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Spouse Cannot Be Divested of Title to Separate Real Property under Texas Family Code 3.63.

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This opinion, though lacking in substantial authority, reaches an equitable result. For a transferee to acquire the status of a holder in due course, it is essential that *each* individual order instrument be clearly indorsed by the transferor. Denying River Oaks Bank the status of a holder in due course was justified because River Oaks never availed itself of its absolute right to have Lewis separately indorse each note in the series. The insistence upon a separate indorsement written on or attached to each promissory note will eliminate at least some of the confusion anticipated by the *Estrada* court and will not be an onerous requirement. Promissory notes, unlike checks, are not generally passed in such great volume that careless acceptance of improperly indorsed instruments should be allowed.

Laurence A. Canter

COMMUNITY PROPERTY—Division of Property on Divorce—Spouse Cannot Be Divested of Title to Separate Real Property Under Texas Family Code § 3.63

Eggemeyer v. Eggemeyer,
554 S.W.2d 137 (Tex. 1977).

Virginia Eggemeyer obtained a divorce from her husband, Homer Eggemeyer, and was named managing conservator of their four minor children. During marriage the couple owned a small farm, one-third of which was the husband's separate property with the remaining two-thirds belonging to the community estate. The divorce decree granted the wife title to the farm subject to a $10,000.00 lien in favor of the husband, to be paid by her when the youngest child reached majority. The husband appealed, alleging that the divestiture of his separate title to real property was clearly an abuse of discretion.[1] The Austin Court of Civil Appeals reversed and remanded the decision in part, holding that section 3.63 of the Texas Family Code does not authorize divestiture of a spouse's separate interest in real estate.[2] On appeal to the Texas Supreme Court, the wife contended that divestiture may be ordered under section 3.63 if the division would be "just and right." Held—*Affirmed*. The divestiture of one spouse's separate realty and the transfer of title to the other spouse is not authorized by section 3.63 of the Texas Family Code; it is, however, within the discretion of the trial court upon divorce to set aside the rents, revenues, and income from a spouse's separate property for the support of minor children.[3]

1. Eggemeyer v. Eggemeyer, 535 S.W.2d 425, 427 (Tex. Civ. App.—Austin 1976), *aff'd*, 554 S.W.2d 137 (Tex. 1977).

2. *Id.* at 428.

3. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 142 (Tex. 1977).

Since 1841 the primary Texas statutory provision concerning property settlement has required a "just and right" division of the estate of the parties.[4] This language has been interpreted consistently to allow the divorce courts broad discretion in dividing the spouses' property.[5] The court's discretion, however, was limited by a provision in the Divorce Act of 1841 which prohibited the divestiture of title to real estate.[6] The same restriction was embodied in each subsequent act prior to the present Family Code provision.[7] The failure of the statute to specify whether the limitation applied only to separate real property, or to community property as well, created a divergence of case law[8] which resulted in confusion lasting until the issue was finally settled in 1960 by the Texas Supreme Court in *Hailey v. Hailey*.[9] Prior to *Hailey*, the prohibition against divestiture was interpreted by some courts to include both separate and community real property;[10] other courts applied the prohibition only to separate real property owned by the spouses.[11] *Hailey* limited the divestiture proviso to separate real property and thereby settled, for the time being, the controversy surrounding the ill-prepared legislation.[12]

Shortly after the passage of the 1841 Act, the Texas Supreme Court established a means of circumventing the issue of divestiture while still

4. *See* TEX. FAMILY CODE ANN. § 3.63 (1975); Tex. Rev. Civ. Stat. art. 4638 (1925); Tex. Rev. Civ. Stat. art. 4634 (1911); Tex. Rev. Civ. Stat. art. 2980 (1895); Tex. Rev. Civ. Stat. art. 2864 (1879); Tex. Laws 1841, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 38 (1973).

5. *See, e.g.*, Bell v. Bell, 513 S.W.2d 20, 22 (Tex. 1974); Gulley v. Gulley, 111 Tex. 233, 238, 231 S.W. 97, 98 (1921); Simons v. Simons, 23 Tex. 344, 348 (1859); Daniels v. Daniels, 490 S.W.2d 862, 862 (Tex. Civ. App.—Eastland 1973, writ dism'd); White v. White, 380 S.W.2d 672, 677-78 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.); Barry v. Barry, 162 S.W.2d 440, 442 (Tex. Civ. App.—Galveston 1942, no writ).

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

7. *Compare* TEX. FAMILY CODE ANN. § 3.63 (1975) *with* statutes cited note 4 *supra*.

8. *See, e.g.*, Tiemann v. Tiemann, 34 Tex. 523, 525 (1871) (community property could not be divested); Mansfield v. Mansfield, 308 S.W.2d 80, 82 (Tex. Civ. App.—El Paso 1957, writ dism'd) (division of community lots held proper); Swanson v. Swanson, 229 S.W.2d 843, 847-48 (Tex. Civ. App.—El Paso 1949, no writ) (error to award entire community lot to one spouse). *See generally* Comment, *Hailey, Hilley and House Bill 670—A Study in Partition and Survivorship in Texas Community Property*, 15 SW. L.J. 613, 614 (1961).

9. 160 Tex. 372, 331 S.W.2d 299 (1960).

10. *See* Tiemann v. Tiemann, 34 Tex. 523, 525 (1871); Maisel v. Maisel, 312 S.W.2d 679, 684 (Tex. Civ. App.—Houston 1958, no writ); Donias v. Quintero, 227 S.W.2d 252, 255-56 (Tex. Civ. App.—El Paso 1949, no writ); Puckett v. Puckett, 205 S.W.2d 124, 125-26 (Tex. Civ. App.—Texarkana 1947, no writ).

11. *See* Carle v. Carle, 149 Tex. 469, 473, 234 S.W.2d 1002, 1005 (1950); Fitts v. Fitts, 14 Tex. 443, 454 (1855); Mansfield v. Mansfield, 308 S.W.2d 80, 82 (Tex. Civ. App.—El Paso 1957, writ dism'd); Walker v. Walker, 231 S.W.2d 905, 907 (Tex. Civ. App.—Texarkana 1950, no writ).

12. Hailey v. Hailey, 160 Tex. 372, 376, 331 S.W.2d 299, 303 (1960).

allowing a "just and right" division of property.[13] In *Fitts v. Fitts*[14] the husband gave his real property in trust for the benefit of his wife and children. As a result, he was left with little or nothing in the community estate. When his wife later divorced him, he was unable to support himself and was faced with utter destitution. The court departed from the usual method of distributing property and recommended that on remand the lower court set aside for the husband that portion of the proceeds from the wife's separate realty necessary for his support.[15] The approach adopted in *Fitts* established an equitable means of providing support without necessitating a divestiture of title to separate property.[16] Subsequent statutory and judicial authority extended the *Fitts* precedent by applying the proceeds from separate property of one spouse to the support of minor children.[17]

In 1969 the Texas Legislature revived the controversy previously settled in *Hailey* when it omitted from the new Family Code[18] the final sentence of the prior divorce statute which had stated "[n]othing herein shall be construed to compel either party to divest himself or herself of the title to real estate."[19] It was unclear whether the deletion was inadvertent or whether the legislature actually intended to change the law.[20] While the express statutory language no longer prohibited divestiture of title to real property, the constitutionality of such divestiture became an issue.[21] In the 1974 decision of *Wilkerson v. Wilkerson*,[22] the Tyler Court of Civil Appeals interpreted revised section 3.63 as extending the divorce court's authority

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13. *See* Fitts v. Fitts, 14 Tex. 443, 453 (1855).

14. *Id.* at 443.

15. *See id.* at 453. It may be argued that such an appropriation of proceeds is actually a form of divestiture of the wife's equitable interest in real estate. *Id.* at 454.

16. *See* Hedtke v. Hedtke, 112 Tex. 404, 410, 248 S.W. 21, 23 (1923); Rice v. Rice, 21 Tex. 58, 68 (1858).

17. *See, e.g.*, Hedtke v. Hedtke, 112 Tex. 404, 410, 248 S.W. 21, 22 (1923); Rice v. Rice, 21 Tex. 58, 69 (1858); Helm v. Helm, 291 S.W. 648, 649 (Tex. Civ. App.—Dallas 1927, no writ); TEX. FAMILY CODE ANN. § 14.05(a) (1975) (the court "may order a parent obligated to support a child to set aside property to be administered for the support of the child . . .").

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

19. TEX. REV. CIV. STAT. art. 4638 (1925); *accord*, Tex. Rev. Civ. Stat. art. 4634 (1911); Tex. Rev. Civ. Stat. art. 2980 (1895); Tex. Rev. Civ. Stat. art. 2864 (1879); Tex. Laws 1841, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898).

20. The Director of the Family Code Project, Professor Joseph W. McKnight, believes the omission was an oversight because the amendment was introduced to the legislature as a "codification of present law." *See* McKnight, *Dissolution of Marriage*, 5 TEX. TECH L. REV. 320, 337 (1974).

21. McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 38 (1973). *See generally* TEX. CONST. art. XVI, § 15.

22. 515 S.W.2d 52 (Tex. Civ. App.—Tyler 1974, no writ). Prior to *Wilkerson*, two civil appeals cases had failed to distinguish between the old and the new law. *See* DePuy v. DePuy, 483 S.W.2d 883, 888 (Tex. Civ. App.—Corpus Christi 1972, no writ); Bryant v. Bryant, 478 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1972, no writ).

to allow divestiture of title to a spouse's separate property.[23] The following year the Corpus Christi Court of Civil Appeals in *Ramirez v. Ramirez*[24] reached the opposite interpretation of the statute and held that although separate personalty could be divested, separate real property could not.[25]

In *Eggemeyer v. Eggemeyer*,[26] the Supreme Court of Texas disapproved of the language in *Wilkerson* and agreed with the decision in *Ramirez*.[27] The majority developed three specific reasons for holding that a spouse's separate property could not be divested. First, the legislature believed section 3.63 was merely a "codification of prior law" and that its adoption would not change the law.[28] Second, the *Eggemeyer* court construed the state constitution as precluding divestiture by its exclusive definition of separate property.[29] Finally, the court stated that both the federal and state constitutions prohibit the deprivation of property without a justifiable public purpose.[30] The four dissenting justices contended that section 3.63 removed the statutory prohibition against divestiture of separate realty and that such divestiture was not a violation of either the state or federal constitutions.[31]

With regard to legislative intent, the majority employed three distinct arguments to support its position. The court first proposed that the legislature had believed the enactment of section 3.63 to be "a codification of present law" as expressed by the legislative commentary which had accompanied the original bill.[32] This position is weakened by the fact that the

23. Wilkerson v. Wilkerson, 515 S.W.2d 52, 56 (Tex. Civ. App.—Tyler 1974, no writ). In support of its holding, the court cited three cases decided after the adoption of section 3.63. *Id.* at 57. None of the three, however, involved divestiture of separate realty. *See* Schreiner v. Schreiner, 502 S.W.2d 840, 849 (Tex. Civ. App.—San Antonio 1973, writ dism'd); *In re* Marriage of McCurdy, 489 S.W.2d 712, 718 (Tex. Civ. App.—Amarillo 1973, writ dism'd); Medearis v. Medearis, 487 S.W.2d 198, 200 (Tex. Civ. App.—Austin 1972, no writ).

24. 524 S.W.2d 767 (Tex. Civ. App.—Corpus Christi 1975, no writ).

25. *Id.* at 771.

26. 554 S.W.2d 137 (Tex. 1977).

27. *Id.* at 142.

28. *Id.* at 139; *see* McKnight, *Dissolution of Marriage*, 5 TEX. TECH L. REV. 320, 337 (1974).

29. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977); *see* TEX. CONST. art. XVI, § 15. The Texas Constitution defines a wife's separate property to include "[a]ll property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent . . . ." This constitutional definition was held to be exclusive in Arnold v. Leonard, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925). The definition was originally adopted to protect the property interests of the wife from being lost to her husband at the time of marriage. *See* Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEXAS L. REV. 1054, 1055 (1957).

30. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140-41 (Tex. 1977); *see* U.S. CONST. amends. V; XIV, § 1; TEX. CONST. art. I, § 19.

31. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 144-45 (Tex. 1977) (dissenting opinion).

32. *Id.* at 139; *see* McKnight, *Dissolution of Marriage*, 5 TEX. TECH. L. REV. 320, 337 (1974).

legislature chose not to restore the act to its previous wording when later considering reinstating the prohibition against divestiture.[33] Likewise, the majority's reliance on section 14.05(a) appears to provide little substantive evidence of a legislative intention to retain the prior law on property division.[34] This section of the Family Code establishes the means by which a court may direct a parent to support his child.[35] It does not, however, pertain to any property rights divisible on divorce. Since children have no vested interest in either the separate or community property of their parents, they are entitled to nothing more than support from their parents.[36]

The majority in *Eggemeyer* found additional evidence to support its interpretation of legislative intent in the wording of section 3.63 that authorizes "a division of the *estate* of the parties . . . ."[37] The court construed this language to mean that the community estate, the estate common to both spouses, is the only "estate" which can be subject to division.[38] This rationale ignores the numerous pre-Family Code decisions which reached an opposite conclusion by applying the same phrase to a division of both the separate personal estate and the community estate.[39] The only apparent reason for excluding separate realty in the prior cases was the express statutory prohibition against the divestiture of separate real property.[40] It may be argued that a more accurate interpretation of the term "estate" would be obtained by applying that usage adopted by judicial interpretations of the identical language in the prior statutes.[41] Thus, the fact that this part of the statute remained unaltered in the Family Code could indicate that the legislature did not intend to limit "estate" to the community estate, but rather to continue the prior construction.

A major weakness in the majority's attempt to rationalize its position on the basis of legislative intent is its failure to consider a well-settled rule of statutory construction which requires the court to give effect to the legislative modification of a statute.[42] Twenty-five years prior to

33. *See* TEX. H.R.J. 160 (1973); TEX. H.R.J. 324 (1975).

34. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 144-45 (Tex. 1977) (dissenting opinion). *But see id.* at 139.

35. TEX. FAMILY CODE ANN. § 14.05(a) (1975).

36. 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).

37. TEX. FAMILY CODE ANN. § 3.63 (1975) (emphasis added).

38. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977).

39. *See, e.g.*, Hedtke v. Hedtke, 112 Tex. 404, 407, 248 S.W. 21, 22 (1923); Goldberg v. Goldberg, 392 S.W.2d 168, 172 (Tex. Civ. App.—Fort Worth 1965, no writ); Grant v. Grant, 351 S.W.2d 897, 898 (Tex. Civ. App.—Waco 1961, writ dism'd).

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

41. *See* Gateley v. Humphrey, 151 Tex. 588, 592, 254 S.W.2d 98, 101 (1952).

42. *See* Putnam Supply Co. v. Chapin, 45 S.W.2d 283, 284 (Tex. Civ. App.—Eastland

Eggemeyer, the Texas Supreme Court in *Gateley v. Humphrey*[43] had reasoned that the omission of significant words from the reenactment of a statute gives rise to a conclusive presumption that it was the intent of the legislature to exclude the objective accomplished by the deleted words.[44]

Despite the questionable reliance on legislative intent, the Texas Supreme Court further supported its decision on state and federal constitutional grounds.[45] The court reasoned that divestiture of separate property would create a class of separate property not encompassed in the state constitutional definition.[46] The Texas Constitution defines the separate property of the wife to be all real and personal property owned before the marriage and that property acquired during marriage by gift, devise or descent.[47] This definition has been construed as being exclusive and not subject to enlargement by the legislature.[48] Marital property is thus either separate or community, and the legislature cannot transform one type of constitutionally defined property into another type of property.[49]

The present difficulty in applying a strict interpretation to the constitutional definition of separate property stems from the original distinctions between separate and community property in divorce proceedings. Prior to the adoption of the Texas Constitution of 1845, separate property was defined by statute to include only land and slaves acquired before marriage or by gift, devise or descent.[50] The community estate consisted of the remainder of the spouse's property, including what is now considered separate personal property.[51] Under this statutory definition the original divorce statute of 1841 was adopted.[52] When the definition of separate property was enlarged in the constitution of 1845 to include all property, not just realty and slaves, no similar adjustment was made in the divorce statute to coincide with the constitution. While the draftsmen of the origi-

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1931), *aff'd*, 124 Tex. 247, 76 S.W.2d 469 (1934). *See also* TEX. REV. CIV. STAT. ANN. art. 5429b-2, §§ 2.01-3.03 (Supp. 1976-1977). The Code Construction Act allows the courts to consider such guidelines as circumstances under which the statute was enacted and former statutory provisions, including laws on similar subjects. *Id.* § 3.03 (2), (4).

43. 151 Tex. 588, 254 S.W.2d 98 (1952).

44. *Id.* at 592, 254 S.W.2d at 101.

45. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977).

46. *Id.* at 140.

47. TEX. CONST. art. XVI, § 15. Although the constitution defines only the wife's separate property, the identical definition has been applied by statute to designate the separate property of the husband. *See* TEX. FAMILY CODE ANN. § 5.01 (1975).

48. Arnold v. Leonard, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925).

49. Williams v. McKnight, 402 S.W.2d 505, 508 (Tex. 1966).

50. Tex. Laws 1840, An Act to Adopt the Common Law of England § 4, at 4, 2 H. GAMMEL, LAWS OF TEXAS 178 (1898).

51. *Id.* § 4, at 4, 2 H. GAMMEL, LAWS OF TEXAS at 178 (1898).

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

nal divorce statute intended to prohibit divestiture of all separate property, they used the words "real property and slaves" as that was the current definition of separate property.[53] After the constitution expanded the definition the courts applied the statute literally, allowing divestiture of personalty, and refusing to acknowledge the legislative intent to exclude all constitutionally defined separate property.[54] As a result of this legislative oversight, divestiture of title to personalty has historically been permitted by the courts without a distinction between the original constitutional and statutory definitions.[55] It is therefore inaccurate for the dissent in *Eggemeyer* to allude to the long parallel existence of the 1841 statute and the 1845 constitutional provisions without reference to the fact that each defined separate property in different terms.[56]

Perhaps the controlling constitutional argument in support of the majority position in *Eggemeyer* concerns the right to own property free from all but a minimum of government intervention.[57] To support a denial of divestiture on this constitutional issue the majority relies on authority limiting the power of the state imposed by the due process clause of the state constitution.[58] The due process clause has been held to prohibit the taking of a person's property for the benefit of another unless there is a justifying public purpose.[59] The public purpose referred to by this article normally would relate to limitations on the state's police power[60] or the right of eminent domain.[61] In the context of *Eggemeyer*, however, the controlling issue concerns substantive protection of property rights as provided by this section of the Texas Constitution.[62] In cases involving substantive due

53. *See id.* § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS at 484 (1898).

54. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 38 (1973); Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 223-24 (1975).

55. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 146 (Tex. 1977) (dissenting opinion).

56. *See* Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 223 (1975).

57. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977).

58. *Id.* at 140. TEX. CONST. art. I, § 19 provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." The majority cites Marrs v. Railroad Comm'n, 142 Tex. 293, 177 S.W.2d 941 (1944) to support its contention. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 141 (Tex. 1977). The *Marrs* decision, however, dealt with the use of the state's police power through an administrative agency to deprive an individual of his property, not with a court's discretion in dealing with a just and right distribution of marital property. Marrs v. Railroad Comm'n, 142 Tex. 293, 304, 177 S.W.2d 941, 948 (1944).

59. Marrs v. Railroad Comm'n, 142 Tex. 293, 304, 177 S.W.2d 941, 948 (1944).

60. Houston & T.C. Ry. v. Dallas, 98 Tex. 396, 401, 84 S.W. 648, 653 (1905).

61. *See* Marrs v. Railroad Comm'n, 142 Tex. 293, 304, 177 S.W.2d 941, 948 (1944).

62. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 141 (Tex. 1977).

process the courts have balanced the interests of the public against those personal and property rights affected by legislative enactments.[63]

A balancing of subjective factors has always served as the foundation for division of property upon divorce in Texas.[64] Prior to *Eggemeyer*, the Texas courts had justified the divestiture of personal property on the basis of a liberal application of the divorce law.[65] The constitutional issue was never raised, perhaps because the state has always recognized a public interest in fostering a special relationship within the institution of marriage.[66] This interest often outweighed an individual's property rights where the courts exercised broad discretion in considering numerous individual factors in the division of property on divorce.[67] One such factor often considered in property division has been the degree of fault in breaking up the marriage.[68] With the adoption of the Texas Family Code in 1969, however, fault is no longer necessary as a ground for divorce.[69] Courts nevertheless have continued to consider fault as a basis for the divestiture of separate personalty and the unequal division of the community estate.[70] It has been questioned whether many of "the old standards associated with fault divorces" remain "suitable for dealing with division of property in a no-fault scheme."[71] *Eggemeyer* appears to indicate a shift in emphasis away from the previously broad discretionary powers of the trial court toward a less subjective equitable division of property. This approach may eventually

63. Williamson v. Lee Optical, 348 U.S. 483, 487 (1955); *see* Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 316, 87 S.W.2d 1069, 1070 (1935). *See also Interpretive Commentary*, TEX. CONST. art. I, § 19, 1 VERNON'S TEX. CONST., 448 (1955).

64. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 433 (1976).

65. *See, e.g.*, Hedtke v. Hedtke, 112 Tex. 404, 407, 248 S.W. 21, 23 (1923); Cooper v. Cooper, 513 S.W.2d 229, 233 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); Bryant v. Bryant, 478 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1972, no writ); Dorfman v. Dorfman, 457 S.W.2d 91, 95 (Tex. Civ. App.—Waco 1970, no writ).

66. *See* Williams v. North Carolina, 317 U.S. 287, 298 (1942). This special relationship, however, may have diminished once the marriage has been terminated.

67. *See* Means v. Means, 535 S.W.2d 911, 917 (Tex. Civ. App.—Amarillo 1976, no writ) (liabilities of the spouses); *In re* Marriage of McCurdy, 489 S.W.2d 712, 719 (Tex. Civ. App.—Amarillo 1973, writ dism'd) (disparity of earning power between the spouses); Dobbs v. Dobbs, 449 S.W.2d 119, 120 (Tex. Civ. App.—Tyler 1969, no writ) (physical condition of the parties, probable future need for support, and educational background).

68. *See* Hooper v. Hooper, 403 S.W.2d 215, 217 (Tex. Civ. App.—Amarillo 1966, writ dism'd); Hudson v. Hudson, 308 S.W.2d 140, 141 (Tex. Civ. App.—Austin 1957, no writ); Faison v. Faison, 31 S.W.2d 828, 832 (Tex. Civ. App.—Dallas 1930, writ dism'd).

69. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 435 (1976).

70. Bell v. Bell, 540 S.W.2d 432, 436 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); Merrell v. Merrell, 527 S.W.2d 250, 255 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); Cooper v. Cooper, 513 S.W.2d 229, 234-35 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

71. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 435 (1976).

result in a division of property similar to a partition by cotenants.

There is further evidence in the opinion that the court has adopted a new perspective from which to approach property distribution under the Family Code. The failure of the majority to distinguish between separate *personal* and *real* property indicates that Texas may follow the lead of other community property jurisdictions and prohibit the divestiture of separate personalty as well as real property.[72] Although the facts in *Eggemeyer* raise no issue of divestiture of personalty and the decision is limited to the facts involved, all of the reasons propounded by the majority can be argued convincingly in favor of a similar prohibition against the divestiture of separate personal property. Thus *Eggemeyer* may signal the quietus of the court's broad discretion to order any just distribution of property on divorce.

The implications that *Eggemeyer* might have on future marital property division may well extend beyond separate property interests. A modernization of Texas divorce law might eliminate many of the complications that have resulted from years of circumventing prior divorce statutes.[73] At the same time such a change may bring the state closer to applying the principles of the ganacial system of marital property upon which Texas community property laws are founded.[74] Under this system both spouses are considered equal and consequently the benefits of the marriage are divided evenly on divorce of the partners.[75]

It has been cogently argued that the discretionary division of property in Texas might be replaced by a system of equal division as currently allowed in California and Louisiana.[76] Such a development, however, may require the Texas courts to reexamine many of the basic community property standards in existence today. It is conceivable that the long-standing opposition to permanent alimony may be dropped in an effort to balance any inequities that might occur with an equal distribution of property.

The uncertainty resulting from the deletion of the prohibition against divestiture in the Family Code appears only partly resolved by *Eggemeyer*. There is no doubt that the ownership of separate real property cannot be

72. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-318 (West 1976); CAL. CIV. CODE ANN. § 4800 (Deering Supp. 1977); LA. CIV. CODE ANN. art. 2406 (West 1971).

73. *See, e.g.*, Hedtke v. Hedtke, 112 Tex. 404, 410, 248 S.W. 21, 22-23 (1923) (award of determinable fee in separate estate of spouse); Fitts v. Fitts, 14 Tex. 443, 453 (1855) (allowing for setting aside of proceeds from separate real property); Helm v. Helm, 291 S.W. 648, 649 (Tex. Civ. App.—Dallas 1927, no writ) (providing for child support by encumbering property).

74. *See generally* Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 210 (1975).

75. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 26 (1967).

76. Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 224 (1975).