. *Id.* at 887-88.

131. 403 S.W.2d 215, 217 (Tex. Civ. App.—Amarillo 1966, writ dism'd). *See also* Dietz v. Dietz, 540 S.W.2d 418, 420 (Tex. Civ. App.—El Paso 1976, no writ), where 99% of the community property was awarded to the husband without good cause.

132. 525 S.W.2d 200 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); *cf.* Boriack v. Boriack, 541 S.W.2d 237, 242-43 (Tex. Civ. App.—Corpus Christi 1976, writ dism'd).

133. Thomas v. Thomas, 525 S.W.2d 200, 202 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

134. Cole v. Cole, 532 S.W.2d 102, 105 (Tex. Civ. App.—Dallas 1975, no writ).

135. 535 S.W.2d 658 (Tex. Civ. App.—El Paso), *rev'd on other grounds*, 543 S.W.2d 863 (Tex. 1976).

136. *Id.* at 660. For other instances of deprivation of livelihood, *see* Edwards v. Edwards, 534 S.W.2d 740, 742 (Tex. Civ. App.—Austin 1976, no writ), and the authorities there cited. *See also* Means v. Means, 535 S.W.2d 911, 914 (Tex. Civ. App.—Amarillo 1976, no writ).

137. When there are no findings of fact or conclusions of law, the appellate court must consider the evidence and all reasonable inferences that may be drawn therefrom in a light most favorable to the appellee. Bishop v. Bishop, 359 S.W.2d 869, 871 (Tex. 1962). *See also* Scoggins v. Scoggins, 531 S.W.2d 245 (Tex. Civ. App.—Tyler 1975, no writ) (with respect to whether there were findings of fact).

138. 449 S.W.2d 119 (Tex. Civ. App.—Tyler 1969, no writ).

wife, but the record disclosed good reasons for the difference. The husband was awarded $3,000 in cash, whereas the wife received $27,000 in cash, a duplex, and an automobile. The cash award in favor of the wife, in large part, represented a recovery by her in a prior proceeding[139] while the husband had previously relinquished all claims to the house and the automobile. Even if a trial court has made errors in evaluating property[140] or errors of law in characterizing property as separate or community,[141] such errors may not justify reversal if the division is otherwise fair.

As a rule, the pleadings to support a division of property on divorce need only be in general terms since a prayer for general relief is sufficient to empower the court to make a complete division of the marital estate.[142] It is better practice, however, to plead specifically as well as generally.[143] A jury verdict with regard to property division is merely advisory,[144] and most trial courts do not even submit an issue relating to property division although a jury has been empaneled to make other findings of fact. The facts underlying the property division, however, are within the province of the jury.[145] Consequently,

139. *Id.* at 120.

140. *See* Preston v. Preston, 453 S.W.2d 389, 391-92 (Tex. Civ. App.—El Paso 1970, no writ). *See also* Fuqua v. Fuqua, 541 S.W.2d 228, 229 (Tex. Civ. App.—Tyler 1976, no writ); McGee v. McGee, 537 S.W.2d 94 (Tex. Civ. App.—Amarillo 1976, no writ) (dictum). *But see* Freeman v. Freeman, 497 S.W.2d 97, 101 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (substantial error may be grounds for reversal).

141. Law v. Law, 517 S.W.2d 379, 384 (Tex. Civ. App.—Austin 1974, writ dism'd); Wilkerson v. Wilkerson, 515 S.W.2d 52, 54 (Tex. Civ. App.—Tyler 1974, no writ); Gaulding v. Gaulding, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1973, no writ); Marks v. Marks, 470 S.W.2d 83, 85 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.). For harmless evidentiary errors, *see* Cravens v. Cravens, 533 S.W.2d 372, 376 (Tex. Civ. App.—El Paso 1975, no writ) (harmless error as to polygraph examination and basing division of property thereon); Merrell v. Merrell, 527 S.W.2d 250, 256 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (dictum) (harmless error in that wife was capable of paying attorneys' fees, but husband required to pay).

142. *See* Schreiner v. Schreiner, 502 S.W.2d 840, 846 (Tex. Civ. App.—San Antonio 1973, writ dism'd); Zaruba v. Zaruba, 498 S.W.2d 695, 698 (Tex. Civ. App.—Corpus Christi 1973, writ dism'd). In Bell v. Bell, 540 S.W.2d 432, 436 (Tex. Civ. App.—— Houston [1st Dist.] 1976, no writ), striking fault allegations was said to be error, but harmless error under the circumstances. Fact finding was also erroneously referred to a master, but all findings of the master adverse to the complainant could have been submitted to a jury should the complainants have desired to do so.

143. With respect to attorney's fees pending appeal, more precise pleading may be required. *See* Carson v. Carson, 528 S.W.2d 308, 309 (Tex. Civ. App.—Waco 1975, no writ).

144. Cockerham v. Cockerham, 514 S.W.2d 150, 156-57 (Tex. Civ. App.—Waco 1974), *rev'd on other grounds*, 527 S.W.2d 162 (Tex. 1975) (affirmed in this respect). *See also* Goetz v. Goetz, 534 S.W.2d 716 (Tex. Civ. App.—Dallas 1976, no writ).

145. Cockerham v. Cockerham, 527 S.W.2d 162, 173 (Tex. 1975), *rev'g* 514 S.W.2d 150 (Tex. Civ. App.—Waco 1974).

if the jury is called on to make a determination that property was acquired before marriage and is, therefore, separate property, that is a fact determination and is binding on the court. Similarly, matters of fact with respect to attorney's fees may be submitted to a jury, but whether attorney's fees are awarded to either party is in the sole discretion of the court.[146]

The courts use numerous devices and standards in making orders that are "just and right." Property of one kind may be awarded to one spouse and that of a different kind to the other,[147] or all of a particular type of property may be awarded to one of the spouses.[148] There is no need to divide particular property by awarding a part to one and a part to the other, but the court may order a sale of property not susceptible of being partitioned-in-kind in order to achieve a partition.[149] In some instances the courts have partitioned corporate stock even though the result has been to leave the spouses competing for corporate control.[150] Frequently, a money judgment is awarded to one spouse to equalize shares,[151] and a lien may be imposed on particular assets for the discharge of such an obligation.[152] Courts have also required one spouse to execute a note in favor of the other[153] or to make periodic payments of fixed sums with or without interest in order

146. Hopkins v. Hopkins, 540 S.W.2d 783, 788 (Tex. Civ. App.—Corpus Christi 1976, no writ).

147. *See* Mercer v. Mercer, 503 S.W.2d 395, 396-97 (Tex. Civ. App.—Corpus Christi 1973, no writ).

148. Elrod v. Elrod, 517 S.W.2d 669, 674 (Tex. Civ. App.—Corpus Christi 1974, no writ).

149. Ellis v. Ellis, 225 S.W.2d 216, 218-19 (Tex. Civ. App.—San Antonio 1949, no writ); Lewis v. Lewis, 179 S.W.2d 594, 596-97 (Tex. Civ. App.—Fort Worth 1944, no writ); Scannell v. Scannell, 117 S.W.2d 538, 547 (Tex. Civ. App.—Fort Worth 1938, no writ).

150. Braswell v. Braswell, 476 S.W.2d 444, 448 (Tex. Civ. App.—Waco 1972, writ dism'd); Brown v. Brown, 191 S.W.2d 814, 817 (Tex. Civ. App.—Dallas 1945, no writ). A minority stockholder is entitled to the usual remedies in case of discriminatory treatment.

151. *In re* Marriage of Jackson, 506 S.W.2d 261, 267 (Tex. Civ. App.—Amarillo 1974, writ dism'd); Weaks v. Weaks, 471 S.W.2d 454, 455 (Tex. Civ. App.—Beaumont 1971, writ dism'd); Kirkham v. Kirkham, 335 S.W.2d 393, 394 (Tex. Civ. App.—San Antonio 1960, no writ).

152. Moor v. Moor, 63 S.W. 347, 352 (Tex. Civ. App. 1901, writ ref'd). *See also* Peterson v. Peterson, 502 S.W.2d 178, 180 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ) (award of money judgment to wife to be paid out of husband's business). Care must be observed so that improper liens are not imposed on homestead property. *See* notes 282 and 348 *infra*. With respect to imposing liens on separate property, *see* notes 202-05 *infra* and accompanying text.

153. Womble v. Womble, 502 S.W.2d 886, 889 (Tex. Civ. App.—Fort Worth 1973, no writ).

to facilitate division of the property.[154] This kind of order should not be confused with permanent alimony.[155] For example, if there were a $100,000 business not susceptible to partition-in-kind and the spouses would not be able to operate it together as a result of their attitudes toward each other, the court might order the business to be turned over to the husband who has been running it all along. Since there would probably not be enough cash available for the husband to compensate the wife for her community interest in the business, the husband might be ordered to make, over a period of years, periodic payments of $5,000 or $10,000 plus interest.[156] The court in *In re Marriage of Jackson*[157] best expressed this proposition when it said that "[s]o long as the division was referable to the rights and equities of the parties in and to properties at the time of dissolution of the marriage, such division should not be regarded as an allowance of permanent alimony in violation of established public policy."[158]

In some cases all of the community property has been awarded to one spouse as compensation for prior waste of the community by the other. In *Reaney v. Reaney*[159] all the remaining community property, as well as a money judgment, was awarded to the wife to compensate her for the husband's culpable dissipation of the community estate.[160] Some trial courts have taken the equities of expenditure into consideration in making its division of property, thereby avoiding making a more precise determination of the issues of reimbursement.[161] The term

154. Garrett v. Garrett, 534 S.W.2d 381, 383 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); Goren v. Goren, 531 S.W.2d 897, 900 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism'd); Forney v. Jorrie, 511 S.W.2d 379, 385 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

155. *See* note 65 *supra*.

156. Unless it is specifically provided that periodic payments will cease on the death of the payee, as well as that of the payor, the right to receive such payments would seem to survive the payee as a debt owed to the payee's estate. *Cf.* TEX. FAMILY CODE ANN. § 14.05(d) (1975), with respect to the obligation to pay child support as commented on in Eggemeyer v. Eggemeyer, 535 S.W.2d 425, 428 (Tex. Civ. App.—Austin 1976, writ granted on other grounds).

157. 506 S.W.2d 261 (Tex. Civ. App.—Amarillo 1974, writ dism'd).

158. *Id.* at 266; *accord*, Benedict v. Benedict, 542 S.W.2d 692, 699 (Tex. Civ. App.—Fort Worth 1976, writ dism'd). *But see In re* Marriage of Long, 542 S.W.2d 712, 715-16 (Tex. Civ. App.—Texarkana 1976, no writ).

159. 505 S.W.2d 338 (Tex. Civ. App.—Dallas 1974, no writ). *See also* Collins v. Collins, 540 S.W.2d 497, 498 (Tex. Civ. App.—Tyler 1976, no writ).

160. Reaney v. Reaney, 505 S.W.2d 338, 340 (Tex. Civ. App.—Dallas 1974, no writ); *cf.* Roye v. Roye, 404 S.W.2d 92, 95 (Tex. Civ. App.—Tyler 1966, no writ), where the husband was awarded a debt owed the community by his paramour whose security he had released pendente lite.

161. *See, e.g.*, Burns v. Burns, 541 S.W.2d 280, 281-82 (Tex. Civ. App.—San Antonio 1976, writ dism'd); Means v. Means, 535 S.W.2d 911, 916-17 (Tex. Civ. App.—Amarillo

reimbursement, though, cannot be said to describe this process of rough justice; it is, perhaps, better described as an "equitable adjustment."

Although courts have sometimes tended to overlook the distinction, there are two very different situations concerning division of property (especially retirement benefits) with which the courts must continue to deal: (1) *division on divorce* and (2) *division after divorce.* If community property is left undivided on divorce, the result is a tenancy in common between the former spouses.[162] When the *divorce* court divides property, it makes an equitable division utilizing its discretionary powers. Division after divorce, on the other hand, does not involve the exercise of the court's discretion.

The handling of retirement benefits on divorce provides a useful example of the process of division since it has given rise to so much difficulty in the past. As in the case of other property, the *division* of such benefits is always the second step in a two-step process: the court must *initially* make an evaluation of what is usually *prospective* retirement benefits in terms of property interest, and *then* the court must determine how to dispose of the interest. In evaluating any interest, the task is complicated, and the court's equitable discretion is notably impaired by the fact that there are contingencies affecting the ultimate enjoyment under consideration. In *Cearley v. Cearley*[163] the Texas Supreme Court borrowed language from the Supreme Court of California commenting on this situation:

> In dividing nonvested pension rights as community property the court must take account of the possibility that death or termina-

1976, no writ); Horlock v. Horlock, 533 S.W.2d 52, 56, 58 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd); Carson v. Carson, 528 S.W.2d 308, 309 (Tex. Civ. App.—Waco 1975, no writ) (*semble*); Fulwiler v. Fulwiler, 419 S.W.2d 251, 252 (Tex. Civ. App.—Eastland 1965, no writ), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 46 (1969); Hartman v. Hartman, 253 S.W.2d 480, 483 (Tex. Civ. App.—Austin 1952, no writ) (dictum). *See also* Burns v. Burns, 541 S.W.2d 280, 281 (Tex. Civ. App.—San Antonio 1976, writ dism'd).

162. Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970). If a spouse controlling particular community property fears it will not be divided equally, this rule of law may encourage him to secrete it. His inclination may be further fueled by his hope that secreting the property may result in its never being found at all. The other spouse's counsel may combat these motives by insistence on an order that any other community property not dealt with by the court be awarded to his client.

A suggested ultimate solution to the problem is to give the divorce court continuing jurisdiction over community property not dealt with at the time of the divorce. But such power, provided by statute, would allow the court to consider facts that occur after the divorce. Nevertheless, this solution may have fewer drawbacks than the prevailing law. *See* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 40 (1971).

163. 544 S.W.2d 661 (Tex. 1976).

> tion of employment may destroy those rights before they mature. In some cases the trial court may be able to evaluate this risk in determining the present value of those rights. . . . But if the court concludes that because of uncertainties affecting the vesting or maturation of the pension that it should not attempt to divide the present value of pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid. This method of dividing the community interest in the pension renders it unnecessary for the court to compute present value of the pension rights, and divides equally the risk that the pension will fail to vest.[164]

In *Cearley* the court had before it what by the old formulation of applicable principles would have been termed a case of *unvested* pension rights. In such instances the court indicates[165] a strong preference for the "if-and-when" order for the division of prospective benefits. But the division of benefits as they are received by the pensioner is also an appropriate means of dividing accrued or even matured interests,[166] thereby allowing the court to avoid the arduous task of giving the interest a present value and the temptation of making a monetary lump-sum award to the other spouse[167]—a practice that has given rise to some difficulty in other jurisdictions.[168] It is not suggested that the court should always, or even usually, divide the future payments between the spouses. An exercise of the court's equitable judgment is always required. Although retirement benefits are properly characterized as a form of deferred compensation for services and are, therefore, community property interests (though in many instances contingent ones), a significant purpose in instituting such benefits is also that of providing for the future maintenance of the pensioner. After carefully weighing the situation in issue, the court may award the prospective pensioner the full right in the interest based on its present equity-value rather than on a lesser amount, the court's determination being dependent upon certain conditions such as premature termina-

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164. *Id.* at 664, *quoting In re* Marriage of Brown, 126 Cal. Rptr. 633 (1976). *See also* DeRevere v. DeRevere, 491 P.2d 249 (Wash. Ct. App. 1971); Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U. SAN. FRAN. L. REV. 635, 654 (1975).

165. Cearley v. Cearley, 544 S.W.2d 661, 664 (Tex. 1976).

166. See notes 177-78 *infra* and accompanying text.

167. *See* Maddox v. Maddox, 489 S.W.2d 392-93 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ) (husband awarded mortgaged property and was required to pay money payments to the wife rather than selling the property and dividing proceeds).

168. *See* Comment, *Lump-Sum Division of Military Retired Pay*, 12 IDAHO L. REV. 197 (1975), *reprinted with modifications in* 3 COMM. PROP. J. 135 (1976).

tion under the employment contract.[169] Alternatively, the court may consider the remoteness of the receipt of prospective benefits[170] or it may apportion the benefits subject to a credit to the pensioner for income taxes which the recipient must later pay.[171] Furthermore, if the value of the interest reflects the fact of its acquisition over a period during which the spouses were not married or were married and living in non-community property states, the court may also consider these factors.[172] On the other hand, the court may simply divide the future payments to be received equally between the spouses[173] and designate the recipient a constructive trustee of the benefits received, ordering payment of a portion of them to the other former spouse.[174] The court may also award the interest in the retirement benefits wholly to the employee and award other property to the other spouse[175] or the other spouse can be awarded a money judgment in compensation for the community interest lost.[176] The prospective pensioner may even be required to withdraw from a pension plan so that his interest may be divided.[177]

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169. Maddox v. Maddox, 489 S.W.2d 391, 392 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

170. Freeman v. Freeman, 497 S.W.2d 97, 100-01 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

171. Troutenko v. Troutenko, 503 S.W.2d 686, 687-88 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

172. *E.g.*, Gaulding v. Gaulding, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1973, no writ); *In re* Marriage of McCurdy, 489 S.W.2d 712, 718 (Tex. Civ. App.—Amarillo 1973, writ dism'd); Marks v. Marks, 470 S.W.2d 83, 85 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.); Webster v. Webster, 442 S.W.2d 786, 788 (Tex. Civ. App.—San Antonio 1969, writ dism'd); Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd); Kirkham v. Kirkham, 335 S.W.2d 393, 394 (Tex. Civ. App.—San Antonio 1960, no writ).

173. Gaulding v. Gaulding, 503 S.W.2d 617 (Tex. Civ. App.—Eastland 1973, no writ); Daniels v. Daniels, 490 S.W.2d 862 (Tex. Civ. App.—Eastland 1973, writ dism'd).

174. Marshall v. Marshall, 511 S.W.2d 72, 75 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

175. Mercer v. Mercer, 503 S.W.2d 395, 397 (Tex. Civ. App.—Corpus Christi 1973, no writ).

Regardless of whether retirement benefits for a married pensioner vest as a result of age, time of service, or *disability*, the benefits are presumed to be community property. Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970). The court was therefore in error in Ramsey v. Ramsey, 474 S.W.2d 939, 941 (Tex. Civ. App.—Eastland 1971, writ dism'd), when it construed disability-retirement benefits as separate property. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 31 (1973). But the appellate court could have treated the error as a harmless one under the circumstances. *See* note 141 *supra* and accompanying text.

176. Maddox v. Maddox, 489 S.W.2d 391, 392-93 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

177. Taylor v. Taylor, 449 S.W.2d 368, 370 (Tex. Civ. App.—El Paso 1969, no

Contractual obligations incurred by the spouses with third persons cannot be altered by the divorce court without a showing of fraud or mistake, even though the third person to whom the debt is owed is a party to the proceedings.[178] If, for example, the wife incurred a contractual obligation during marriage, the contracting third party may intervene in the divorce proceeding and take the claim to judgment. The usual reason for intervention in such an instance is to show that the wife's obligations were incurred while she was acting as an agent of necessity for the husband.[179] Hence, though she herself may have been a principal, she was also acting as the husband's agent, and therefore, he would be liable too. Should the court order the husband to pay the debt, the wife would not be released from her obligation under the contract.[180] The court may order one spouse to pay a debt for which the other is also obligated for the purpose of achieving a just and fair division of property. The objective is to relieve one of the spouses of a particular obligation and to exonerate his property from seizure for satisfaction of debts.[181] Such an objective, however, can only be achieved if the spouse who is ordered to pay does, in fact, pay since, as pointed out by the Texarkana court in *Dorfman v. Dorfman*,[182] the creditor's rights against any spouse who is already

writ), *discussed in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 42 (1971).

178. Broadway Drug Store, Inc. v. Trowbridge, 435 S.W.2d 268, 270 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

179. *See* Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975), where the wife's trustee in bankruptcy intervened in the divorce proceeding to establish the husband's liability as well as that of the wife with respect to certain contractual obligations. No objection appears to have been raised with respect to the standing of the trustee to assert these claims against the husband. The court concluded that liabilities incurred by the wife in operating a dress shop were also those of the husband by application of the doctrine of "holding-out" and ratification within the law of agency. *Id.* at 171-74. *See also* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 91-92 (1976).

180. Goren v. Goren, 531 S.W.2d 897, 900 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism'd).

181. *See* Mangum v. Mangum, 184 S.W.2d 338, 339 (Tex. Civ. App.—San Antonio 1944, no writ); Hughes v. Hughes, 259 S.W. 180, 182 (Tex. Civ. App.—Amarillo 1924, writ dism'd); Hubbard v. Hubbard, 38 S.W. 388 (Tex. Civ App. 1896, no writ). For an extended discussion of these and related authorities *see* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 82-84 (1976).

182. 457 S.W.2d 417, 423 (Tex. Civ. App.—Texarkana 1970, no writ). If the order is spelled out with precision, it would seem that it would have all the means of enforcement of any other order involving property division, at least if payment is ordered to be made through the registry of the court. *See Ex parte* Sutherland, 526 S.W.2d 536, 539 (Tex. 1975), to the effect that a citation for civil contempt for failure to pay part of periodic retirement benefits into the registry of the court pursuant to an order dividing marital property on divorce did not constitute imprisonment for debt. *See* McKnight,

obligated cannot be affected by such an order. Recently, in *Walker v. Walker*,[183] it was pointed out that the court's order should contain a provision for the liability of one ex-spouse to the other should the other discharge a joint obligation ordered to be paid by one who fails to do so.[184] If, however, there are tax liabilities to be paid, specific provisions concerning their payment should be included in the order since an order to pay "community debts" has been construed as not necessarily encompassing all tax liabilities.[185]

B. The Scope of Section 3.63 with Respect to Separate Property

There is an ongoing dispute concerning the scope of section 3.63, which authorizes the court to make a division of marital property on divorce.[186] There are four general options: (1) no division of any separate property and equal division of the community, (2) no division of any separate property but division of the community in the court's discretion, (3) no division of separate realty but division of separate personalty and the community in the court's discretion, or (4) division of both separate and community property as the court deems "just and right."[187] The first option rests on the constitutional definition of separate and community property and the inability of the legislature, the courts, or spouses to abrogate it.[188] The second option is supported by a literal interpretation of the word "estate" in the statute.[189]

Most recent litigation has centered on the third and fourth options and the extent of the jurisdiction of the divorce court to divest title to

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Family Law, Annual Survey of Texas Law, 30 SW. L.J. 68, 86-87 n.138 (1976); Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 653, 656-57 (1974). *See also* note 62 *supra* and notes 349-50 *infra* and accompanying text.

183. 527 S.W.2d 200 (Tex. Civ. App.—Fort Worth 1975, no writ).

184. *Id.* at 204 (concurring opinion); *see* Forney v. Jorrie, 511 S.W.2d 379, 386 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (discharge of debt owed to a third person). *See also* Moor v. Moor, 63 S.W. 347, 352 (Tex. Civ. App. 1901, writ ref'd).

185. Brooks v. Brooks, 515 S.W.2d 730, 733 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.). *See also* Cole v. Cole, 532 S.W.2d 102, 104-05 (Tex. Civ. App.—Dallas 1975, no writ). For other authorities relating to tax consideration *see* McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 68, 87 (1976); McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 83 (1975); Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 651 (1974) (specificity of decree to include tax liabilities).

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

187. *See* Comment, *Division of Marital Property On Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 219-21 (1975) (an analysis of the outlook of the eight community property states in this regard).

188. *See* note 85 *supra* and authorities there cited.

189. *See* note 85 *supra* and authorities there cited.

separate realty. In *DePuy v. DePuy*[190] it was said that "[g]enerally, separate [real] property will be restored to its owner. Where personal property is involved, the court is vested with wide discretion in making disposition whether it be separate or community."[191] This observation is derived from a long line of cases antedating the enactment of section 3.63 of the Family Code. When that statute's progenitor was enacted in 1841,[192] the statute went on to say that the divorce court would never divest title to realty. Judicial interpretation of the statute construed the prohibition against divestiture of title to apply only to separate realty—as the statute's draftsmen certainly intended.[193] The statute of 1841 remained in effect until January 1, 1970, at which time it was reenacted as part of title 1 of the Family Code.[194] But in the reenactment the sentence referring to divestiture of title to realty was omitted even though the commentary presented to the legislature stated that the statute was unchanged. This legislative history has, therefore, given rise to considerable controversy as to the meaning of the statute as it now stands.[195] Since section 3.63 simply provides that the court shall order a division of the estate of the parties in a manner that the court deems just and right, the Tyler and Dallas courts have held that the broad power to divide as may be deemed just and right includes the power to divide separate real property.[196] There are obiter dicta to the same effect in several other cases though those cases did not actually involve a division of separate realty.[197] The Corpus Christi court, however,

190. 483 S.W.2d 883, 888 (Tex. Civ. App.—Corpus Christi 1972, no writ) (concurring opinion).

191. *Id.* at 888.

192. Tex. Laws 1841, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898).

193. Hailey v. Hailey, 160 Tex. 372, 376, 331 S.W.2d 299, 303 (1960) (referring to article 4638, another predecessor of section 3.63 of the Family Code). *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 38-39 (1973).

194. *Compare* Tex. Laws 1841, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898), *with* TEX. FAMILY CODE ANN. § 3.63 (1975). For an application of that statute prior to codification, *see* Holmes v. Holmes, 447 S.W.2d 423, 424 (Tex. Civ. App.—Waco 1969, no writ).

195. For a more detailed history of the enactment of section 3.63, *see McKnight, Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 38-39 (1973). *See also* Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209 (1975).

196. Baxla v. Baxla, 522 S.W.2d 736, 739-40 (Tex. Civ. App.—Dallas 1975, no writ); Wilkerson v. Wilkerson, 515 S.W.2d 52, 56-57 (Tex. Civ. App.—Tyler 1974, no writ).

197. *In re* Marriage of Butler, 543 S.W.2d 147, 149 (Tex. Civ. App.—Texarkana 1976, no writ); Burns v. Burns, 541 S.W.2d 280, 282 (Tex. Civ. App.—San Antonio 1976, writ dism'd); Dietz v. Dietz, 540 S.W.2d 418, 420 (Tex. Civ. App.—El Paso 1976, no writ); Merrell v. Merrell, 527 S.W.2d 250, 255 (Tex. Civ. App.—Tyler 1975, writ

after carefully considering the legislative history of the statute, concluded that section 3.63 of the Family Code was intended to mean that title to separate realty could not be divested.[198] The Austin court has agreed with this conclusion,[199] and the Tyler court appears to have withdrawn from its earlier position.[200] These holdings, however, do not appear to affect a long line of cases dating from 1855, which allow the imposition of a *trust* on separate realty for the support of the other spouse or of the minor children.[201]

If it is impermissible to divest title to separate property (or some of it), it would seem to follow that a *lien* cannot be put on separate property to guarantee payment of a monetary award, because the lien is an interest in the property itself and foreclosure of the lien would constitute complete divestiture of title. Nevertheless, a series of civil appeals cases sustains orders fixing liens on separate estates for the discharge of payments to the former spouse by the owner of the property.[202] Though the language of these cases is imprecise[203] and unsupported by a reasoned analysis, reliance may also be put on an early holding of the Texas Supreme Court to support the same conclusion.[204] It may also be argued that such a lien is no more than a tentative divestiture

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ref'd n.r.e.); Harrison v. Harrison, 495 S.W.2d 1, 3 (Tex. Civ. App.—Tyler 1973, no writ); *In re* Marriage of McCurdy, 489 S.W.2d 712, 717 (Tex. Civ App.—Amarillo 1973, writ dism'd); Medearis v. Medearis, 487 S.W.2d 198, 200 (Tex. Civ. App.—Austin 1972, no writ).

198. Ramirez v. Ramirez, 524 S.W.2d 767, 768-69 (Tex. Civ. App.—Corpus Christi 1975, no writ).

199. Eggemeyer v. Eggemeyer, 535 S.W.2d 425, 428 (Tex. Civ. App.—Austin 1976, writ granted).

200. Spiller v. Spiller, 535 S.W.2d 683, 684 (Tex. Civ. App.—Tyler 1976, writ dism'd) (dictum).

201. *Ex parte* Scott, 133 Tex. 1, 14, 123 S.W.2d 306, 313 (1939); Fitts v. Fitts, 14 Tex. 443, 447-48, 453 (1855); Eggemeyer v. Eggemeyer, 535 S.W.2d 425, 428 (Tex. Civ. App.—Austin 1976, writ granted); Pape v. Pape, 35 S.W. 479, 480 (Tex. Civ. App. 1896, writ dism'd); Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 212-13 (1975).

202. Bell v. Bell, 540 S.W.2d 432, 441 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); *In re* Marriage of Jackson, 506 S.W.2d 261, 267 (Tex. Civ. App.—Amarillo 1974, writ dism'd); Mea v. Mea, 464 S.W.2d 201, 206 (Tex. Civ. App.—Tyler 1971, no writ); Mozisek v. Mozisek, 365 S.W.2d 669, 670 (Tex. Civ. App.—Fort Worth 1963, writ dism'd); Smith v. Smith, 187 S.W.2d 116, 120-21 (Tex. Civ. App.—Fort Worth 1945, no writ); Hursey v. Hursey, 165 S.W.2d 761, 765 (Tex. Civ. App.—Dallas 1942, writ dism'd).

203. *Bell, Jackson, Mea, Mozisek,* and *Hursey* all refer to the imposition of an "equitable lien" in these instances. In *Hursey* the court goes on to say that "[t]he effect of the recital was merely to make the amount a charge against Hursey's separate estate, until paid." Hursey v. Hursey, 165 S.W.2d 761, 765 (Tex. Civ. App.—Dallas 1942, writ dism'd).

204. Simons v. Simons, 23 Tex. 344, 349 (1859).

since ultimate divestiture by foreclosure is essentially voluntary in that it may be precluded by compliance with the court's order to pay.[205]

Problems which are essentially those of characterization of property as either separate or community are encountered by the courts in dividing property produced by the efforts of a particular spouse in developing separate property. Similar problems arise in dividing property produced by the income from separate property and in dividing corporate interests that are closely held or solely owned. *Norris v. Vaughan*[206] did not concern division on divorce, but the principles of characterization exemplified there are applicable to the problems encountered on divorce. At marriage the husband owned certain producing gas leases and certain partnership interests. During marriage the partnerships acquired other gas leases (including the Hill and Cantrell leases) and interests in gas leases under farmout agreements that were paid for in part with the husband's separate property and that of his partners. The labor and talents of the husband and that of his partners also contributed to the acquisition of those profitable interests. Wells were drilled on these leases at the expense of the husband's separate property and that of the partnership. On the wife's death her heirs sought to show that some of the property was community property. The Supreme Court of Texas analyzed the situation largely in favor of the community claimants: (1) separate property, so long as it can be traced and identified, remains separate property; (2) no community interest was shown as to gas produced from wells which were drilled prior to marriage and which required little of the husband's attention during marriage except to provide upkeep out of separate property, since community character will not be impressed on separate property by virtue of the husband's activities relating solely to production and maintenance; (3) income from the partnership "which bought and sold gas" was community property though the partnership interests themselves remained separate property; and (4) such interests as the husband obtained in wells drilled on gas leases acquired during marriage, which acquisitions were in part due to the husband's labor and talents and in part to that of his partners and therefore attributable to him, were community property with a right of reimbursement in favor of the husband's separate property for money spent for acquisitions, drilling costs, and his share

205. *See* Smith v. Smith, 187 S.W.2d 116, 121 (Tex. Civ. App.—Fort Worth 1945, no writ).

206. 152 Tex. 491, 260 S.W.2d 676 (1953).

of partnership expenses.[207] Hence, once the character of the property has been determined, the ordinary rules of property division may be applied.[208] It must be borne in mind, however, that *Norris* concerned a *partnership* situation at a time before the enactment of the Uniform Partnership Act when Texas still adhered to the aggregate rather than the entity theory of partnership acquisitions.[209]

The problem of the division of a spouse's closely-held corporate interest (an interest analogous to that of a partnership interest under the entity theory of the Uniform Partnership Act) has been considered by several courts of civil appeals. All have reached the conclusion that a separate interest in a closely-held corporate endeavor is treated as though it is community property for purposes of division on divorce.[210] The Supreme Court of Texas recently considered a somewhat similar question in *Bell v. Bell.*[211] There the court sidestepped the apparent issue of separate property divestiture by holding that the trial court properly considered the separate property corporate interest in awarding it solely to the husband and did not award it to him without considering it as part of the marital property division as a whole.[212] At the very least, *Bell* holds that it is proper—perhaps required[213]—that the

207. *Id.* at 495-503, 260 S.W.2d at 679-83.

208. Care must be taken not to generalize the holding in *Norris* too far. It may be asserted that the court's refusal to apportion acquisitions between the separate and community estate, thereby relegating the right of the separate claimant to that of reimbursement, results from the difficulty of assigning a proportionate value to labor and talent (attributable to the community) and capital expenditure (which is provided by the separate estate). At least in the case of a speculative acquisition, such as a mineral interest, the court chose to attribute the entire ownership interest to labor and talent, thereby classifying it as community.

209. *See* McKnight v. McKnight, 535 S.W.2d 658, 661 (Tex. Civ. App.—El Paso), *rev'd*, 543 S.W.2d 863 (Tex. 1976). TEX. REV. CIV. STAT. ANN. art. 6132b §§ 24, 26, 27, 28-A, 28-B (1970) are particularly relevant to division of partnership interests on divorce.

210. Uranga v. Uranga, 527 S.W.2d 761, 765 (Tex. Civ. App.—San Antonio 1975, writ dism'd); Mea v. Mea, 464 S.W.2d 201, 204-06 (Tex. Civ. App.—Tyler 1971, no writ); Dillingham v. Dillingham, 434 S.W.2d 459, 461-62 (Tex. Civ. App.—Fort Worth 1968, writ dism'd). Note, however, that the yet unresolved constitutional issue with respect to divestiture of the separate estate in general also bears on this question. *See* text accompanying note 85 *supra*. If the separate corporate interest is so closely held as to constitute the alter ego of a spouse, the division of the interest in favor of the other spouse is justified. In Wells v. Hiskett, 288 S.W. 2d 257 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.), the court by way of dicta stated that if a spouse fraudulently expands separate corporate assets at the expense of the community, the divorce court may properly treat the expanded assets as community property. *Id.* at 262.

211. 513 S.W.2d 20 (Tex. 1974).

212. *Id.* at 22.

213. *See In re* Marriage of Butler, 543 S.W.2d 147, 149 (Tex. Civ. App.—Texarkana 1976, no writ).

divorce court consider all of the separate personal property holdings of the spouses in making the division on divorce, and it is perfectly proper to confirm the ownership of all separate personalty in its owner.

C. Foreign Realty

If on divorce the husband possesses realty in another state which he purchased during the marriage using community property, does the Texas divorce court, using whatever means it has at its disposal, have power to divide that realty? May the court order the husband to convey all or a portion of that realty to his wife in a manner that is fair and just, or does the court wholly lack jurisdiction to deal with this property other than merely taking it into consideration in making a division of the Texas property? Texas courts have denied themselves jurisdiction to make any sort of direct division.[214] The closest Texas courts have come to dealing with this problem is to hold that the divorce court may consider investments in foreign realty when dividing other property.[215] No Texas appellate case has dealt with a dispute concerning an in personam order to convey foreign realty.[216] With respect to such orders, there are certain inherent problems which involve characterization of the interest in law, the type of conveyance required, and possible interests of third persons. There are, however, instances of Texas courts approving orders of foreign divorce courts with respect to Texas realty.[217]

D. Reimbursement

Reimbursement is one of the most difficult subjects in the entire division process. The right of reimbursement arises only on dissolution

214. Kaherl v. Kaherl, 357 S.W.2d 622, 624 (Tex. Civ. App.—Dallas 1962, no writ) (division on divorce). *See also* Moor v. Moor, 255 S.W. 231, 235 (Tex. Civ. App. 1900, writ denied) (division after divorce). However, personal property located in another jurisdiction presents no jurisdictional problems of division if the court has jurisdiction of the spouse having ownership or control of the property. Moor v. Moor, 63 S.W. 347, 351 (Tex. Civ. App. 1901, writ ref'd) (*mobilia sequuntur personam*).

215. Deger v. Deger, 526 S.W.2d 272, 274 (Tex. Civ. App.—Waco 1975, no writ); Walker v. Walker, 231 S.W.2d 905, 906 (Tex. Civ. App.—Texarkana 1950, no writ).

216. *But see* discussion in Estabrook v. Wise, 506 S.W.2d 248, 253 (Tex. Civ. App.—Tyler) (division after divorce), *dism'd as moot per curiam*, 519 S.W.2d 632 (Tex. 1974). *See also* notes 338-44, 414-15 *infra* and accompanying text.

217. McElreath v. McElreath, 162 Tex. 190, 207-08, 345 S.W.2d 722, 733 (1961); Forman v. Forman, 496 S.W.2d 243, 244-45 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ). *See also* Allis v. Allis, 378 F.2d 721 (5th Cir.), *cert. denied*, 389 U.S. 953 (1967), *commented on in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 138 n.50 (1968).

of the community.[218] Such a dissolution may be caused by the death of a spouse, severance of the marriage bonds by divorce or annulment,[219] or by a spouse's bankruptcy when at least part of the community may be dissolved.[220] It is an equitable right achieved through the exercise of the court's discretionary powers. The right of reimbursement of one marital estate for the benefit of another is not absolute; the court may deny or reduce the claim of reimbursement for reasons of fairness. The Texas Supreme Court has held that such a situation exists when the spouse claiming reimbursement for investment of his separate funds in particular property has the right of occupancy of the property or income from the property.[221] The right of reimbursement is sometimes spoken of as one in the nature of an equitable charge on the property of the spouse benefited in favor of the claimant furnishing the benefit.[222] The right rests on the benefit contributed and is not affected by the claimant's failure to show a partitionable interest in the property benefited.[223] Since the right is based on a contribution to property interests, living expenses paid for with separate funds are not reimbursable.[224]

To establish a right of reimbursement for the enrichment of one marital estate by another, the amount contributed to the benefit of the other estate must be proved. Courts have not always required an accounting for every dollar in the sense of *tracing* investments to particular assets for purposes of characterization, but investment in the

218. *See* Gonzales v. Gonzales, 117 Tex. 183, 187, 300 S.W. 20, 22 (1927). Though the point is not likely to be relevant to division on divorce, the two or four-year statutes of limitation are applicable to the claim for reimbursement depending on whether the transaction is based on a writing. Burton v. Bell, 380 S.W.2d 561, 565 (Tex. 1964). The lapse of time, however, is relevant to division after divorce.

219. The rules of reimbursement, like those of division of marital property, seem inapplicable to the situation of the putative marriage. *See* McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 310, 340 (1974). *See also* McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 68 n.5 (1975). But the ordinary rules governing unjust enrichment are applicable to that situation.

220. *See* Collins v. Bryan, 88 S.W. 432, 433 (Tex. Civ. App. 1905, no writ).

221. Dakan v. Dakan, 125 Tex. 305, 317-18, 321, 83 S.W.2d 620, 627, 629 (1935).

222. *Id.* at 319-20, 83 S.W.2d at 628.

223. *Contra*, Aman v. Cox, 164 S.W.2d 744, 748-49 (Tex. Civ. App.—Eastland 1942, no writ). In this case the court's error stems from its confusing reimbursement (an equitable right in personam) with a real property interest.

224. Norris v. Vaughan, 152 Tex. 491, 503, 260 S.W.2d 676, 683 (1953); Henderson v. Henderson, 425 S.W.2d 363, 365 (Tex. Civ. App.—San Antonio 1968, writ dism'd); Gaulding v. Gaulding, 256 S.W.2d 684, 688 (Tex. Civ. App.—Dallas 1953, no writ); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 46-47 (1969). *But see* Cooper v. Cooper, 120 S.W.2d 269, 271 (Tex. Civ. App.—Amarillo 1938, no writ). It may be argued, however, that the second sentence of TEX. FAMILY CODE ANN. § 4.02 (1975) changes the rule enunciated in the text.

property benefited must be shown.[225] Except for a sometimes less demanding standard as to amount, the evidentiary process of showing how much separate property was used to improve community property is virtually the same as that used to trace mutations of separate property.[226] The reason for the slight difference in approach is explained by the rule that *tracing* of separate funds demonstrates ownership of the ultimate mutation (with the benefits of appreciation in value that ownership entails), whereas the contribution of a benefit merely gives rise to a right of reimbursement in a monetary amount. Merely showing a substantial separate estate at marriage will not establish a right of reimbursement from a large community estate in favor of a depleted separate estate without showing *how* the separate estate benefited the community.[227] Nor will it suffice to demonstrate a benefited separate estate by showing depleted community earnings.[228] In each instance, the manner of benefit to the other marital estate must be shown.[229]

The measure of reimbursement depends on the nature of the benefit. The cases may be classified into three categories: (1) reimbursement for improvements, (2) reimbursements for benefits received other than improvements, and (3) cases involving fluctuating funds. If funds of one estate are used for the improvement of another, the measure of reimbursement is the cost or enhancement in value,

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225. Younger v. Younger, 315 S.W.2d 449, 452 (Tex. Civ. App.—Waco 1958, no writ), *quoting* Edsall v. Edsall, 240 S.W.2d 424, 430 (Tex. Civ. App.—Eastland 1951, no writ).

226. Burns v. Burns, 541 S.W.2d 280, 281 (Tex. Civ. App.—San Antonio 1976, writ dism'd).

227. Moor v. Moor, 255 S.W. 231, 235 (Tex. Civ. App.—1900, writ denied). The showing of substantial losses must have also militated against reimbursement in that case.

228. *Cf.* Duncan v. United States, 247 F.2d 845 (5th Cir. 1957) (tracing case). In order to show the amount of federal estate tax due from separate property as opposed to community property, the court allowed the IRS to show a depleted community income. Although the original separate assets were not traced, it was surmised that an original substantial separate estate had survived. *Id.* at 850-52. This method of "proof" will not suffice in Texas law either for purposes of characterization or for those of reimbursement. *See* Meshwert v. Meshwert, 543 S.W.2d 877, 879 (Tex. Civ. App.—Beaumont 1976, writ granted) (dicta); *In re* Greer, 483 S.W.2d 490, 493-94 (Tex. Civ. App.—Amarillo 1972, writ dism'd) (characterization case). *See also* Uranga v. Uranga, 527 S.W.2d 761, 765 (Tex. Civ. App.—San Antonio 1975, writ dism'd).

229. There is no right of reimbursement for contributing to the benefit of an expectancy. Since the expectancy by its nature is not a present *marital* estate, that which is contributed to it is for the benefit of someone outside the marital partnership. Hence, the deprived spouse must assert a right arising from the perpetration of actual or constructive fraud. Raulston v. Raulston, 531 S.W.2d 683, 684-85 (Tex. Civ. App.—Texarkana 1975, no writ).

whichever is less;[230] hence, both elements must be proved.[231] If, for example, community property is used to build a barn on the wife's separate property or to repair a house on the husband's separate property, showing present replacement value of the improvement or repair is a factor in proving enhancement. The rationale for the rule that the right of reimbursement is in the *lesser* amount of cost or enhancement is based on the assumption that the estate rendering the benefit to the other estate receives a compensating benefit for its contribution during the marriage, as when the community benefits a separate estate which is productive of community income or marital enjoyment. Where separate property is used to improve community property, the reason for the rule is based on the voluntariness of the expenditure. But whatever the rationale of the rule, its strict application may produce results of dubious justice, regardless of whether the marriage has existed during a period of economic inflation or depression. The chances of an inequitable result are enhanced if the marriage was of a relatively short duration. But since division of property on divorce, as well as the process of reimbursement, is one for the exercise of the trial judge's discretion, adjustments may be made in division of properties as the equities demand.

If funds of one estate are used for the benefit of another for purposes other than improvement, the measure of reimbursement is the amount expended.[232] Some common examples are discharges of encumbran-

230. Lindsay v. Clayman, 151 Tex. 593, 600, 254 S.W.2d 777, 781 (1952). The court clearly requires proof of amount expended and enhancement in value. There seems to be an underlying assumption that enhancement would be less than the amount expended. In Dakan v. Dakan, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935), the court said that "in case of reimbursement for improvements, the amount of recovery is limited to the amount of enhancement of the property at the time of partition by virtue of the improvements placed thereon." In Girard v. Girard, 521 S.W.2d 714 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ), it was pointed out that if the court errs in making its award for reimbursement, the spouse in whose favor the error runs has no basis for complaint on appeal. *Id.* at 717-18. *See also* Bazile v. Bazile, 465 S.W.2d 181, 182 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ dism'd); Harris v. Royal, 446 S.W.2d 351, 352 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.), *discussed in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 44 (1971).

231. *E.g.*, Lindsay v. Clayman, 151 Tex. 593, 600, 254 S.W.2d 777, 781 (1952); Newland v. Newland, 529 S.W.2d 105, 109-10 (Tex. Civ. App.—Fort Worth 1975, writ dism'd) (dictum). *See also* Williams v. Williams, 537 S.W.2d 107, 110 (Tex. Civ. App.—Tyler 1976, no writ) (where claimant failed to prove either element).

232. Parson v. United States, 460 F.2d 228, 233 (5th Cir. 1972); Colden v. Alexander, 141 Tex. 134, 147, 171 S.W.2d 328, 334 (1943); Bazile v. Bazile, 465 S.W.2d 181, 182 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ dism'd); Higgins v. Higgins, 458 S.W.2d 498, 500-01 (Tex. Civ. App.—Eastland 1970, no writ); McCurdy v. McCurdy, 372 S.W.2d 381, 384 (Tex. Civ. App.—Waco 1963, writ ref'd). *But see* Jackson v. Jackson, 524 S.W.2d 308, 312 (Tex. Civ. App.—Austin 1975, no writ). The

ces, payment of interest on purchase-money notes, payment of taxes, and (in any area quite distinct from interests in realty or tangible personalty) payment of premiums on life insurance policies. Expenditures for making separately owned land productive have been handled in this way[233] although it seems that such benefits are more in the nature of improvements. Although the measure of reimbursement in these instances is the amount actually expended, the right is, again, only an equitable one with the right of recovery of a lesser amount (or none at all) based on the circumstances of the benefit rendered as weighed against interim compensation received by the spouse whose interest rendered the benefit.

A single supreme court case, *Schmidt v. Huppman*,[234] forms the basis for the measure of reimbursement concerning fluctuating funds, stocks of merchandise, herds of livestock, or similar properties. In these instances, the measure of reimbursement is the opening or lowest balance. If the initial balance of the fund can be shown and it is proved that the fund was always maintained at that level through the marriage, the court speaks of allowing "reimbursement" for that initial or minimum balance.[235] But, as is readily seen by this analysis and that of related cases,[236] this situation is more properly described as one of "characterization." In this context it has been argued that if the business has been operating at a loss, there is nothing to divide and, therefore, no right of reimbursement.[237] This argument, however, seems to confuse liabilities and property interests.

Some courts have applied these rules of reimbursement rather loosely and have sometimes given them little more than passing notice

court apparently applied the test of enhancement in this case. Although it did not discuss the equities of the situation, the court's treatment of the problem indicates that there is some confusion in the application of the rule. *See also* Comment, *Retirement Benefits and the Right to Reimbursement*, 11 HOUS. L. REV. 960 (1974).

233. Cone v. Cone, 266 S.W.2d 480, 483-84 (Tex. Civ. App.—Amarillo 1953, writ dism'd); *see* Comment, *Development of a Separate Property Oil and Gas Lease with Community Funds*, 27 BAYLOR L. REV. 743, 743-45 (1975). But improvement of the land's surface, as in the case of urban real estate development for sale would likely be termed enhancement.

234. 73 Tex. 112, 11 S.W. 175 (1889) (stock of merchandise).

235. *See id.* at 116, 11 S.W. at 176. *See generally* Smoak v. Smoak, 525 S.W.2d 888, 890 (Tex. Civ. App.—Texarkana 1975, writ dism'd), *commented on in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 68, 77 (1976).

236. *See* Hartman v. Hartman, 253 S.W.2d 480, 482-83 (Tex. Civ. App.—Austin 1952, no writ) (dictum); Farrow v. Farrow, 238 S.W.2d 255, 257 (Tex. Civ. App.—Austin 1951, no writ).

237. Fyke v. Fyke, 463 S.W.2d 242 (Tex. Civ. App.—Fort Worth 1971, no writ) (a division after divorce case); *cf.* Gifford v. Gabbard, 305 S.W.2d 668, 671 (Tex. Civ. App.—El Paso 1957, no writ).

while making a general equitable division on divorce.[238] Though the term reimbursement is used in these cases to describe this process, it is nothing more than an adjustment of equities. The most striking instance of this "casual reimbursement" occurred in *Horlock v. Horlock*[239] where the court at one point applied proper reimbursement principles with respect to a separate benefit received at community expense[240] but, at another point, abandoned all adherence to the rules in favor of achieving an equitable adjustment of interests.[241] In spite of a brief flirtation with the minimum balance principle, the court seemed to treat "reimbursement" as a *technique* in division of property rather than the application of rules of law.

Regardless of the type of reimbursement utilized, the measure is one of *not more than* the measuring amount,[242] subject to reduction in accordance with the equities of the situation. Furthermore, in no instance is the claimant entitled to interest.[243] Consequently, if during the marriage one spouse had *advanced* a sum of money to the other or allowed the other to use property of a particular amount or value, the right of reimbursement, even over a long term of years, is limited to the amount advanced. One means of avoiding this result is to term the transaction a loan rather than an advancement. In the past when the husband was manager of both the separate and community estates, it was difficult to conceive of loans between husband and wife.[244] But now that each spouse has full contractual capacity, it is reasonable to conceive of each spouse as a borrower or a lender. In *Padgett v. Padgett*[245] there was a question whether the wife, in the course of the

238. Means v. Means, 535 S.W.2d 911, 916-17 (Tex. Civ. App.—Amarillo 1976, no writ); Horlock v. Horlock, 533 S.W.2d 52, 56, 58 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd); Carson v. Carson, 528 S.W.2d 308, 309 (Tex. Civ. App.—Waco 1975, no writ); Fulwiler v. Fulwiler, 419 S.W.2d 251, 252 (Tex. Civ. App.—Eastland 1965, no writ); Hartman v. Hartman, 253 S.W.2d 480, 483 (Tex. Civ. App.—Austin 1952, no writ) (dictum); *see* note 161 *supra* and accompanying text.

239. 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd).

240. *Id.* at 59-60.

241. *Id.* at 56, 58.

242. The measurements restated are: (1) reimbursement for improvements—the lesser of expenditure or enhancement; (2) reimbursement for expenditures other than improvements—expenditure; and (3) fluctuating fund cases—minimum balance.

243. Dakan v. Dakan, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935); Padgett v. Padgett, 487 S.W.2d 850, 852 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.); Collins v. Bryan, 88 S.W. 432, 433-34 (Tex. Civ. App.—1905, no writ).

244. Sparks v. Taylor, 99 Tex. 411, 425, 90 S.W. 485, 489 (1906). *But see* Ryan v. Ryan, 61 Tex. 473, 474, 476 (1884) (loan between husband and wife).

245. 487 S.W.2d 850 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 34-35 (1973) (origin of present analysis found herein).

marriage, had lent money to her husband or had simply allowed him to use her separate property by way of advancement. On dissolution of the community by death of the husband, the wife sued the husband's estate alleging that her separate property was the subject matter of a loan and claimed interest against her husband's estate from the time the loan was allegedly made. The court stated that if she had merely *advanced* money to her husband, the interest would run only from his death.[246] The court concluded, however, that she had made a loan and interest would run from the date of maturity of the indebtedness.[247] Although construing such transactions as loans rather than advancements provides recovery of the full sum with interest, thereby circumventing the stern strictures of the rules of reimbursement, there are two obvious pitfalls in this approach: first, proof of the loan and its terms; and second, the statute of limitations. If the first of these barriers is overcome, one must always consider the latter unless it can be proved that the loan was not to become due until a repayment was demanded or until the community is dissolved.[248] The claimant-spouse may, therefore, plead in the alternative for recovery of the loan with interest or for reimbursement.

E. Attorney's Fees

Although not specifically provided for in the Family Code, a claim for the wife's attorney's fees has long been treated as a distinct element in the divorce process, regardless of whether it is viewed as an incident to the division of property under section 3.63[249] or as a term of a property settlement agreement or mistakenly treated as an element of costs under section 3.65.[250] Prior to 1963 any contract made by a feme covert providing for necessaries of the marriage was construed as that

246. Padgett v. Padgett, 487 S.W.2d 850, 852 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

247. *Id.* at 852.

248. In *Padgett*, the transaction occurred prior to 1968 when Tex. Rev. Civ. Stat. Ann. art. 5535 (1925) tolled the statute of limitation with respect to claims of married women, and the husband had also acknowledged the indebtedness in his will. As of January 1, 1968, the statute of limitation is no longer tolled by coverture. Tex. Laws 1967, ch. 309, § 3, at 740, *as amended*, TEX. REV. CIV. STAT. ANN. art. 5535 (Supp. 1976).

249. *See* TEX. FAMILY CODE ANN. § 3.63 (1975); McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 80-82 (1975).

250. *See* TEX. FAMILY CODE ANN. § 3.65 (1975); McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 343 (1974). *See also* Chapman v. Chapman, 172 S.W.2d 127 (Tex. Civ. App.—Fort Worth 1943, writ dism'd); Jacks v. Teague, 136 S.W.2d 896 (Tex. Civ. App.—Dallas 1940, writ dism'd).

of the husband because of the wife's contractual incapacity caused by coverture.[251] Thus, the wife acted as the husband's agent of necessity in contracting for necessary services of an attorney.[252] Since the husband was liable for such contractual obligations as a principal, all community property subject to his control and all his separate property were thus available to satisfy the obligation. Although the award of her attorney's fees has juristic antecedents in the law of contracts, such an award to either spouse is now treated as an element of equitable property division insofar as the burden of paying the attorney's fees of one spouse is shifted to the other.[253] Occasionally, however, a court will still refer to the old doctrine of necessaries in discussing an attorney's fees.[254] For example, in *Cearley v. Cearley*[255] the court of civil appeals approved of the trial court's finding that the attorney's fees of the wife were both reasonable and necessary and sustained an order that each spouse should bear the expense of his or her legal fees.[256] It was argued in *Lipshy v. Lipshy*[257] that the 1972 addition of the Equal Rights

251. *See* Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964) (wife's general incapacity to contract during coverture). *See also* United States v. Yazell, 382 U.S. 341 (1966).

252. Attorney's fees in a divorce action are deemed "necessary" when it is shown that the wife has prosecuted a bona fide suit, based on valid grounds, in good faith and upon probable cause. Werlein v. Bishop, Docket No. 1173 (Tex. Civ. App.—Houston [14th Dist.] Oct. 29, 1975) (unreported). But whether a contract was to provide necessaries must be established as a matter of fact. That conclusion does not arise merely as a consequence of the marriage. *See* Moody v. Sondock, Docket No. 16,385 (Tex. Civ. App.—Houston [1st Dist.] Nov. 21, 1974) (unreported). For a general discussion of agency of necessity in this context, *see* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 84-85 (1976); McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 80-82 (1975); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 39-40 (1973) (wife's incapacity to contract with attorney or anyone else under old law).

253. Carle v. Carle, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950); *accord*, Williams v. Williams, 537 S.W.2d 107, 111 (Tex. Civ. App.—Tyler 1976, no writ); Cearley v. Cearley, 536 S.W.2d 96, 99 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 544 S.W.2d 661 (Tex. 1976); Cole v. Cole, 532 S.W.2d 102, 105-06 (Tex. Civ. App.—Dallas 1975, no writ); Brown v. Brown, 520 S.W.2d 571, 578-79 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). *See also* Comment, *Award of Attorney's Fees in Divorce Litigation in Texas*, 13 HOUS. L. REV. 1016 (1976).

In a separate suit after divorce by an attorney whose services were terminated prior to divorce, liability must rest on principles of contract law. *See* Werlein v. Bishop, Docket No. 1173 (Tex. Civ. App.—Houston [14th Dist.] Oct. 29, 1975) (unreported). *See also In re* Marriage of Parr, 543 S.W.2d 433 (Tex. Civ. App.—Corpus Christi 1976, no writ) (suit for divorce dismissed after death of wife).

254. *See* Braswell v. Braswell, 476 S.W.2d 444, 446 (Tex. Civ. App.—Waco 1972, writ dism'd).

255. 536 S.W.2d 96 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 544 S.W.2d 661 (Tex. 1976).

256. *Id.* at 99.

257. 525 S.W.2d 222, 226 (Tex. Civ. App.—Dallas 1975, writ dism'd).

Amendment to the Texas Constitution precluded the award of attorney's fees to the wife.[258] The court concluded, however, that there is no constitutional bar to recovery of attorney's fees since either spouse may be entitled to attorney's fees under Texas law.[259] This conclusion is unexceptionable if the award of attorney's fees rests on exercise of the court's just discretion,[260] but if it rests on the doctrine of necessaries, the opinion is not so easily defended since the standard of the duty of support under the statute[261] is strikingly unequal.[262] In Pennsylvania such awards have been declared unconstitutional under provisions similar to those of the Texas Constitution.[263]

Since married women now have full contractual capacity,[264] there is far less reason to burden the husband with the wife's legal fee.[265] The

258. TEX. CONST. art. I, § 3(a) (Pamp. Supp.). *See also* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 SW. L.J. 31, 46-50 (1972); Comment, *The ERA and Texas Marital Law*, 54 TEXAS L. REV. 590 (1976).

259. Lipshy v. Lipshy, 525 S.W.2d 222, 227 (Tex. Civ. App.—Dallas 1975, writ dism'd). For a brief discussion of an equal protection argument under the fourteenth amendment to the Constitution of the United States, *see* Werlein v. Bishop, Docket No. 1173 (Tex. Civ. App.—Houston [14th Dist.] Oct. 29, 1975) (unreported). *See also* Comment, *The ERA and Texas Marital Law*, 54 TEXAS L. REV. 590, 591-92 (1976).

260. *But see* Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 221-22 (1975).

261. TEX. FAMILY CODE ANN. § 4.02 (1975). If the second sentence of that statute should be declared unconstitutional, however, along with the correlative provisions of TEX. FAMILY CODE ANN. § 3.59 (1975), the duty of each spouse to support the other (if any) would be equal and the impediment to awarding attorney's fees as a function of the doctrine of necessaries would be removed.

262. *See* Comment, *The ERA and Texas Marital Law*, 54 TEXAS L. REV. 90, 595-96 (1976).

263. *See* DeRosa v. DeRosa, 60 Pa. D. & C.2d 71 (1972); Kehl v. Kehl, 57 Pa. D. & C.2d 164 (1972). *Compare* TEX. CONST. art. I, § 3(a) (Pamp. Supp.), *with* PA. CONST. art. I, § 28. *See also* Wiegand v. Wiegand, 310 A.2d 426 (Pa. Super. Ct. 1973), *rev'd*, 337 A.2d 256 (Pa. 1975) (remanded to trial court to hear the issue because superior court sua sponte raised the issue and exceded it's appellate jurisdiction). It is also striking that the Texas and Pennsylvania Supreme Courts have construed their constitutional amendments similarly with respect to the wife's recovery in tort in areas which were previously restricted to recovery by the husband. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 68, 70 (1976). *But see* Hendricks v. Hendricks, 535 S.W.2d 668, 670 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (regarding constitutionality of the alimony statutes of other states).

264. Bellah v. First Nat'l Bank, 474 S.W.2d 785, 786-87 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.); Kitten v. Vaughn, 397 S.W.2d 530, 532 (Tex. Civ. App.—Austin 1965, no writ); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 SW. L.J. 39, 45-46 (1967). *See also* United States v. Yazell, 382 U.S. 341 (1966); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 39-40 (1973); McKnight, *Family Law, Annual Survey of Texas Law*, 24 SW. L.J. 49, 54 (1970); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 SW. L.J. 44, 54 (1969); Mcknight, *Matrimonial Property, Annual Survey of Texas Law*, 22 SW. L.J. 129, 142-43 (1968).

265. For recent instances of a court's refusal to award the wife some or all of

wife is capable of entering into contractual relations with her attorney as a principal and thus is personally responsible for such undertakings. The court may deal with the wife's attorney's fee as an incident of division of property or leave each party to discharge his or her contractual obligations in this regard. If third parties are involved in the proceeding, it may be necessary to determine how much of the attorney's fees are properly attributable to the various aspects of the case.[266] The decision to award attorney's fees should be based upon a two-step inquiry. Initially, the court must decide whether it will award attorney's fees as part of the division of marital property. At the second step, the amount of the award and the manner of payment must be determined.[267] The court may conclude, with respect to the first inquiry, that there may be no justification for charging the expense of one spouse's attorney's fees against the interest of the other spouse.[268] In cases of no-fault divorce,[269] the arguments advanced against an any but equal division of the community, along with *allocation* of separate property to its owner are even stronger with respect to awards of attorney's fees in such cases. This is especially true when the no-fault proceeding is instituted by a wealthy petitioner against a respondent who opposes the divorce.[270] In such a situation there is very strong reason for leaving each spouse to discharge his or her attorney's fees out of his or her share of the marital estate. In no-fault cases as a further alternative to ordering the husband to pay the wife's attorney's fees (as was the case when divorce was based on fault and the old necessaries rule prevailed), the attorney's fees of *both* spouses may be treated as reasonable and necessary expenses of winding up the

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her attorney's fees, *see* Boriack v. Boriack, 541 S.W.2d 237, 243 (Tex. Civ. App.—Corpus Christi 1976, writ dism'd); Hopkins v Hopkins, 540 S.W.2d 783, 788 (Tex. Civ. App.—Corpus Christi 1976, no writ).

266. *See* Hopkins v. Hopkins, 539 S.W.2d 242, 249 (Tex. Civ. App.—Fort Worth 1976, no writ).

267. McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 84-85 (1976).

268. In Cooper v. Cooper, 513 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ), where both spouses had substantial separate estates, as well as a substantial community estate, the court suggested there might be no justification for charging the wife's attorney's fees against the husband's marital property interest. *Id.* at 234.

269. *See* text accompanying notes 117-20 *supra*; *In re* Williams, 199 N.W.2d 339, 348 (Iowa 1972); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 36-37, 39-40 (1973). *See also* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 80 (1975).

270. McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 81 (1975).

marriage and thus payable from the community estate prior to its division.[271] Further, since the award of attorney's fees is merely an incident in the general division of property, it was pointed out by one court that in dividing property the trial court must always be mindful of the fact that the husband is liable for his own attorney's fees.[272] With respect to contingent fees (as in the case of fixed fees), the wife as maker of the contract with her attorney is clearly bound as a principal. It is an open question, however, whether the husband should be bound against his interest on the wife's contingent fee contract.[273] It is a question that is also distinct from that of fitting the award for the wife's attorney's fees into the context of the contingent fee contract entered into between the wife and her attorney.

For the determination of attorney's fees and resolving any disputes that may arise from such agreements, attorneys who participate in the trial, although not actual parties to the suits, are bound by a settlement agreement in which the attorney's fees are fixed.[274] In *Carter v. Leiter*[275] the wife's attorneys were actual parties to the suit for divorce and were awarded a joint and several judgment of their fees against the husband and the wife.[276] In the attorneys' subsequent suit against

271. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 85 (1976); McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 81 (1975). Such an approach would tend to ensure more adequate compensation for the husband's counsel, while also keeping the wife's attorney's fees within reasonable bounds.

272. Cooper v. Cooper, 513 S.W.2d 229, 235 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

273. No appellate court in Texas has addressed itself to the pernicious aspects of contingent fees in divorce matters, but the Ethical Considerations appended to the Disciplinary Rules of The State Bar of Texas clearly state that "[b]ecause of the human relationship involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified." State Bar of Texas, Rules and Code of Professional Responsibility, EC 2-20 (1973). *But see* Moody v. Sondock, Docket No. 16,385 (Tex. Civ. App.—Houston [1st Dist.] Nov. 21, 1974) (unreported) (suit by attorney whose services had been terminated by wife on reconciliation with husband).

But chicanery between ex-spouses to defeat a court order to pay attorney's fees must be effectively restrained. Myers v. Myers, 515 S.W.2d 334, 334-35 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ dism'd), *noted in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 82-83 (1975).

274. Mullinax, Wells, Mauzy & Collins v. Dawson, 478 S.W.2d 121, 122-23 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 40 (1973). But in *Ex parte* Harvill, 415 S.W.2d 174 (Tex. 1967), an enjoined attorney for a third party defendant in a divorce proceeding was held not to be a party for purposes of citation for contempt. *Id.* at 177. *But see* TEX. R. CIV. P. 683; *Ex parte* Browne, 543 S.W.2d 82, 85 (Tex. 1976). *See also Ex parte* Wright, 538 S.W.2d 483 (Tex. Civ. App.—Beaumont 1976, no writ).

275. 476 S.W.2d 461 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

276. *Id.* at 462. The Ethics Committee of the State Bar of Texas has since issued an

the husband for recovery of the fees, the court concluded that the divorce court's decree was res judicata to the subsequent suit.[277] In some instances a money judgment may be awarded to an attorney for his fee.[278] But a mere direction on the part of the divorce court that both spouses will pay their own attorney's fees does not constitute a judgment in favor of the attorneys.[279] If an award for only a portion of the wife's attorney's fees is made against the husband, in a subsequent suit the attorney may recover the balance of his fee from the ex-wife.[280] While the process of contempt is a last resort in payment of attorney's fees in matters of child support, it is not available for enforcement of attorney's fees awarded on divorce.[281] A money judgment, however, may be granted to one of the spouses to cover the attorney's fees.[282]

The decision to award attorney's fees is made by the divorce judge.[283] In fixing the amount of the fee, evidence must be heard on the value of the services rendered and a finding made on that basis;[284]

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opinion that it is improper for a lawyer to secure a judgment for legal fees against his client in the same suit as that in which he is representing that client. State Bar of Texas, Comm. on Interpretation of the Code of Professional Responsibility, opinion 374 (1974).

277. Carter v. Leiter, 476 S.W.2d 461, 462 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). In Merrell v. Merrell, 527 S.W.2d 250 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.), a spouse's former attorney intervened in the divorce proceeding to recover his fee after having filed a separate suit for the same purpose. The spouse's plea in abatement was sustained as to the suit in intervention. *Id.* at 253. *See also* Bonilla v. Parr, — S.W.2d — (Tex. Civ. App.—San Antonio 1976, no writ); Dickson v. McWilliams, 543 S.W.2d 868 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

278. Goldberg v. Goldberg, 392 S.W.2d 168, 170-71 (Tex. Civ. App.—Fort Worth 1965, no writ). The wife's attorneys were actual parties to the proceeding by virtue of the fact that they had sought injunctive relief against the husband and another.

279. Douthit v. Anderson, 521 S.W.2d 127, 130 (Tex. Civ. App.—Dallas 1975, no writ).

280. Masters v. Stair, 518 S.W.2d 439, 441 (Tex. Civ. App.—San Antonio 1975, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 82 (1975), along with an earlier inconclusive appeal in the same case. Presumably the divorce court's order was ambiguous and therefore could not constitute an order to the wife to pay the amount in addition to that which the husband was ordered to pay.

281. *See* Wallace v. Briggs, 162 Tex. 485, 488-89, 348 S.W.2d 523, 525-26 (1961) (dictum). *See also* note 350 *infra*.

282. Brunell v. Brunell, 494 S.W.2d 621, 623 (Tex Civ. App.—Dallas 1973, no writ). But a lien may not be put on a homestead for their payment. *Id.* at 623. *See also* Peterson v. Peterson, 502 S.W.2d 178 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

283. Prewitt v. Prewitt, 459 S.W.2d 720, 722-23 (Tex. Civ. App.—Tyler 1970, no writ); *see* Smith, *Family Law, Annual Survey of Texas Law*, 26 Sw. L.J. 51, 54 (1972).

284. Hopkins v. Hopkins, 539 S.W.2d 242, 249 (Tex. Civ. App.—Fort Worth 1976, no writ); Huntley v. Huntley, 512 S.W.2d 767, 771 (Tex. Civ. App.—Austin 1974, no writ). In Reaney v. Reaney, 505 S.W.2d 338, 341 (Tex. Civ. App.—Dallas 1974, no writ), there presumably was evidence in the record sustaining the value of the attorney's time and services. *See* Webster v. Webster, 442 S.W.2d 786 (Tex. Civ. App.—San

judicial notice of minimum fee schedules or the judge's past experience in such matters is insufficient to establish the fee. The standard that is applied in fixing the fee is that of *reasonableness* under the circumstances.[285] Before the disabilities of coverture were removed, the wife contracted for attorney's fee as her husband's agent of necessity. This resulted in the wife's attorney's fee, as a "necessary", being fixed in a *reasonable* amount in order to protect the principal from any imposition that might have been perpetrated on the agent. But today, the judicial determination of a *reasonable* amount is to achieve an equitable division of the marital property.[286]

To preclude disputes between the attorney and his client subsequent to divorce, it is essential that the attorney reach a firm fee arrangement with his client at the beginning of the suit.[287] The client should be advised that the attorney's fees may include fees for appraisers, actuaries, accountants, and other experts in the capacity of witnesses.[288] Finally, the attorney must be careful in drafting the pleadings to state the prayer for attorney's fees in sufficiently general terms so that necessary appeal costs will be included.[289]

F. Disputes Involving Third Persons

A property dispute between the spouses may also affect the interests of third persons. In order to deal conclusively with all the rights of others, divorce courts[290] may join the third persons in-

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Antonio 1969, no writ). *See also* Meshwert v. Meshwert, 543 S.W.2d 877 (Tex. Civ. App.—Beaumont 1976, writ granted); Ramirez v. Ramirez, Docket No. 1173 (Tex. Civ. App.—San Antonio, Dec. 4, 1974) (unreported), *noted in* TEX. LAW. WEEKLY DIG. Vol. 11, No. 49, at 3 (Dec. 18, 1974); Annot., 59 A.L.R.3d 152 (1974).

285. For a not altogether current approach, see Boenker v. Boenker, 405 S.W.2d 843, 849 (Tex. Civ. App.—Houston 1966, writ dism'd); *cf.* Hale v. Hale, 336 S.W.2d 934, 936 (Tex. Civ. App.—Eastland 1960, no writ).

286. McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 81 n.112 (1975). But such an amount is also limited by the amount agreed between the wife and her attorney. Carson v. Carson, 528 S.W.2d 308, 309 (Tex. Civ. App.—Waco 1975, no writ).

287. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 82 (1975).

288. *See* Currie v. Currie, 518 S.W.2d 386, 390-91 (Tex. Civ. App.—San Antonio 1974, writ dism'd). For comments on a receiver's commission, see Huntley v. Huntley, 512 S.W.2d 767, 770 (Tex. Civ. App.—Austin 1974, no writ).

289. *See* Carson v. Carson, 528 S.W.2d 308, 309 (Tex. Civ. App.—Waco 1975, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 85 (1976). In Dietz v. Dietz, 540 S.W.2d 418, 422 (Tex. Civ. App.—El Paso 1976, no writ), the appellate court affirmed the trial court's award of attorney's fees without prejudice to the appellant in seeking further attorney's fees on remand.

290. Courts of special jurisdiction may adjudicate disputes involving third parties in

volved.[291] In some instances the venue statute may make effective adjudication of these rights impossible,[292] but the third party may waive his objection to venue by intervening or by instituting an original proceeding.[293] The severance of disputes involving third persons may also result in defeating the purposes of the joinder.[294]

Unless they control or participate in the proceeding, third persons are not bound by the divorce decree;[295] however, non-parties who are not bound by the judgment may still be factually prejudiced. A spouse's partner may be affected by the terms of a divorce decree as a practical matter,[296] and in anticipation of such a problem, the partners may seek dissolution of the partnership.[297] A minor child's beneficial interests in a fund of which a spouse is trustee cannot be affected without joinder of the child.[298] But constructive fraud in the creation of a trust for a child may be put in issue for the purpose of adjusting interests in other property without joinder of the beneficiary as a party.[299] But minor children are parties to the consolidated suit affecting the parent-child relationship under section 3.55 of the Family Code.[300]

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suits for divorce. Hopkins v. Hopkins, 539 S.W.2d 242, 246 (Tex. Civ. App.—Fort Worth 1976, no writ); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 139-40 (1968).

291. *See* Couch Mortgage Co. v. Hughes, 536 S.W.2d 70, 72 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

292. *See* TEX. REV. CIV. STAT. ANN. art. 1995(16) (Supp. 1976); Schulz v. Schulz, 478 S.W.2d 239, 244 (Tex. Civ. App.—Dallas 1972, no writ).

293. *Cf.* May v. Little, 473 S.W.2d 632, 633-34 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.) (plaintiff waived right to be sued in county of residence where intervention action arose out of action initiated by him).

294. For the kinds of disputes which might have been consolidated had they been initiated simultaneously, *see* Teas v. Teas, 469 S.W.2d 918 (Tex. Civ. App.—Waco 1971, no writ) (divorce); Teas v. Republic Nat'l Bank, 460 S.W.2d 233 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.) (suits by wife to set aside fraudulent conveyances), *commented on in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 46-47 (1971).

295. *See* Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363 (Tex. 1971) (judgment binds only those who are either parties to suit or in privity with party). *See generally* Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200 (Tex. 1974); Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Note, 52 TEXAS L. REV. 1410 (1974).

296. *See* TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 27, 32(2) (1970).

297. *See* Gaines v. Gaines, 519 S.W.2d 694, 696-97 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 88 (1976).

298. *See Ex parte* Fleming, 532 S.W.2d 122, 123 (Tex. Civ. App.—Dallas 1975, no writ) (*semble*).

299. *See In re* Marriage of McCurdy, 489 S.W.2d 712, 717-18 (Tex. Civ. App.—Amarillo 1973, writ dism'd), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 75 n.65 (1974).

300. TEX. FAMILY CODE ANN. § 3.55 (1975). *See* McKnight, *Commentary on the*

Further, third parties must be joined for the purpose of setting aside a fraudulent transfer allegedly made by a spouse.[301]

Intervention is an effective method for a third person to protect his rights. He may intervene for any number of reasons, but the most common is to estabish a debt owed by one of the spouses.[302] Intervention must be timely.[303] The intervening creditor does not jeopardize his standing as a contractual creditor since the divorce court lacks the power to absolve either spouse of contractual liability.[304] Nor is the creditor jeopardized by his failure to intervene as long as the former community estate is not dissipated, for it has long been established that a division of marital property on divorce does not prejudice the rights of creditors to reach property partitioned to the non-contracting spouse.[305]

Texas Family Code, Title 1, 5 TEX. TECH L. REV. 281, 332-33 (1974). *See also* Becknal v. Atwood, 518 S.W.2d 593 (Tex. Civ. App.—Amarillo 1975, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 68, 89-90 (1976).

301. Gabriel v. Mendez, 517 S.W.2d 447, 449 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.). *See also* Davis, *Hiding, Diverting and Snarling Marital Assets in Anticipation of Divorce—And What Can Be Done About It* in INSTITUTE ON TEXAS FAMILY LAW AND COMMUNITY PROPERTY 73 (J. McKnight ed. 1973). With respect to the burden of proving a community interest when property stands in the name of, or is possessed by, the other spouse or a third person, see McGee v. McGee, 537 S.W.2d 94, 96 (Tex. Civ. App.—Amarillo 1976, no writ); Harris v. Harris, 174 S.W.2d 996, 999 (Tex. Civ. App.—Fort Worth 1943, no writ). With respect to the quantum of proof, see Newland v. Newland, 529 S.W.2d 105, 107 (Tex. Civ. App.—Fort Worth 1975, writ dism'd), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 68, 77 (1976).

302. *See* Broadway Drug Store v. Trowbridge, 435 S.W.2d 268, 270 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ). *See also* note 182 *supra* and notes 361-66 *infra* and accompanying text. In Cockerham v. Cockerham, 527 S.W.2d 162, 164 (Tex. 1975), a spouse's trustee in bankruptcy intervened to assert liability of marital assets controlled by the other spouse, but there was no discussion of the trustee's standing to intervene.

303. *See* Roberson v. Roberson, 420 S.W.2d 495, 499 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.) (attempted intervention on part of alleged putative wife of husband), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 SW. L.J. 129, 139-40 n.55 (1968). *See also* McKnight & Dorsaneo, *Management and Liability of Community Property and Joinder of Spouses in Suits* in INSTITUTE ON TEXAS FAMILY LAW F-1, F-10 to F-20 (State Bar of Texas 1976) (joinder of parties generally under TEX. R. CIV. P. 39); McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 86-87 (1975).

304. Broadway Drug Store v. Trowbridge, 435 S.W.2d 268, 270 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ). In attempting to show that a former husband is liable for his ex-wife's purchase of necessaries during their marriage, their divorce judgment is not admissible as a prior inconsistent statement to impeach the ex-wife's testimony when the judgment did not reflect any statements of the wife, did not contain any statements of her attorney at the prior trial, and the attorney was not called as a witness. Gabel v. Blackburn Operating Corp., 442 S.W.2d 818, 819 (Tex. Civ. App.—Amarillo 1969, no writ).

305. Boyd v. Ghent, 93 Tex. 543, 547-48, 57 S.W. 25, 26 (1900); Dean v. First Nat'l

PROCEEDINGS AFTER JUDGMENT

Finality of Decree and Orders Pending Appeal

A simple declaration of dissolution of the marriage without a recital for whom and against whom it is ordered constitutes a divorce on no-fault grounds.[306] This no-fault decree is sufficient to support a division of the marital property. When problems of division are difficult, the court may grant an interlocutory dissolution of the marriage as petitioned but may reserve judgment on property division before entering its judgment on all matters in issue.[307] The judgment becomes final and subject to appeal thirty days after rendition;[308] however, if circumstances warrant, the court on its own motion may withdraw or alter the judgment within this thirty-day period.[309] Nevertheless, in *Dunn v.*

Bank, 494 S.W.2d 222, 226 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.); First Nat'l Bank v. Hickman, 89 S.W.2d 838, 843 (Tex. Civ. App.—Austin 1935, writ ref'd); Grandjean v. Runke, 39 S.W. 945, 946 (Tex. Civ. App. 1897, no writ); McKnight, *Management, Control and Liability of Marital Property* in TEXAS FAMILY LAW & COMMUNITY PROPERTY 159, 180-82 (J. McKnight ed. 1975); McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 82 (1974). *But see* note 364 *infra*.

306. Law v. Law, 517 S.W.2d 379, 382-83 (Tex. Civ. App.—Austin 1974, writ dism'd); Blancas v. Blancas, 495 S.W.2d 597, 602 (Tex. Civ. App.—Texarkana 1973, no writ). *But see* TEX. R. CIV. P. 306.

307. Spiller v. Spiller, 535 S.W.2d 683, 684 (Tex. Civ. App.—Tyler 1976, writ dism'd); Galvan v. Galvan, 534 S.W.2d 398, 399 (Tex. Civ. App.—Austin 1976, writ dism'd).

In Burleson v. Burleson, 419 S.W.2d 412 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ), after the husband filed suit for divorce in Texas, the wife brought suit in Nevada. The petition was granted without any division of marital property. With the sole issue of property division before it, the court apparently made a partition rather than an equitable division on divorce. *Id.* at 416-17. It may be relevant that the husband had died in the meantime. Carter v. Burleson, 439 S.W.2d 381, 383 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ). The earlier case is discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 SW. L.J. 129, 138 n.50 (1968); Rasor, *Family Law, Annual Survey of Texas Law*, 23 SW. L.J. 60, 68 (1969); VanDercreek, *Texas Civil Procedure, Annual Survey of Texas Law*, 22 SW. L.J. 174, 178 (1968), and both cases, in McKnight, *Family Law, Annual Survey of Texas Law*, 24 SW. L.J. 49, 49-50 (1970). *See also* Bonilla v. Parr, — S.W.2d — (Tex. Civ. App.—San Antonio 1976, no writ).

308. TEX. R. CIV. P. 329b (6); *Ex parte* Wagley, 530 S.W.2d 609, 611 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). In Scott v. Scott, 408 S.W.2d 135 (Tex. Civ. App.—Fort Worth 1966, writ dism'd), the appellate court ruled that the trial court's alteration of its decree to vest the wife with title to the cash surrender value of an insurance policy on the husband's life, rather than a judgment for its value, involved a matter of substance which could not be corrected by a nunc pro tunc order after the decree became final. *Id.* at 136. A clerical error may, however, be corrected after the judgment becomes final. Holway v. Holway, 506 S.W.2d 643, 646 (Tex. Civ. App.—El Paso 1974, no writ).

309. *See* Law v. Law, 517 S.W.2d 379, 381 (Tex. Civ. App.—Austin 1974, writ dism'd), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 73-74 (1975). *See also* Means v. Means, 535 S.W.2d 911 (Tex. Civ. App.—Amarillo 1976, no writ).

Dunn,[310] where the husband died two days after the trial judge made an *oral* award of divorce in favor of the wife and a division of the property, the supreme court held that the wife's motion to dismiss was properly overruled.[311] Pending appeal, further orders of the court are necessary with respect to the subject matter of *some* temporary orders.[312] An order granting a new trial, for example, does not automatically continue temporary alimony.[313] On the other hand, it has been concluded that an agreed order with respect to management of marital property was not subject to change by the trial court.[314]

Direct and Collateral Attacks

Dissatisfaction with the division of property on divorce can result in a direct attack on the judgment in three ways: an appeal from the order of the trial court by alleging an error of law or abuse of discre-

310. 439 S.W.2d 830 (Tex. 1969), *discussed in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 36 (1971). *But see* Deen v. Deen, 530 S.W.2d 913 (Tex. Civ. App.—Fort Worth 1975, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 72-73 (1976), where the husband also died before final disposition of the matter, but the wife was ultimately successful in setting aside the husband's invalid default judgment for divorce. 530 S.W.2d at 917. Hence, the wife's property rights were those of a widow unaffected by the decree. Earlier proceedings in the same matter are discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 72-73 (1975). If, however, a spouse dies while the divorce proceeding is pending, the court loses its power to make a discretionary division of marital property. Pritchard v. Tuttle, 534 S.W.2d 946, 950 (Tex. Civ. App.—Amarillo 1976, no writ).

With respect to the court's power to award attorney's fees after termination of a divorce proceeding as a result of the death of a party, *see* Bonilla v. Parr, — S.W.2d —, — (Tex. Civ. App.—San Antonio 1976, no writ); *In re* Marriage of Parr, 543 S.W.2d 433, 435 (Tex. Civ. App.—Corpus Christi 1976, no writ).

311. Dunn v. Dunn, 439 S.W.2d 830, 833-34 (Tex. 1969); TEX. R. CIV. P. 164.

In Echols v. Austron, Inc., 529 S.W.2d 840 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), the court held that a bonus paid to a spouse by his employer after rendition of judgment, but before entry thereof, was not community property since "the rights of the parties were fixed as of the time of the rendition of the judgment . . . ." *Id.* at 846.

312. *See* Carson v. Carson, 528 S.W.2d 308, 309 (Tex. Civ. App.—Waco 1975, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 85 (1976) (pleadings sufficient to support an order for attorney's fees for appeal); *Ex parte* Thompson, 510 S.W.2d 165, 168 (Tex. Civ. App.—Dallas 1974, no writ) (temporary alimony).

313. *Ex parte* Thompson, 510 S.W.2d 165, 168 (Tex. Civ. App.—Dallas 1974, no writ).

314. Spiller v. Spiller, 535 S.W.2d 683, 685-86 (Tex. Civ. App.—Tyler 1976), writ dism'd); Spiller v. Sherrill, 518 S.W.2d 268, 272-73 (Tex. Civ. App.—San Antonio 1974, no writ). The final judgment with respect to property disposition was, of course, an appealable order. A *temporary* order with respect to marital property management not involving injunctive relief is not an appealable order under article 4662, which authorizes appeals from orders granting temporary injunctions. Dickson v. Dickson, 516 S.W.2d 28, 30 (Tex. Civ. App.—Austin 1974, no writ); TEX. REV. CIV. STAT. ANN. art. 4662 (1952).

tion,[315] a writ of error,[316] or a bill of review.[317] With respect to the state of the record for purposes of appeal, a trial court sitting without a jury is only required to make specific fact findings on ultimate, controlling issues.[318] If a party to a nonjury trial anticipates raising an issue on appeal with respect to abuse of discretion in dividing the community estate, he should request a finding of fact as to the value of the community estate. In *Caldwell v. Caldwell*[319] the trial court failed to make such a finding and merely granted the husband a specific dollar amount as his portion of the community property. The appellate court held that there was no error in the trial court's failure to find the total value of the community because the husband, under rule 297 of the Texas Rules of Civil Procedure, waived his right to such a finding by not demanding it.[320] Furthermore, if a case is withdrawn from the jury, the trial court may not make such findings.[321]

If the appellant was not present at the trial, certain responsibilities

315. *See* Currie v. Currie, 518 S.W.2d 386, 388 (Tex. Civ. App.—San Antonio 1974, writ dism'd). It was recently held that an intermediate appellate court may not render judgment contrary to that of the trial court with respect to division of property without remand. McKnight v. McKnight, 543 S.W.2d 863, 866 (Tex. 1976), *rev'g*, 535 S.W.2d 658, 661-62 (Tex. Civ. App.—El Paso 1976). The court in *McKnight* was careful to distinguish remittitur cases such as Dietz v. Dietz, 540 S.W.2d 418, 420-21 (Tex. Civ. App.—El Paso 1976, no writ), and Cooper v. Cooper, 513 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ). *But see* Horlock v. Horlock, 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd).

316. TEX. REV. CIV. STAT. ANN. arts. 2249, 2249a (1971); *see* Smith v. Smith, 535 S.W.2d 380, 383-84 (Tex. Civ. App.—Beaumont 1976, writ granted); Roberts v. Roberts, 525 S.W.2d 268 (Tex. Civ. App.—Waco 1975, no writ). In *Roberts* a default judgment was entered against the wife who had failed to appear. The default, however, was entered two days prior to the date on which the wife was cited to answer. The judgment was set aside since default (or waiver of jury trial) cannot occur prior to the answer date. *Id.* at 270. *See also* American Motorists Ins. Co. v. Box,, 531 S.W.2d 407, 410 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (explanation of difference between bill of review and writ of error).

317. For examples of bills of review alleging the secreting of assets, *see* McFarland v. Reynolds, 513 S.W.2d 620, 624-25 (Tex. Civ. App.—Corpus Christi 1974, no writ); Raney v. Mack, 504 S.W.2d 527, 533 (Tex. Civ. App.—Texarkana 1973, no writ). A party cannot seek rescission of an agreement, such as the one in *McFarland*, following divorce without first offering to restore the benefits received under it or making a sufficient explanation for failure to do so. Guion v. Guion, 475 S.W.2d 865, 869 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).

318. Goren v. Goren, 531 S.W.2d 897, 901 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism'd).

319. 423 S.W.2d 140 (Tex. Civ. App.—Waco 1967, no writ).

320. *Id.* at 142. *See also* Williams v. Williams, 537 S.W.2d 107, 111 (Tex. Civ. App.—Tyler 1976, no writ). With respect to jury trials under TEX. R. CIV. P. 296, *see* Boriack v. Boriack, 541 S.W.2d 237, 242 (Tex. Civ. App.—Corpus Christi 1976, writ dism'd).

321. *See* Spiller v. Spiller, 535 S.W.2d 683, 685 (Tex. Civ. App.—Tyler 1976, writ dism'd).

with respect to the record devolved upon the appellee. In cases of citation by publication it is very clear[322] that the parties must prepare a narrative statement of the evidence for the record. In *Smith v. Smith*[323] the appellant (by way of writ of error) had not appeared at the trial and a court reporter had not been present to record the evidence.[324] The appellee had not prepared a narrative of the evidence. The appellant had been successful in his efforts to procure a statement of the evidence from the judge who was unable to recollect it. The Supreme Court of Texas held that the appellant who through no fault of his own was unable to provide the record needed for the appeal was entitled to a new trial.[325]

But in other instances a successful appeal may be precluded. First, a party is estopped to prosecute an appeal when he has enjoyed the fruits of the property division.[326] Second, the judgment of a trial court ordinarily will not be set aside for an attorney's inattention to his client's affairs.[327]

322. *See* McCarthy v. Jesperson, 527 S.W.2d 825, 826 (Tex. Civ. App.—El Paso 1975, no writ); TEX. R. CIV. P. 244.

323. 544 S.W.2d 121 (Tex. 1976), *rev'g* 535 S.W.2d 380 (Tex. Civ. App.—Beaumont 1976). The appellant had, nevertheless, filed an answer.

324. Effective May 27, 1975, TEX. REV. CIV. STAT. ANN. art. 2324 (Supp. 1976) was amended to require a court reporter at a hearing only on request. *See* Bledsoe v. Black, 535 S.W.2d 795, 796 (Tex. Civ. App.—Eastland 1976, no writ); Mills v. Mills, 535 S.W.2d 713, 715 (Tex. Civ. App.—Eastland 1976, no writ) (both cases involving the parent-child relationship).

325. Smith v. Smith, 544 S.W.2d 121, 123 (Tex. 1976); Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd) (answer not filed); Dugie v. Dugie, 511 S.W.2d 623 (Tex. Civ. App.—San Antonio 1974, no writ) (answer not filed, but appellant agreed to continuance and was advised of trial setting). *But see* Englander Co. v. Kennedy, 428 S.W.2d 806, 807 (Tex. 1968); Scoggins v. Scoggins, 531 S.W.2d 245, 247 (Tex. Civ. App.—Tyler 1975, no writ) (question whether record contained a statement of facts); Ducoff, v. Ducoff, 523 S.W.2d 264, 267 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (appellant present at trial but no reporter); Brown v. Brown, 520 S.W.2d 571 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (appellant not present at trial but statement of evidence and findings of fact prepared by judge). *See also* Schwartz v. Jefferson, 520 S.W.2d 881, 885 (Tex. 1975) (contempt an issue).

326. Carle v. Carle, 149 Tex. 469, 472, 234 S.W.2d 1002, 1004 (1950); McCartney v. Mead, 541 S.W.2d 202, 205 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); Roye v. Roye, 531 S.W.2d 242, 244 (Tex. Civ. App.—Tyler 1975, no writ); Trader v. Trader, 531 S.W.2d 189, 190-91 (Tex. Civ. App.—San Antonio 1975, writ dism'd); *cf.* McFarland v. Reynolds, 513 S.W.2d 620, 623 (Tex. Civ. App.—Corpus Christi 1974, no writ) (bill of review). In Girard v. Girard, 521 S.W.2d 714 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ), a reimbursement case, it was concluded that the spouse in whose favor the trial court erred had no basis for complaint on appeal. *Id.* at 718. *See also* Williams v. Williams, 537 S.W.2d 107 (Tex. Civ. App.—Tyler 1976, no writ); Spiller v. Spiller, 535 S.W.2d 683 (Tex. Civ. App.—Tyler 1976, writ dism'd); Newland v. Newland, 529 S.W.2d 105 (Tex. Civ. App.—Fort Worth 1975, writ dism'd).

327. *See* Law v. Law, 517 S.W.2d 379, 381 (Tex. Civ. App.—Austin 1974, writ

The grounds for presenting an equitable bill of review[328] are a meritorious defense to the cause of action;[329] fraud, accident, or wrongful act of the other party in preventing the presentation of a defense to the action;[330] and lack of fault or negligence on the part of the petitioner.[331] In *McFarland v. Reynolds*[332] the court was sharply divided with respect to the last element. The ex-wife, who had entered into an agreed judgment in the divorce action, brought her bill of review to set aside all matters relating to the division of property, but not the divorce itself. Her contention was that her agreement to the judgment had been procured by the husband's fraudulent misrepresentation with respect to the assets and liabilities of the community estate. A majority of the appellate court concluded that the wife's bill of review should have been granted, but the dissenting judge discerned fraud and negligence on her part.[333] No point was made with respect to the extent to which the wife had acted on advice of counsel during the negotiations with her husband. In *Crispin v. Crispin*,[334] a somewhat similar case, at least part of the petitioner's predicament seems attributable to her failure to employ counsel. It was demonstrated that the ex-wife was quite familiar with such proceedings and fully capable of procuring counsel. The court concluded that she was negligent in failing to make an accurate determination of the value of the property in

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dism'd); Leonard v. Leonard, 512 S.W.2d 771, 773 (Tex. Civ. App.—Corpus Christi 1974, writ dism'd); Swearingen v. Swearingen, 487 S.W.2d 784, 787 (Tex. Civ. App.—San Antonio 1972, writ dism'd) (bill of review).

328. The equitable bill of review should not be confused with the statutory bill of review which is a more restrictive procedural device available only to a defendant allegedly served with process by publication. *See* TEX. R. CIV. P. 329. For a discussion of the grounds for a statutory bill of review, *see* McCarthy v. Jesperson, 527 S.W.2d 825, 826-27 (Tex. Civ. App.—El Paso 1975, no writ).

329. *See* Alexander v. Hagedorn, 148 Tex. 565, 568, 226 S.W.2d 996, 998 (1950). *See also* Ragsdale v. Ragsdale, 520 S.W.2d 839 (Tex. Civ. App.—Fort Worth 1975, no writ).

330. McFarland v. Reynolds, 513 S.W.2d 620, 623 (Tex. Civ. App.—Corpus Christi 1974, no writ). The former wife succeeded in her proceeding for a bill of review to set aside a judgment incorporating an agreed judgment with respect to property, which agreement was procured by the husband by fraudulent representations as to the value of the community estate and outstanding debts for which it was liable.

331. Alexander v. Hagedorn, 148 Tex. 565, 569, 226 S.W.2d 996, 998 (1950); Swearingen v. Swearingen, 487 S.W.2d 784, 786 (Tex. Civ. App.—San Antonio 1972, writ dism'd). *But see* Texas Indus., Inc. v. Sanchez, 525 S.W.2d 870 (Tex. 1975); Deen v. Deen, 530 S.W.2d 913 (Tex. Civ. App.—Fort Worth 1975, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 72-73 (1976).

332. 513 S.W.2d 620 (Tex. Civ. App.—Corpus Christi 1974, no writ).

333. *Id.* at 628 (dissenting opinion). *See also* Boley v. Boley, 506 S.W.2d 934 (Tex. Civ. App.—Fort Worth 1974, no writ).

334. 529 S.W.2d 310 (Tex. Civ. App.—Austin 1975, no writ) (no fraud on part of respondent was demonstrated).

question.[335] But oversights of counsel, which may occur in instances such as these, are usually imputed to the client and result in the denial of the bill of review.[336]

A collateral attack may be made upon a judgment for division of marital property for lack of jurisdiction over the person or the subject matter.[337] *Estabrook v. Wise*[338] was a dispute involving subject matter jurisdiction over foreign realty, which had not been dealt with by the divorce court.[339] The court of civil appeals disagreed with respect to whether the thrust of the suit was in rem or in personam.[340] In those rare instances when the issue has been presented to them, Texas appellate courts have denied the power of Texas divorce courts to characterize or divide foreign realty.[341] Still, a Texas divorce court has *considered* the value of realty acquired in another jurisdiction in making an equitable division of marital property,[342] though in granting in personam relief questions of title under foreign law are nonetheless to be reckoned with.[343] But the Texas Supreme Court has, as a matter of comity, given effect to an in personam order of a foreign court with

335. *Id.* at 314-15.

336. Swearingen v. Swearingen, 487 S.W.2d 784, 787 (Tex. Civ. App.—San Antonio 1972, writ dism'd), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 70 (1974), along with Blancas v. Blancas, 495 S.W.2d 597 (Tex. Civ. App. —Texarkana 1973, no writ).

337. *See* Hodges, *Collateral Attacks on Judgments*, 41 TEXAS L. REV. 163, 166-67 (1962). A collateral attack is ordinarily not an appropriate means of questioning characterization of marital property divided on divorce. *See Ex parte* Sutherland, 526 S.W.2d 536, 538-39 (Tex. 1975). Nor is it an appropriate means of contesting the validity of a property settlement agreement incorporated in a divorce decree. Peddicord v. Peddicord, 522 S.W.2d 266, 267 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); Gregory v. Gregory, 404 S.W.2d 657, 659 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

338. 506 S.W.2d 248 (Tex. Civ. App.—Tyler), *writ dism'd as moot per curiam*, 519 S.W.2d 632 (Tex. 1974).

339. *Id.* at 249.

340. *Id.* at 253.

341. Kaherl v. Kaherl, 357 S.W.2d 622 (Tex. Civ. App.—Dallas 1962, no writ) (division on divorce); Moor v. Moor, 255 S.W. 231 (Tex. Civ. App. 1900, writ denied) (division after divorce).

342. Deger v. Deger, 526 S.W.2d 272, 274 (Tex. Civ. App.—Waco 1975, no writ); Walker v. Walker, 231 S.W.2d 905, 906 (Tex. Civ. App.—Texarkana 1950, no writ). With respect to characterization of personal property acquired by Texans in another jurisdiction, *see In re* Perry, 480 S.W.2d 893 (Mo. 1972), *noted* in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 32 (1973); Moor v. Moor, 63 S.W. 347, 351 (Tex. Civ. App. 1901, writ ref'd); *cf.* Tirado v. Tirado, 357 S.W.2d 468 (Tex. Civ. App.—Texarkana 1962, writ dism'd) (Texans' interest in foreign realty in the form of personalty).

343. *See* Estabrook v. Wise, 506 S.W.2d 248, 253 (Tex. Civ. App.—Tyler) (dissenting opinion), *dism'd as moot per curiam*, 519 S.W.2d 632 (Tex. 1974).

respect to Texas realty,[344] and a foreign court might give a Texas order the same treatment with regard to realty within its jurisdiction.

Enforcement

Money judgments awarded to achieve an equitable division of property may be enforced by execution, and liens may be perfected and foreclosed unless the realty on which they are to be imposed has become exempt. In *Spence v. Spence*[345] the husband was awarded a tract of rural land and the wife was awarded a money judgment of $40,000 against him to balance their interests. After the divorce the former husband remarried and filed a voluntary designation of homestead in the county in which the rural property was located.[346] The first wife then sought to impose and foreclose a lien on the tract to

344. McElreath v. McElreath, 162 Tex. 190, 195, 345 S.W.2d 722, 725 (1961). *See also* Allis v. Allis, 378 F.2d 721 (5th Cir.), *cert. denied*, 389 U.S. 953 (1967), *noted in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 138 n.50 (1968); Forman v. Forman, 496 S.W.2d 243 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ), *noted in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 75 (1974).

Cole v. Lee, 435 S.W.2d 283 (Tex. Civ. App.—Dallas 1968, writ dism'd), involved a dispute between foreign ex-spouses with respect to a property settlement agreement involving, *inter alia*, Texas realty. The Dallas Court of Civil Appeals concluded that the settlement should first be rescinded before an action for recovery of realty could be brought, and the proper forum for rescission of the settlement contract under the forum non conveniens doctrine was that of the domicile of the parties. *Id.* at 288. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 56-57 (1969).

For characterization of Texas realty acquired by out of state residents, *see* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 129-30 (1968), and authorities there cited. *See also* Patterson v. Metzing, 424 S.W.2d 255 (Tex. Civ. App.—Corpus Christi 1967, no writ), *commented on in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 47-48 (1969).

Final, foreign alimony decrees are enforceable in Texas under the doctrine of "full faith and credit." Rumpf v. Rumpf, 150 Tex. 475, 478, 242 S.W.2d 416, 417 (1951); Hendricks v. Hendricks, 535 S.W.2d 668, 670 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); *see* Vandervoort, Sams, Anderson, Alper & Post v. Vandervoort, 529 F.2d 424, 425 (5th Cir. 1976) (with respect to a money judgment and attorney's fees granted by a Florida court). *See also* Layton v. Layton, 538 S.W.2d 642, 648 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

345. 455 S.W.2d 365 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).

346. *Id.* at 368. Under present law, remarriage would be unnecessary for achievement of the ex-husband's objectives, because single adults may now claim a homestead exemption as well. TEX. CONST. art. XVI, §§ 50, 51. A single adult may, however, only claim 100 rural acres as exempt as compared to 200 acres for a family. TEX. REV. CIV. STAT. ANN. art. 3833 (Supp. 1976). Personal property exemptions have also been extended with respect to single adults although the aggregate amount that can be claimed is only $15,000 in value for a single adult as compared to $30,000 for a family. *Id.* art. 3836; *see* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 84-86 (1974).

secure her unsatisfied judgment. Her efforts failed, however, as the husband and his second wife had by that time built a dwelling on the property and maintained it as their only home. Even if actual occupancy had begun after the lien was seemingly perfected, the homestead character of the property would have been fixed by the couple's prior acts evidencing an intention to make the property their home. These evidentiary acts were buttressed by the subsequent home construction and occupancy. The fact that the homestead was established with the express intention of putting the property out of reach of the former wife added to, rather than detracted from, the former husband's argument.[347] From the ex-wife's point of view, her position would have been secure from the outset if the divorce court had imposed a lien on the then nonhomestead property to secure payment of the money judgment awarded.[348]

If a money judgment is awarded that is to be paid in installments, the doctrine of anticipatory breach seems applicable to its enforcement.[349] If a division of property is adjudicated and money is ordered to be paid as received, as in the case of pension or retirement bene-

347. Spence v. Spence, 455 S.W.2d 365, 369 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).

348. With respect to liens on separate property, *see* notes 198-201 *supra* and accompanying text.

In Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645 (1974), the author points out that "if the wife relinquished her interest in existing assets for an unsecured promissory note from the husband or for an agreement calling for periodic payments . . . , she must consider that in the event of default she will be relegated to an ordinary suit for breach of contract . . . ." *Id.* at 648. Mr. Rudberg, *citing* Sayers v. Pyland, 161 S.W.2d 769 (Tex. 1942), suggests that a lien can effectively be made to encumber any asset retained by the other spouse, including the homestead. *Id.* at 648. This suggestion overstrains the authority cited if a lien is sought to be put on homestead property to ensure payment of a note given to facilitate partition of property *other than* that on which the homestead is located. *See* John Hancock Mut. Life Ins. Co. v. Glasgow, 135 Tex. 470, 474, 141 S.W.2d 942, 943-44 (1940); Brunell v. Brunell, 494 S.W.2d 621, 624 (Tex. Civ. App.—Dallas 1973, no writ) (court invalidated a lien on homestead property for payment of attorney's fees). *See also* Goldberg v. Goldberg, 425 S.W.2d 830 (Tex. Civ. App.—Fort Worth 1968, no writ), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 56 (1969).

For practical advice on utilizing the assistance of a federal agency in connection with a lien fixed on an airplane, see Goodwin v. Goodwin, 451 S.W.2d 532, 535 (Tex. Civ. App.—Amarillo), *rev'd on other grounds*, 456 S.W.2d 885 (Tex. 1970), *summarized in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 41 n.53 (1971).

349. *See* Lee v. Lee, 509 S.W.2d 922, 926 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.) (child support case). *See also* Forney v. Jorrie, 511 S.W.2d 379 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.). Both cases are discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 107-08 (1975).

fits, the contempt powers of the divorce court seem available for enforcement of the obligation when the recipient of periodic payments had been ordered to make payment into the registry of the court.[350]

350. *See Ex parte* Sutherland, 526 S.W.2d 536, 539 (Tex. 1975) (confinement for failure to pay retirement benefits as received does not constitute imprisonment for debt). But in *Ex parte* Sutherland, 515 S.W.2d 137 (Tex. Civ. App.—Texarkana 1974, writ dism'd), the court had said that an order to pay interest on late payments of the ex-wife's accruing share of property is not enforceable by contempt. *Id.* at 141; see notes 63 and 182 *supra*. *See also* Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 653-57 (1974). In *Ex parte* Anderson, 541 S.W.2d 286, 287-88 (Tex. Civ. App.—San Antonio 1976, no writ), the appellate court held that the contempt power was available to coerce payment of periodic retirement benefits ordered to be paid directly to the ex-spouse.

The court called upon to enforce its order by contempt may not, of course, make a substantive change in the terms of its order with respect to division of property over 30 days after entry of the final order. *Ex parte* Wagley, 530 S.W.2d 609, 611 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). In the divorce decree the wife was awarded one-half of the husband's retirement benefits. The court's later order directed the ex-husband to deposit one-half the amount of his monthly retirement check in his former wife's bank account, thereby substantively changing the original order. In Cocke v. Cocke, 408 S.W.2d 348 (Tex. Civ. App.—Waco 1966, writ dism'd), the court relied upon principles of contract law in holding that the terms of a property settlement agreement incorporated in a divorce decree were not subject to modification based on a deterioration in the ex-husband's financial circumstances. *Id.* at 350.

It is also asserted that failure to pay attorney's fees *cannot* provoke a proper order for contempt. *Ex parte* Werner, 496 S.W.2d 121, 122 (Tex. Civ. App.—San Antonio 1973, no writ) (*semble*). *Sed quaere* if they are ordered paid into the registry of the court and constitute an integral part of the equitable division of property on divorce. *See* note 261 *supra* and accompanying text. *See also Ex parte* Myrick, 474 S.W.2d 767, 772 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ); text accompanying note 292 *supra*. If the court applies a single sanction for the commission of several acts asserted to be contemptuous and any one of those acts will not support the order, the citation for contempt is void. *Ex parte* Harwell, 538 S.W.2d 667, 671 (Tex. Civ. App.—Waco 1976, no writ) (contempt will not lie for violation of an order to pay arrearages of temporary alimony and child support ordered in final decree); *Ex parte* Werner, 496 S.W.2d 121, 122 (Tex. Civ. App.—San Antonio 1973, no writ). In any case, contempt of an order cannot issue except in violation of an order properly entered. *Ex parte* Valdez, 521 S.W.2d 724, 726 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). It may issue where the contempt occurs out of the presence of the court only in violation of a prior order in writing. *Ex parte* Spencer, 508 S.W.2d 698, 699 (Tex. Civ. App.—Texarkana 1974, no writ). To withstand the attack of a writ of habeas corpus, the order must be in clear and specific terms. *See Ex parte* Filemyr, 509 S.W.2d 731, 733 (Tex. Civ. App.—Austin 1974, no writ). *See also Ex parte* Thompson, 510 S.W.2d 165 (Tex. Civ. App.—Dallas 1974, no writ). Related cases involving contempt for violation of child support orders are discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 93 (1974). A proper citation for contempt of a court's order must always run from the court, and not the person of the judge, toward whom particular conduct of the contemner is directed. If, for example, the judge of court *B* sits as the judge of court *A* in which the divorce proceeding is filed, the judge may cite a party for contempt only in his capacity as judge of court *A* and not as judge of court *B*. *Ex parte* Alvarado, 543 S.W.2d 144, 147 (Tex. Civ. App.—El Paso 1976, no writ); *Ex parte* Lowry, 518 S.W.2d 897, 901-02 (Tex. Civ. App.—Beaumont 1975, no writ). The writ of habeas corpus is ordinarily not the appropriate means of attacking the trial court's determination that particular property constituted community property. *Ex parte* Sutherland, 526 S.W.2d 536, 538-39 (Tex. 1975).

Whether an order to pay a money judgment that is payable in installments or an order incorporating a property settlement agreement to the same effect is enforceable by contempt has not been conclusively decided.[351] The law is settled, however, with respect to the enforcement of an order to pay a lump sum award. More than fifteen years ago, the Texas Supreme Court held in *Ex parte Preston*[352] that such an order was enforceable by contempt. The contempt power of the trial court is also clearly available to enforce an order to deliver chattels or to transfer property, tangible or intangible,[353] wherever located, provided the court acquired personal jurisdiction over the recalcitrant former spouse.[354] It is generally accepted that a divorce court may decree a change in ownership of realty or personalty and proper recordation of such an order constitutes notice of the passing of title (to such property as is affected by constructive notice) to those who may assert acquisition of a subsequent interest in the property.[355] Whether a writ of possession may issue from the divorce court to give effect to its order with respect to personalty as well as realty may be disputed.[356]

With the exception of garnishment of wages,[357] the writ of garnishment may generally be utilized to reach nonexempt property in the

351. *See Ex parte* Neff, 542 S.W.2d 268 (Tex. Civ. App.—Fort Worth 1976, no writ); *Ex parte* Anderson, 541 S.W.2d 286, 287-88 (Tex. Civ. App.—San Antonio 1976, no writ), *discussing Ex parte* Yates, 387 S.W.2d 377 (Tex. 1965). *But see* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 86-87 n.138 (1976).

352. 162 Tex. 379, 384, 347 S.W.2d 938, 940-41 (1961).

353. *See* Miguez v. Miguez, 453 S.W.2d 514, 520 (Tex. Civ. App.—Beaumont 1970, no writ) (concerning federal agricultural allotment), *discussed in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 41 (1971). Difficulties encountered in enforcing a decree involving an award of shares in a corporation closely held by the family of an ex-spouse are illustrated by Earthman's, Inc. v. Earthman, 526 S.W.2d 192 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). *See also* Echols v. Austron, Inc., 529 S.W.2d 840 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

354. Davi v. Davi, 456 S.W.2d 238, 241 (Tex. Civ. App.—Texarkana 1970, writ dism'd) (child support case). *See also Ex parte* Limoges, 526 S.W.2d 707 (Tex. Civ. App.—Austin 1975, no writ), *commented on in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 103-04 (1976).

355. *See* Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 652 (1974). Nonparty third persons should be given notice of any change in contractual rights involving such third persons. For example, if some interest in an insurance policy on the life of one spouse is given to the other, notice should be given to the insurer. *Id.* at 652. In Goodwin v. Goodwin, 451 S.W.2d 532 (Tex. Civ. App.—Amarillo), *rev'd on other grounds*, 456 S.W.2d 885 (Tex. 1970), the court advised the ex-wife that her judgment lien on an airplane awarded the ex-husband should be filed with the Federal Aviation Administration. *Id.* at 534-35.

356. *See* TEX. R. CIV. P. 310, 632, 633; Andrews v. Beck, 23 Tex. 455 (1859); Crawford v. Southern Rock Island Plow Co., 77 S.W. 280 (Tex. Civ. App.—1903, writ ref'd).

357. TEX. CONST. art. XVI, § 28; TEX. REV. CIV. STAT. ANN. art. 4099 (1966).

hands of third persons for the enforcement of money judgments. Public policy, however, "exempts from garnishment or execution departments of state that are performing governmental functions."[358] There also seems to be no recourse against the federal government to insure payment of federal retirement benefits.[359] Nor does the Social Services Amendment Act of 1974 appear to give any aid in regard to federal benefits.[360]

With respect to the rights of third persons established during marriage against either spouse, it has long been established that a division of community property on divorce does not prejudice the rights of such third persons to reach that property which might have been reached during the marriage to satisfy a liability, regardless of whether the property is awarded to a spouse who is not personally bound for liability.[361] In *Maryland Casualty Co. v. Schroeder*[362] a bonding company that had insured against the husband's fraud sued both former spouses to recover money embezzled by the husband during marriage. The embezzled funds were traced by the plaintiff (but not as to amount) into various community assets that had been awarded to the wife on divorce. The court held that this was a sufficient showing to

358. Addison v. Addison, 530 S.W.2d 920, 921 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (former wife sought to garnish Texas Southern University for judgment indebtedness).

359. *See* United States v. Smith, 393 F.2d 318, 321 (5th Cir. 1968), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 45-46 (1969); Arnold v. United States, 331 F. Supp. 42, 44 (S.D. Tex. 1971).

360. *See* Wilhelm v. Department of the Air Force, 418 F. Supp. 162, 164 (S.D. Tex. 1976); Morrison v. Morrison, 408 F. Supp. 315, 316-17 (N.D. Tex. 1976). *See also* Maunder v. Maunder, 127 Cal. Rptr. 707 (Ct. App. 1976). *See generally* 42 U.S.C. § 653 (Supp. V, 1975), *amending* 42 U.S.C. § 301 *et seq.* (1970). Short of state action in the federal courts, which may be achieved by administrative intercession of the Federal Department of Health, Education and Welfare, the Social Services Amendments Act of 1974 offers Texas no more than federal assistance to *locate* former spouses who may not have complied with court orders. Garnishment of wages from federal sources is not available because that remedy under the federal act is dependent on its availability under state law. *See* Crane v. Crane, 417 F. Supp. 38 (E.D. Okla. 1976). But it is argued that because the federal government is under the act subject to garnishment in the same way as any other debtor, state courts should be competent to direct federal agencies to divide benefits arising under federal pension rights, if they do not constitute nongarnishable "wages." It has been suggested that a proceeding against a federal agency might succeed if pursued in a state where there is no prohibition of wage garnishment. *See* Baumgardner v. Southern Pac. Co., 177 S.W.2d 317, 319-20 (Tex. Civ. App.—El Paso 1943, no writ).

361. Boyd v. Ghent, 93 Tex. 543, 547, 57 S.W.25, 26-27 (1900); Dean v. First Nat'l Bank, 494 S.W.2d 222, 226 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.); First Nat'l Bank v. Hickman, 89 S.W.2d 838, 842 (Tex. Civ. App.—Austin 1935, writ ref'd); Grandjean v. Runke, 39 S.W. 945, 946 (Tex. Civ. App. 1897, no writ). *But see* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 82 (1974).

362. 446 S.W.2d 117 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.).

fix a constructive trust on those properties and that, as *trustee*, it was incumbent on the ex-husband to show which funds were *not* subject to the trust.[363] The court stated that it was irrelevant that the ex-wife knew nothing of the embezzlement.[364]

The Texas Constitution precludes spouses from partitioning their community estate to the prejudice of the rights of preexisting creditors;[365] spouses may, however, make gifts of community property to each other, thereby precluding the donor's creditors' claim to it as long as that gift does not constitute a fraudulent transfer.[366] Nonexempt property awarded to a spouse on divorce which thereafter becomes exempt property would seem protected from all but secured claims previously perfected against it.[367] At any rate, exempt property that is the subject matter of an award on divorce and remains exempt by the subsistence of the existing exemption[368] or creation of a new one *eo instanti* of the divorce[369] cannot be reached by preexisting creditors. The United States Government as a creditor, however, need not be overly concerned with exemptions and related doctrines asserted under state law.[370]

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363. *Id.* at 121.

364. *Id.* at 121. This case exemplifies the high watermark of applicability of the rule. Arguments can be fashioned for curbing or even reinterpreting the rule. *See* McKnight, *Management, Control and Liability of Marital Property* in TEXAS FAMILY LAW & COMMUNITY PROPERTY 159, 182 (J. McKnight ed. 1975).

365. TEX. CONST. art. XVI, § 15.

366. *See* Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 432 (Tex. 1970), *discussed in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 SW. L.J. 34, 47-48 (1971); TEX. BUS. & COMM. CODE ANN. §§ 24.02-.03 (1968). *See also* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 43 (1973). With respect to federal tax liability, *see* McKnight, *Family Law, Annual Survey of Texas Law*, 30 SW. L.J. 68, 87, 93 (1976).

367. But if a creditor is willing to take the risk of liability for wrongful levy on land and procures a writ of execution against such property, he need not provide the levying officer an indemnity bond since the officer cannot suffer liability for wrongful levy. *See* Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 433 (Tex. 1970), *discussed in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 SW. L.J. 34, 47-48 (1971). But with respect to a levy on personalty *see* TEX. ATT'Y GEN. OP. No. H-827 (1976).

368. Julian v. Andrews, 491 S.W.2d 721, 727 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 83 (1974); *cf.* Miller v. Two Investors, Inc., 475 S.W.2d 610, 612 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.). *See also* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 44 n.138 (1973).

369. Henry S. Miller Co. v. Shoaf, 434 S.W.2d 243, 244-45 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 24 SW. L.J. 49, 54-55 (1970). With respect to subsequent abandonment of a homestead, *see* Burk Royalty Co. v. Riley, 475 S.W.2d 566, 567 (Tex. 1972), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 SW. L.J. 31, 39-40 (1972).

370. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 29 SW. L.J. 67, 95 (1975). *See also* Stroman v. McCanless, 391 F. Supp. 1344 (N.D. Tex. 1975).

Resort to the bankruptcy court in an effort to discharge liability under a property settlement agreement or awards on divorce has been generally unsuccessful.[371] *In re Nunnally*[372] presented a situation where an ex-wife, who had been awarded a money judgment on divorce either for reimbursement or for repayment of a loan, intervened in her former spouse's voluntary bankruptcy proceeding. The bankrupt asserted that this claim, which was secured by a lien on that part of his naval retirement benefits awarded to him, as well as the award to his ex-wife of her attorney's fees, should be discharged. The court held for the former wife and stated that the bankruptcy label of nondischargeable "alimony"[373] applied to the award rather than the Texas label of "property division."[374] The court pointed out that, although permanent alimony is not awarded on divorce by Texas courts, a property division contains "a substantial element of alimony-substitute, support or maintenance, however termed,"[375] and therefore falls within the "alimony" exception to debts dischargeable in bankruptcy. In a later unreported case[376] a property settlement agreement between the spouses was approved and incorporated in a divorce decree in which the husband agreed to pay the wife $56,000 at the rate of $300 a month. The

371. *See In re* Smith, No. BK3-2065 (N.D. Tex., July 2, 1973), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 77-78 (1974). An earlier stage of the proceeding is discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 42 (1973). *But see In re* Parnass, No. BK3-3473F (N.D. Tex., Oct. 27, 1974), *noted in* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 89 n.155 (1976), where the court held that an award of $200,000 as agreed in a property settlement and ordered by the divorce court "was void because it was based on permanent alimony to be paid after divorce by court order."

372. 506 F.2d 1024, 1026 (5th Cir. 1975), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 92 (1975).

373. See Bankruptcy Act, § 17(a), 11 U.S.C. § 35(a)(7) (1970), which provides:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as
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> . . . .
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> (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation . . . .

374. *In re* Nunnally, 506 F.2d 1024, 1027 (5th Cir. 1975); *see* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 77-78 (1974); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 42 (1973). On behalf of the bankrupt, the court treated his retirement pay as not passing to the trustee in bankruptcy for the benefit of creditors. 506 F.2d at 1026; *see* Kokoszka v. Belford, 417 U.S. 642, 647-48 (1974). An interest "designed to function as a wage substitute at some *future* period and, during that *future* period, to 'support the basic requirements of life for [the debtors] and their families . . . .'" does not pass to the debtor's trustee in bankruptcy. *Id.* at 648, *quoting* Lines v. Frederick, 400 U.S. 18, 20 (1970).

375. *In re* Nunnally, 506 F.2d 1024, 1027 (5th Cir. 1975). *See also In re* Golden, 411 F. Supp. 1076 (S.D.N.Y.), *aff'd*, 535 F.2d 213 (2d Cir. 1976) (per curiam).

376. *In re* Hodges, No. BK3-7472 (N.D. Tex., Nov. 17, 1975).

bankruptcy court was concerned whether this payment constituted "alimony-substitute." Looking at the circumstances behind the decree, the court concluded that one of the principal reasons that the husband agreed to periodic payments was to provide for the support and maintenance of his wife; consequently the indebtedness constituted "alimony-substitute." The bankruptcy court's conclusion is that in applying *Nunnally*, the court must determine whether a particular indebtedness arising from a property settlement agreement or a divorce court's decree constitutes "alimony-substitute" as a matter of *fact*.[377]

Property Undisposed of by Decree

Community property not affected by the divorce decree becomes a tenancy in common between the former spouses.[378] No further recourse may be had to the divorce court for division of the community;[379] the former spouses who seek to divide the property must resort to partition.[380]

Disputes with respect to property undivided on divorce usually occur when counsel for both parties fail to recognize community assets as such.[381] The most common oversight has occurred with respect to retirement benefits that have not matured to payment.[382] Care must

377. *Cf.* Nichols v. Hensler, 528 F.2d 304, 307-08 (7th Cir. 1976). *See also In re* Parnass, No. BK3-3473F (N.D. Tex., Oct. 27, 1974).

378. Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970).

379. *See id.* at 554-55. *See also* Scott v. Scott, 408 S.W.2d 135 (Tex. Civ. App.—Fort Worth 1966, writ dism'd). It has been suggested that statutory reform in this respect may be in order. McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 40 (1971). As to separate property, however, its character is undisturbed. *See* Cowart v. Cowart, 515 S.W.2d 359, 362 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

380. *See* Busby v. Busby, 457 S.W.2d 551, 554-55 (Tex. 1970); Smith v. Cooper, 541 S.W.2d 274, 276-77 (Tex. Civ. App.—Texarkana 1976, no writ). As a preliminary step to seeking partition, a declaratory judgment may be sought to determine whether there is property to partition. *See* Dessommes v. Dessommes, 461 S.W.2d 525, 526-27 (Tex. Civ. App.—Waco 1970, no writ). In Fyke v. Fyke, 463 S.W.2d 242, 245 (Tex. Civ. App.—Fort Worth 1971, no writ), the court concluded, perhaps wrongly, that if there were no net assets of the ex-spouses, there was no former community estate to divide. *See* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 41 (1971).

381. The severe consequences of malpractice in this regard are exemplified by Smith v. Lewis, 118 Cal. Rptr. 621, 629 (1975). In that case the court upheld an award of $100,000 in damages against an attorney who had failed to conduct adequate legal research to determine that certain retirement benefits of the husband were community property and subject to division on divorce. *See* TIME, Jan. 12, 1976, at 53.

382. Another common oversight on the part of counsel in the process of divorce is failure to prepare a new will for a divorced spouse. Although section 69 of the Probate Code may rectify some oversights, disputes can be better obviated by preparation of a

be taken that the divorce decree covers such interests.[383] A decree stating that each spouse holds as separate property that which is in his or her "possession" does not cover a spouse's interest in a retirement fund.[384] The division of property must be clearly indicated in the decree[385] and not merely supported by knowledge of counsel.[386] A mere recital in the divorce decree that there is no community property to divide has been said, however, not to bar a later proceeding to partition community property not disposed of on divorce.[387]

In *Busby v. Busby*[388] the ex-wife asserted a tenancy in common in the military disability retirement benefits of her ex-husband, which were undisposed of on divorce. The supreme court held that regardless of

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new will or codicil. *See* McFarlen v. McFarlen, 536 S.W.2d 590, 591 (Tex. Civ. App.—Eastland 1976, no writ); Smith v. Smith, 519 S.W.2d 152, 154-55 (Tex. Civ. App.—Dallas 1974, writ ref'd); TEX. PROB. CODE ANN. § 69 (1956).

383. The Texas Supreme Court stressed this point in Busby v. Busby, 457 S.W.2d 551, 555 (Tex. 1970), and reiterated it in Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976).

384. Dessommes v. Dessommes, 505 S.W.2d 673, 676 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). The spouse's vested interest in the retirement fund gave him control of an equitable interest in the fund through the exercise of various options including the right to determine the time of retirement, to change the beneficiary of death benefits and to convert the interest to a policy of insurance. "Possession," as that word was used in the decree, could not properly be interpreted as "including such intangible contract rights as these. The term is ordinarily understood as referring to property over which the parties have physical control or, at least, a power of immediate enjoyment and disposition." *Id.* at 676.

385. Constance v. Constance, 537 S.W.2d 488, 490 (Tex. Civ. App.—Austin), *rev'd*, 544 S.W.2d 659 (Tex. 1976). The findings of the trial court recited that " 'inasmuch as no award is being made to Plaintiff for any portion of retired pay, the Court finds that the sum of $200.00 per month for child support is reasonable and it is accordingly ORDERED by the Court that the Defendant contribute the sum of $200.00 per month toward the support and maintenance of said minor children . . . .' " *Id.* at 489. The decretal part of the judgment then dealt with the property settlement agreement in which there was no mention of the respondent's retired pay and no residual clause providing for community property not disposed of therein. In a subsequent suit for partition of the retirement benefits, the court of civil appeals held that those benefits had been undisposed of by the divorce decree. 537 S.W.2d at 489-90. In reversing this holding the Texas Supreme Court said that "[i]t is clear on the face of the decree in question that the award of $200 per month for child support rested upon the decision of the trial court to award the retirement benefits to the husband." 544 S.W.2d at 660.

386. Adwan v. Adwan, 538 S.W.2d 192, 196-97 (Tex. Civ. App.—Dallas 1976, no writ); Wilson v. Wilson, 507 S.W.2d 916, 919 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

387. Clendenin v. Krock, 527 S.W.2d 471, 473 (Tex. Civ. App.—San Antonio 1975, no writ). The crucial factor was that the retirement benefits in issue had not "been before the court." If characterization had been litigated and the property deemed separate property of the husband, the determination would have been res judicata. *See id.* at 474 (concurring opinion); *cf.* Constance v. Constance, 537 S.W.2d 488, 490 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 544 S.W.2d 659 (Tex. 1976).

388. 457 S.W.2d 551 (Tex. 1970), *discussed in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 40 (1971).

whether retirement is voluntary or involuntary, those retirement benefits which *accrue* during the marriage are community property.[389] The former wife was, therefore, awarded one-half of the entire sum of the benefits received in spite of the fact that the couple was not married until after the husband had been in military service for four of his almost twenty-one years of active service. A strict application of this rule could produce unjust and anomalous results.[390]

Lower appellate courts in several subsequent decisions ignored the rule seemingly laid down in *Busby* in favor of a proportionate calculation of the community interest if all benefits had not been earned during a marriage in a community property state.[391] In *Angott v. Angott*,[392] for example, the employee-husband's interest in his employer's retirement benefit plan had accrued during marriage, but no division of the benefits was made in the divorce decree. As a result, the wife thereafter claimed her rights as a tenant in common in the benefits. The court concluded that the community interest is represented by "the

389. Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970); Fulton v. Duhaime, 525 S.W.2d 62, 63 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). Disability benefits are also considered to be community property under similar circumstances. *Cf. In re* Marriage of Butler, 543 S.W.2d 147, 150 (Tex. Civ. App.—Texarkana 1976, no writ); Ramsey v. Ramsey, 474 S.W.2d 939, 940-41 (Tex. Civ. App.—Eastland 1971, writ dism'd) (divorce case), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 31 (1973).

390. *See* Note, 25 Sw. L.J. 340, 350 (1971). One of its most curious consequences was that it equated the acquisition of the pension claimant, in the sense of inception of title, to that of the naked trespasser asserting title to realty by adverse possession rather than the trespasser with color of title. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 33 n.21 (1972). *See also* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 30-31 (1973). In applying the doctrine of inception of title to a situation of adverse possession, the trespasser with color of title acquires title from the date of his possession, whereas the naked trespasser acquires title only after the statute of limitations has run.

391. Mitchim v. Mitchim, 509 S.W.2d 720, 725 (Tex. Civ. App.—Austin 1974), *rev'd on other grounds*, 518 S.W.2d 362 (Tex. 1975); Wilson v. Wilson, 507 S.W.2d 916, 917-18 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); Dessommes v. Dessommes, 505 S.W.2d 673, 680-81 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.); Angott v. Angott, 462 S.W.2d 73, 74-75 (Tex. Civ. App.—Waco 1970, no writ). The same approach to division of community property has been employed in numerous divorce cases. *See, e.g.*, Gaulding v. Gaulding, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1973, no writ); *In re* Marriage of McCurdy, 489 S.W.2d 712, 715-16 (Tex. Civ. App.—Amarillo 1973, writ dism'd); Marks v. Marks, 470 S.W.2d 83, 84 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.). For cases arising prior to *Busby*, see Webster v. Webster, 442 S.W.2d 786, 788 (Tex. Civ. App.—San Antonio 1969, no writ); Mora v. Mora, 429 S.W.2d 660, 663 (Tex. Civ. App.—San Antonio 1968, writ dism'd); Kirkham v. Kirkham, 335 S.W.2d 393, 393-94 (Tex. Civ. App.—San Antonio 1960, no writ).

392. 462 S.W.2d 73 (Tex. Civ. App.—Waco 1970, no writ). The couple was married in 1939 and divorced in 1966. The husband began work in 1941 and voluntarily retired in 1967.

proportion which the benefits earned during marriage bears to the total benefits earned during the entire period of employment, represented by the fraction 291/303."[393] The same approach has been employed in dealing with the situations in which an interest in a retirement fund was earned while the spouses were domiciled in noncommunity property states.[394] A similar recourse to equitable considerations was had in *Dessommes v. Dessommes*[395] where the ex-wife again asserted a partitionable cotenancy interest in all the husband's undivided retirement benefits. After the divorce, the former husband continued to augment the fund,[396] and the prior retirement plan was superseded by a new one under which the ex-husband was entitled to an annuity when he subsequently retired. The trial court granted an instructed verdict for the husband. Reversing and remanding, the appellate court first observed that the oversight of the divorce court left the spouses with a tenancy in common.[397] The court then stated that:

> [w]hen the proportions contributed by several owners to a common fund cannot be established and the equities are equal, the owners must be considered equal tenants in common. . . .
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> . . . [But] the circumstances shown here justify imposing on the former husband the burden to establish the portion of the commingled retirement fund attributable to contributions *since* the

393. *Id.* at 74. *See also* Wilson v. Wilson, 507 S.W.2d 916 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ), *commented on in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 85 (1975).

394. Mitchim v. Mitchim, 509 S.W.2d 720, 725 (Tex. Civ. App.—Austin 1974), *rev'd on other grounds*, 518 S.W.2d 362 (Tex. 1975), *relying on* Dessommes v. Dessommes, 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). But the foreign law must be proved. *See* Wilson v. Wilson, 507 S.W.2d 916, 918 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ). In *Mitchim* the right to retirement benefits accrued while the couple was living in California. Without any discussion of California law, the court assumed that Texas law (*i.e., Busby*) was applicable, but as interpreted in *Dessommes.* Mitchim v. Mitchim, 509 S.W.2d 720, 725 (Tex. Civ. App.—Austin 1974), *rev'd on other grounds*, 518 S.W.2d 362 (Tex. 1975). There the dissenting judge read *Busby* as holding that when the husband's retirement benefits accrued in a community property state, the wife becomes "entitled to her portion of that part of the interest in the retirement plan which was earned while the parties were man and wife." *Id.* at 726 (dissenting opinion). *See also* Lumpkins v. Lumpkins, 519 S.W.2d 491, 494-95 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (dissenting opinion).

395. 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.), a sequel to Dessommes v. Dessommes, 461 S.W.2d 525 (Tex. Civ. App.—Waco 1970, no writ).

396. In Fox v. Smith, 531 S.W.2d 654 (Tex. Civ. App.—Waco 1975, no writ), the husband was a participant in a funded employee profit-sharing plan, the interest in which was undivided on divorce. He subsequently designated his sister as beneficiary of his share. After his death, his ex-wife was adjudged entitled to one-half the fund. *Id.* at 656.

397. Dessommes v. Dessommes, 505 S.W.2d 673, 677, 679 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

> divorce. . . . [I]f the parties are shown to have been the equal owners of a fund at a certain time, and one of them is shown to have made additions to that fund in an undetermined amount, the party who made the additions should have the burden to show the amount of the additions.[398]

On motion for rehearing the ex-wife argued that "since the couple was married when the employee's interest accrued, the interest was community property, just as if it were a tract of land then acquired, and contributions either after the divorce or before the marriage would not affect the parties' equal ownership."[399] The court did not agree with the wife's argument. It found that the characterization of benefits as community property under the doctrine of inception of title would not do substantial justice and the benefits should be apportioned to the former spouses by recognizing the accrual of interests before and during the marriage and after it was dissolved as might be proved by the ex-husband.[400] The court recognized that *Busby* presented some difficulties in this regard, but concluded that "the law on this point [could] not be regarded as settled."[401] In *Cearley v. Cearley*[402] the Texas Supreme Court concluded that pension rights *earned* during the marriage, though *not yet accrued or matured*, are contingent community property interests subject to division on divorce. The court also indicated that such community property interests left undivided on divorce—and later sought to be divided—embrace only those interests *earned during marriage*.[403]

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398. *Id.* at 679 (emphasis added).

399. *Id.* at 681.

400. *Id.* at 681. On remand, however, the ex-husband was apparently unable to discharge his burden of proof. *See* Dessommes v. Dessommes, 543 S.W.2d 165, 169-70 (Tex. Civ. App.—Texarkana 1976, no writ). The divorce court cannot, of course, consider projected postdivorce accruals in value of an interest in a retirement fund. In *In re* Marriage of Rister, 512 S.W.2d 72, 74 (Tex. Civ. App.—Amarillo 1974, no writ), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 78 (1975), it was concluded that the divorce court should not consider projected postdivorce increases in value of an interest in a retirement fund. *But cf. In re* Marriage of Freiberg, 127 Cal. Rptr. 792 (Ct. App. 1976). But the California approach is not always helpful in these matters. *See* 3 COMM. PROP. J. 125 (1976), where in discussing *In re* Marriage of Brown, 126 Cal. Rptr. 633 (1976), it was said:

> One final point noted by the court is that judicial recognition of the non-employee spouse's interest in vested and nonvested pension rights was not intended to, nor does it, limit the employee's freedom to change or terminate employment, to agree to modification of the terms of the employment (including retirement benefits), or to elect between alternative retirement programs. (It would seem that this last statement may cause some problems in the future.)

401. Dessommes v. Dessommes, 505 S.W.d 673, 681 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

402. 544 S.W.2d 661, 663-64 (Tex. 1976).

403. *Id.* at 666. The court thereby allows avoidance of many inequities that had

The appellate courts have not spoken conclusively concerning the limitation of actions asserting claims to community property left undivided on divorce. Nonetheless, some guidance may be adduced from their treatment of these problems thus far. With respect to seeking a declaratory judgment regarding an interest left undivided, the courts have spoken of a petitioner's having to proceed within four years of the development of a controversy[404] unless the subject matter of the dispute is controlled by a statute of limitation of shorter duration. With respect to a right of partition to property in esse, no statute of limitation runs as to the right to seek the partition itself.[405] But if a defense of title is interposed as to realty, the rules applicable to adverse possession of a tenancy in common are applicable to the former spouse.[406] As to interests in personalty, it is most likely that the statute of limitation applicable to the tort of conversion will be pled,[407] but the cause of action with respect to retirement benefits does not arise until the right to receive a benefit matures.[408]

Since rights of reimbursement are fixed on termination of marriage by divorce,[409] a right of reimbursement not adjudicated in the divorce

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concerned critics of *Busby*. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 33 (1972); McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 40 (1971); Comment, *Military Retirement Benefits as Community Property: New Rules from the Supreme Court?*, 24 BAYLOR L. REV. 235 (1972); Note, 25 Sw. L.J. 340 (1971).

404. Dessommes v. Dessommes, 543 S.W.2d 165, 168-69 (Tex. Civ. App.—Texarkana 1976, no writ); Dessommes v. Dessommes, 505 S.W.2d 673, 677 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.); Dessommes v. Dessommes, 461 S.W.2d 525, 527 (Tex. Civ. App.—Waco 1970, no writ); TEX. REV. CIV. STAT. ANN. art. 5529 (1958). Since the controversy in this instance developed prior to maturation of the retirement benefits, a court might hold that the statute of limitions for seeking a declaratory judgment does not commence until a controversy has arisen *after* maturity of the interest.

405. Constance v. Constance, 537 S.W.2d 488, 490 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 544 S.W.2d 659 (Tex. 1976); *see* Dessommes v. Dessommes, 505 S.W.2d 673, 677 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) (statute of limitations begins to run on repudiation of one cotenant's interest). Nor is the ex-spouse bound by estoppel. Taggart v. Taggart, 540 S.W.2d 823, 825 (Tex. Civ. App.—Corpus Christi 1976, writ granted).

406. There is an inconclusive discussion on the point in Bradley v. Bradley, 540 S.W.2d 504, 514-15 (Tex. Civ. App.—Fort Worth 1976, no writ). A third person might also assert title by adverse possession in which case the usual rules governing the period relied on are applicable.

407. TEX. REV. CIV. STAT. ANN. art. 5526.2 (1958).

408. Dessommes v. Dessommes, 505 S.W.2d 673, 677 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) (court also alludes to laches at this point).

409. Dakan v. Dakan, 125 Tex. 305, 320-21, 83 S.W.2d 620, 628-29 (1935); Pritchard v. Tuttle, 534 S.W.2d 946, 952 (Tex. Civ. App.—Amarillo 1976, no writ). It is clear from the context of the opinion in *Pritchard* that in using the phrase "date of partition," the court means the date the community estate was terminated. *Id.* at 952.

proceeding may be pursued after the divorce.[410] For the purposes of determining the statute of limitation applicable to such a claim, the Supreme Court of Texas has characterized the right of reimbursement as a "debt."[411] Consequently, the appropriate limitation period is either four years[412] or two years[413] depending on whether the debt is evidenced by a writing or not.

The jurisdiction of Texas courts to deal with foreign realty undisposed of in a Texas divorce has not been conclusively resolved,[414] and an Oklahoma federal court has abstained from ruling on a dispute with respect to Oklahoma realty undisposed of by a Texas divorce court.[415] The power of Texas courts to adjudicate title with respect to Texas realty undisposed of by a foreign divorce court is undisputed, although a Texas court will not exercise its jurisdiction in all instances. In *Cole v. Lee*[416] a property settlement agreement had been entered into in connection with a divorce of foreign domiciliaries at their place of domicile in the Virgin Islands. The ex-wife sued to set aside a portion of the agreement with respect to the Texas land and sought to recover a one-half interest in the land alleged to have been community property. The ex-husband made a special appearance under rule 120a[417]

410. *See* Howle v. Howle, 422 S.W.2d 252, 255-56 (Tex. Civ. App.—Tyler 1967, no writ), *discussed in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 56 (1969).

In Starkey v. Holoye, 536 S.W.2d 438, 441 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.), the court uses the word "reimbursement" to refer to a right to set off for mortgage payments made after divorce. This is a reference to a general equitable principle, rather than that of marital reimbursement which must accrue prior to the termination of the marriage. On the other hand, in spite of the termination of a marriage, the concept of marital fraud or constructive fraud (if not with respect to community property but in relation to the interest of children of the prior marriage) still has relevance as between the former spouses. *See* Great Am. Reserve Ins. Co. v. Sanders, 525 S.W.2d 956, 959 (Tex. 1975); Box v. Southern Farm Bureau Life Ins. Co., 526 S.W.2d 787, 789 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). Both cases are discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 89-90 (1976).

411. Burton v. Bell, 380 S.W.2d 561, 565 (Tex. 1964).

412. TEX. REV. CIV. STAT. ANN. art. 5527.1 (1958) (writing).

413. *Id.* art. 5526.4 (no writing).

414. *See* Estabrook v. Wise, 506 S.W.2d 248, 252 (Tex. Civ. App.—Tyler), *dism'd as moot per curiam*, 519 S.W.2d 632 (Tex. 1974), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 84 (1975); notes 332-34 *supra* and accompanying text. *See also* Note, 28 BAYLOR L. REV. 425 (1976), *reprinted with modifications in* 3 COMM. PROP. J. 236 (1976).

415. Williamson v. Williamson, 306 F. Supp. 516, 518 (W.D. Okla. 1969). For possible breaks in the federal abstention doctrine in matrimonial matters, *see* McKnight, *Family Law, Annual Survey of Texas Law*, 30 Sw. L.J. 68, 74-76 (1976).

416. 435 S.W.2d 283 (Tex. Civ. App.—Dallas 1968, writ dism'd).

417. TEX. R. CIV. P. 120a.

for the purpose of objecting to jurisdiction of the court under the principle of *forum non conveniens*. The ex-wife asserted that the suit was one in rem for recovery of title to Texas land and that article 1975[418] conferred jurisdiction. The Dallas Court of Civil Appeals concluded that the settlement agreement should first be rescinded before an action for recovery of realty could be brought and that the proper forum for rescission under the *forum non conveniens* doctrine was that of the domicile of the parties.[419] But Texas realty of a nonresident couple, regardless of their domicile, would not necessarily be community property. Its characterization would depend on the source of funds and other circumstances of its acquisition.[420]

Carter v. Burleson[421] involved a foreign divorce in which one of the spouses was a Texas resident. The husband commenced the divorce proceeding in Texas,[422] and the wife brought a subsequent suit in Nevada. The wife's proceeding succeeded, but without division of property. On subsequent remand the trial court *partitioned* the undisposed community property.[423]

CONCLUSION

The last word on the subject of division of property in consequence of marital breakdown will never be written. When it seems that analysis is almost abreast of legislative reform, judicial decisions follow in such quick succession that the commentator is soon badly out of date. As this article is completed, several cases dealt with here are before the Texas Supreme Court on writs of error. If one waited for them to be decided, others would have then taken their place on the docket.

In recent years the law has shown substantial growth in this field. But as the open places in the law have been filled with clear directions

418. TEX. REV. CIV. STAT. ANN. art. 1975 (1964).

419. Cole v. Lee, 435 S.W.2d 283, 287 (Tex. Civ. App.—Dallas 1968, writ dism'd).

420. *See* Huston v. Colonial Trust Co., 266 S.W.2d 231, 233-34 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.). *See also* Patterson v. Metzing, 424 S.W.2d 255 (Tex. Civ. App.—Corpus Christi 1967, no writ).

421. 439 S.W.2d 381 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ).

422. Burleson v. Burleson, 419 S.W.2d 412 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ).

423. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 24 Sw. L.J. 49, 49-50 (1970); *cf.* Mitchim v. Mitchim, 509 S.W.2d 720, 725 (Tex. Civ. App.—Austin 1974), *rev'd on other grounds*, 518 S.W.2d 362 (Tex. 1975) (proceeding for division of property commenced in Texas after foreign decree of divorce without a property division).

for the future, new voids are opened. Thus the law is developed and refined. With little likelihood in the diminution of family disputes and the assurances that the results of many of those rows will be adjudicated in the appellate courts, what is written here must serve merely as a beginning for those who seek to advise their clients—a guide to the path to be paved with the cases of tomorrow.