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CONSTITUTIONAL LIMITATIONS ON THE DIVISION OF PROPERTY UPON DIVORCE

JAMES N. CASTLEBERRY, JR.*

PRE-*Eggemeyer* STATUTORY EVOLUTION AND COURT CONSTRUCTION OF SECTION 3.63, TEXAS FAMILY CODE

The recent decision of the Texas Supreme Court in *Eggemeyer v. Eggemeyer*¹ is a welcome breath of fresh air in the musty atmosphere of over 100 years of erroneous decisions of intermediate appellate courts regarding the discretionary power of a court in a divorce proceeding to make a division of the property of the spouses. These pre-*Eggemeyer* decisions can be attributed in part to several different, but related, reasons which will be discussed. Nevertheless, the issue resolved by the limited decision in *Eggemeyer* is only "the tip of the iceberg."² Several important questions concerning the power of a court in a divorce proceeding to make valid orders affecting the property rights of the spouses remain unanswered. Can a court divest one of the parties of separate personal property and vest it in the other? Is the court required to make an equal partition of the community property? May the court utilize a basic partnership accounting approach in settling the property rights of the spouses upon termination of the marriage by divorce? Should courts continue to apply equitable principles of reimbursement to enable each party to recover any equitable claims against a community or separate property interest of a spouse which has been improved or enhanced at the expense of the separate estate of the other spouse or the community? Could a court, in a "fault" divorce proceeding award damages for breach of the marriage "contract" as against the party who breached it?

The decision in *Eggemeyer* was a response to the question whether the provisions of section 3.63 of the Texas Family Code authorize a trial court to divest a spouse of separate realty upon divorce.³ The statutory provision dealing with the authority of a

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1. 554 S.W.2d 137 (Tex. 1977), noted in 9 ST. MARY'S L.J. 331 (1977).

2. The decision is confined to the issue of the power of a court in a divorce proceeding to divest a spouse of separate real property in the exercise of the authority granted in TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).

3. See *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 142 (Tex. 1977) (construing TEX. FAM. CODE ANN. § 3.63 (Vernon 1975)).

divorce court to divide and dispose of the property of the parties was originally enacted in 1841.⁴ It expressly prohibited a divorce court from divesting title to realty. Over a hundred years later, the Texas Supreme Court finally interpreted the identical prohibition in a successor statute⁵ to apply only to separate realty.⁶ When this statutory provision was enacted as section 3.63 of the Texas Family Code, effective January 1, 1970, the language expressly prohibiting divestiture of title to realty was omitted and the extent of the power of a court to divide the property became uncertain.⁷ Professor McKnight, who served on the State Bar of Texas committee which prepared the proposals for the codification of Texas family law, contended that the omission of the prohibition was inadvertent. He emphasized that the commentary that was prepared by the committee to accompany the proposed codification when presented to the legislature stated that the Code adopted the then existing law.⁸ The Corpus Christi Court of Civil Appeals, in *Ramirez v. Ramirez*,⁹ agreed with Professor McKnight, and held that section 3.63 should be construed as an enactment of existing law which prohibited the divestment of title to separate realty.¹⁰ The contrary view was adopted by the Dallas and Tyler Courts of Civil Appeals.¹¹ Apparently convinced that the legislature intentionally omitted the prohibition and meant to change the existing law, these courts held that

4. See 1841 Tex. Gen. Laws, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898). Prior to the adoption of section 3.63 the statutes had always contained the prohibition that "[n]othing herein shall be construed to compel either party to divest himself or herself of the title to real estate." See Tex. Rev. Civ. Stat. art. 4638 (1925); Tex. Rev. Civ. Stat. art. 4634 (1911); Tex. Rev. Civ. Stat. art. 2980 (1895); Tex. Civ. Stat. art. 2864 (1879); 1841 Tex. Gen. Laws, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898). The sentence was construed to prohibit divestiture of separate real property only. *Hailey v. Hailey*, 160 Tex. 372, 376, 331 S.W.2d 299, 303 (1960); accord, *Reardon v. Reardon*, 163 Tex. 605, 607, 359 S.W.2d 329, 330 (1962). TEX. FAM. CODE ANN. § 3.63 (Vernon 1975) omits the statutory prohibition and provides: "In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." See Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 204 (1975).

5. Tex. Rev. Civ. Stat. art. 4638 (1925).

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

7. See 554 S.W.2d 137, 139 (Tex. 1977).

8. See McKnight, *Commentary to Title I, Texas Family Code*, 5 TEX. TECH L. REV. 281, 337 (1974); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 SW. L.J. 27, 39 (1973).

9. 524 S.W.2d 767 (Tex. Civ. App.—Corpus Christi 1975, no writ).

10. *Id.* at 768-69.

11. See *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).

a court had power under section 3.63 to divide any property owned by the parties, including separate realty, in such manner as the court deemed to be fair, just and equitable.¹²

In *Eggemeyer v. Eggemeyer*¹³ the Texas Supreme Court cited *Ramirez* with approval, referring to it as a "well reasoned decision,"¹⁴ and, after carefully reviewing the legislative history of section 3.63, determined that the legislature had intended to enact the Family Code as a codification of existing law and that therefore, section 3.63 must be construed as prohibiting a court from divesting the title to separate realty.¹⁵

Interesting semantic gymnastics, typically used to substitute form in the place of substance, enabled the courts to avoid the prohibition against divestiture of separate realty. In some cases this resulted in the idea that the court in a divorce proceeding could subject the separate real property of one spouse to a life estate in favor of the other spouse to insure support of such spouse after the divorce.¹⁶ The rationale was that such a decree did not actually divest the *title* to realty, but merely subjected the income, rents, and revenues from the property to the support of the other spouse.¹⁷ The possible application of the "open mine doctrine" under this approach could easily leave the owner of the legal title with nothing but an empty shell.¹⁸ It is at such times that one recalls the observation of Lord Coke: "But what is the land but the profits thereof."¹⁹ Other decisions upheld the power of a divorce court to impose a trust on a spouse's separate realty for support of the other spouse subsequent to the divorce.²⁰ Another approach was to place an equi-

12. *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).

13. 554 S.W.2d 137 (Tex. 1977).

14. *Id.* at 138.

15. *Id.* at 139. Three reasons for this determination were cited. First, the legislative commentary considered section 3.63 to be a codification of present law. *Id.* at 139. Second, TEX. FAM. CODE ANN. § 14.05 (Vernon 1975) specifically authorizes property of a spouse to be set aside for the support of the *child* without authorizing such for the other spouse. Finally, section 3.63 contains the language "estate of the parties," not "estates." There is only one estate, namely the community. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977).

16. *See Keton v. Clark*, 67 S.W.2d 437, 439 (Tex. Civ. App.—Waco 1933, writ ref'd).

17. *Id.* at 439.

18. The open mine doctrine authorizes a life tenant to work all mines that were in existence when the life estate commenced. *See Youngman v. Shular*, 155 Tex. 437, 438-39, 288 S.W.2d 495, 496 (1956); *White v. Blackman*, 168 S.W.2d 531, 533-34 (Tex. Civ. App.—Texarkana 1942, writ ref'd w.o.m.).

19. 1 E. COKE, COMMENTARY UPON LITTLETON 45 (London 1794).

20. *See, e.g., Ex parte Scott*, 133 Tex. 1, 14, 123 S.W.2d 306, 313 (1939); *Fitts v. Fitts*, 14 Tex. 443, 447-48, 453 (1855); *Keene v. Keene*, 445 S.W.2d 624, 626 (Tex. Civ. App.—Dallas

table *lien* on the separate realty of one spouse to insure the payment of an award of money to the other divorced spouse.²¹ These decisions expressed the view that the imposition of a lien on the separate realty did not constitute a divestment of the title, but simply made the amount of the monetary award a *charge* against the separate realty until it was paid.²² It may be argued that such a lien does not per se operate as a divestiture and that the divestment through foreclosure would result from the voluntary act of refusal to pay the debt which is secured by the lien. As Professor McKnight has pointed out, however, the lien is an interest in the property itself, and foreclosure of the lien would constitute complete divestiture of title.²³ The contention has also been made that the imposition of a trust or a lien should be deemed against public policy because it restrains the alienation of the realty which is subjected to it.²⁴ Dictum in *Eggemeyer* indicates that some of this discretion may no longer be permitted. Commenting on language in *Hedtke v. Hedtke*²⁵ the court stated that *Hedtke* was overbroad in holding a husband owed a duty of support to the divorced wife, as well as the children.²⁶

CONSTITUTIONAL LIMITATIONS

Having interpreted the intention of the legislature in enacting section 3.63 to statutorily prohibit the divestment of separate realty, the *Eggemeyer* court considered the applicability of two separate provisions of the Texas Constitution to the power of a court under section 3.63 to divest the separate property of a spouse.²⁷ First, article XVI, section 15, of the Texas Constitution defines separate

1969, writ dismiss'd); *Pape v. Pape*, 35 S.W. 479, 480 (Tex. Civ. App. 1896, writ dismiss'd). See also Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 212-13 (1975).

21. See, e.g., *Simons v. Simons*, 23 Tex. 344, 348 (1859); *In re Marriage of Jackson*, 506 S.W.2d 261, 267 (Tex. Civ. App.—Amarillo 1974, writ dismiss'd); *Mozisek v. Mozisek*, 365 S.W.2d 669, 670 (Tex. Civ. App.—Fort Worth 1963, writ dismiss'd).

22. See *Hursey v. Hursey*, 165 S.W.2d 761, 765 (Tex. Civ. App.—Dallas 1942, writ dismiss'd).

23. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 446-47 (1976).

24. Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 224-25 (1975).

25. 112 Tex. 404, 409, 248 S.W. 21, 22 (1923).

26. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 141 (Tex. 1977). The *Eggemeyer* court expressly stated that a parent's separate property may be subjected to a duty of support for the children. *Id.* at 142.

27. *Id.* at 140-41.

property, and that definition is exclusive.²⁸ Making a broad reference to *all* separate property the court stated: "If one spouse's separate property may by a divorce decree be changed from the separate property of the one spouse into the separate property of the other, there is a type of separate property which is not embraced within the constitutional definition of the term."²⁹ It is, of course, well established that the legislature has no power to add to, or subtract from, the exclusive constitutional modes of creating separate property, and any attempt by the legislature to do so is unconstitutional and void.³⁰ The reasoning of the majority was that since the constitution does not specifically and expressly authorize the creation of separate property of one spouse by judicially divesting such property from the other spouse in a divorce proceeding, the property must necessarily retain its status as the separate property of the spouse who owned it. The court observed: "*The nature of property is fixed by the Texas Constitution, and not by what is 'just and right.'*" Culpability may, despite no-fault divorce, be a basis for the dissolution of a marriage, but it is no basis for a redefinition of property at variance with the Texas Constitution.³¹ The dissent in *Eggemeyer* criticized the majority's view that the constitutional definition is exclusive.³² Case law decisions were cited in support of the contention that courts had recognized the valid classification of separate property created in a manner other than the constitutionally prescribed methods. However, the decisions cited concerned cases of mutations of separate property,³³ and post-marriage increases in the value of separate property.³⁴ The dissent also cited the statutory provision which declares that the separate property of a spouse includes the recovery for personal injuries other than loss of earnings sustained by the spouse during marriage.³⁵ The error in the

28. *Id.* at 140 (citing *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972); *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925)). See also Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEXAS L. REV. 1054, 1057-58 (1957).

29. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977); see *McKnight, Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 444 (1976).

30. See *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966); *Hilley v. Hilley*, 161 Tex. 569, 573-74, 342 S.W.2d 565, 567-68 (1961); *Arnold v. Leonard*, 114 Tex. 535, 539-40, 273 S.W. 799, 802 (1925).

31. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) (emphasis added).

32. *Id.* at 146-47 (dissenting opinion).

33. *Id.* at 146 (dissenting opinion) (citing *Love v. Robertson*, 7 Tex. 6 (1851) (slave purchased with separate funds was separate)).

34. *Id.* at 146 (dissenting opinion) (citing *Stringfellow v. Sorrells*, 82 Tex. 277, 18 S.W. 689 (1891) (increase in size of separate livestock not community)).

35. *Id.* at 146 (dissenting opinion) (citing TEX. FAM. CODE ANN. § 5.01(a) (Vernon 1975)).

dissent's contention is that the mutation of separate funds by purchase, the fattening of a mule, or damages for loss of a hand do not require a reclassification of the property as separate or community. The property which had been previously classified as separate or community property has merely taken a new form or has had its value enhanced, and the owner's rights in the res remain the same.

The constitutional problem envisioned by the court in this regard seems to be predicated on the theory that the divestment and investment of the property as a result of the court's division of property in a divorce proceeding occurs *during* the marriage while the parties are still husband and wife. One commentator has suggested that in resolving the problem, it must be determined which aspect of the court's decree occurs first, the divorce of the parties or the division of the property.³⁶ Under the *Eggemeyer* majority opinion, the parties are still married at the time the court acts under section 3.63, and therefore, the constitutional definition, which is applicable only to a "wife," controls the classification of any property owned or acquired at any time by a "wife." In like manner, when the court acts under section 3.63, the statutory definition of separate property applicable to property owned or acquired by a "spouse" must be applied. It seems that such an approach would be equally applicable to both separate and community property. The result would be that the court in a divorce proceeding would have no power to divest title to the separate or community property of either spouse and transfer the title thereto to the other spouse as his or her separate property because to do so would constitute an attempt to create separate property of the spouses in a mode not authorized by the constitution and statutes.

It seems obvious, however, that neither the constitutional nor the statutory classification should be applied to property that one acquires in a judicial proceeding, the purpose of which is to dissolve a marriage and terminate the status of the parties as spouses. The view embraced by the majority opinion would fix the status of property acquired in a proceeding for dissolution of a marriage on the same basis as though the property were acquired during the marriage when the parties are working together as husband and wife in joint efforts to acquire property. It would determine the classification of property acquired in a proceeding to remove one's status as a "wife" or "spouse" as though such was not the real nature or

36. 14 Hous. L. Rev. 1104, 1112-13 (1977).

purpose of the proceeding. It would apply constitutional and statutory classifications of property rights blindly and without regard to the basic policy considerations that are intended to be served by them. It would completely disregard the fact that the division of the "estate of the parties" by the court under section 3.63 is an integral part of one single judgment in which the court both grants the divorce and makes the division of the property and that the entire judgment becomes effective at the same moment.³⁷ Thus, the property division directed by section 3.63 does not in fact invest the parties with the property during their marriage but rather at the moment that their marriage is terminated. Since the property thus acquired by the parties would be acquired "upon the divorce of the parties" it would not be acquired as a "wife" or "spouse" and consequently neither the constitutional nor the statutory classifications of property acquired during marriage would be applicable.

The second view, adopted by the dissenting opinion states, without explanation or citation of supporting authority, that "the property division directed by Section 3.63 occurs *after* the divorce of the parties, and Article 16, Section 15, providing for the initial characterization of property, does not control this situation."³⁸ This approach avoids the constitutional problem dealt with by the majority opinion, and leaves the divorce court unhampered by any constitutional definitions or classification of the rights of parties who acquire property in the divorce proceeding under section 3.63. The same would also be true of the statutory definitions and classification under this view. However, this approach seems to be based on an erroneous conception of the nature and scope of the judgment of a divorce court under section 3.63. The error here is essentially the same error as made in the majority opinion, but made in a different way. Both views fail to properly treat the judgment of the court granting the divorce and making a division of the "estate of the parties" as one integrated action in which each part becomes effective and operative at the same moment. It seems rather unique that both views reach their respective results by the same erroneous premise, that the divorce of the parties and the division of their property are not integral parts of a single court order, but are based

37. See, e.g., *Ex parte Scott*, 133 Tex. 1, 14, 123 S.W.2d 306, 313 (1939); *Carter v. Carter*, 336 S.W.2d 466, 468 (Tex. Civ. App.—Austin 1960, no writ); *Pelham v. Sanders*, 290 S.W.2d 684, 687-88 (Tex. Civ. App.—Texarkana 1956, no writ).

38. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 146 (Tex. 1977) (dissenting opinion) (emphasis added).

on different concepts of the status of the parties at the time the divorce court makes its division of the "estate of the parties" under section 3.63. The identical result can also be produced by applying the correct legal basis. The court could recognize that the parties before the court are seeking the dissolution of their marriage and are no longer acting together in joint efforts to acquire property. Additionally, the property which they acquire as a result of the court's division of the "estate of the parties" under section 3.63 is not acquired before the divorce, or after the divorce, but at the moment of divorce. Furthermore, the parties do not have status as a "wife" or "spouse" at the time of such acquisition; therefore, the constitutional and statutory definitions and classifications of property are not intended to be, and are not, applicable.

The second, and most significant, ground on which the court based its decision in *Eggemeyer* is that of "substantive due course."³⁹ The court observed that "[t]he protection of one's right to own property is said to be one of the most important purposes of government. That right has been described as fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions."⁴⁰ Pointing out that the Texas Constitution provides that no citizen of Texas may be deprived of his property "except by the due course of the law of the land,"⁴¹ the court emphasized that due course protection requires substantive as well as procedural due course.⁴² The court also quoted the language of the United States Supreme Court in *Thompson v. Consolidated Gas Utilities Corp.*:⁴³ "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."⁴⁴

This statement of basic constitutional law was quoted and relied upon by the Texas Supreme Court in *Marrs v. Railroad Commission*.⁴⁵ There, the court held that the operational result of the production proration allowable order of the Railroad Commission was to reduce plaintiff's production so as to cause the oil in

39. *Id.* at 140.

40. *Id.* at 140.

41. TEX. CONST. art. I, § 19 states: "No 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."

42. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) (citing TEX. CONST. art. I, § 19, comment (Vernon 1955)).

43. 300 U.S. 55, 80 (1937).

44. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140-41 (Tex. 1977).

45. 142 Tex. 293, 305, 177 S.W.2d 941, 949 (1944).

plaintiff's tract to migrate to an adjoining neighbor's tract where it could be, and was, produced. Thus, the effect of the order was to take the private property of the plaintiff and give it to the defendant in violation of the constitutional prohibition.⁴⁶ It is important to note that the language of the United States Supreme Court in *Thompson* makes it clear that before the private property of a person can be taken, two conditions precedent must exist: (1) there must be a justifying public purpose, and (2) compensation must be paid.⁴⁷ In *Marrs*, and in *Thompson*, the necessity for regulation of the production of oil and gas in the interest of the public health, safety, and general welfare provided the basis for the valid exercise of the police power, but the result of the orders went beyond a mere "regulation of the use of property" and amounted to a *taking* without compensation.⁴⁸

In spite of the rather obvious attempt by the supreme court to point out to trial courts the basic constitutional limitation to the authority of courts under section 3.63 of the Family Code, some post-*Eggemeyer* courts of civil appeals decisions have refused to recognize either the constitutional limitations or the available alternatives.⁴⁹ They have continued to blindly follow the pre-*Eggemeyer* precedent which, for over a hundred years, has incorrectly failed to apply the rudimentary constitutional premise that the legislature has no power to either impliedly or expressly authorize a trial court to divest one spouse of property, of any classification whatsoever, and transfer such property to the other spouse "except by the due course of the law of the land." Some of these decisions have continued to apply the pre-*Eggemeyer* interpretation of section 3.63 to separate personal property, thus making a distinction between the statutory power of the trial court under section 3.63 to divest title to separate personal property and the power to divest separate realty.⁵⁰ This distinction is erroneous because it fails to recognize

46. *Id.* at 305, 177 S.W.2d at 949.

47. See *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937).

48. See *id.* at 79; *Marrs v. Railroad Comm'n*, 142 Tex. 293, 305, 177 S.W.2d 941, 949 (1944).

49. See *Muns v. Muns*, No. 19439 (Tex. Civ. App.—Dallas, May 23, 1978) (not yet reported); *Posey v. Posey*, 561 S.W.2d 602, 606 (Tex. Civ. App.—Waco 1978, no writ); *Eichelberger v. Eichelberger*, 557 S.W.2d 587, 588-89 (Tex. Civ. App.—Waco 1977, writ dismissed); *Musslewhite v. Musslewhite*, 555 S.W.2d 894, 897 (Tex. Civ. App.—Tyler 1977, writ dismissed).

50. See *Posey v. Posey*, 561 S.W.2d 602, 606 (Tex. Civ. App.—Waco 1978, no writ); *Eichelberger v. Eichelberger*, 557 S.W.2d 587, 588-89 (Tex. Civ. App.—Waco 1977, writ dismissed); *Musslewhite v. Musslewhite*, 555 S.W.2d 894, 897 (Tex. Civ. App.—Tyler 1977, writ dismissed).

that the scope and extent of the authority of the trial court under section 3.63 is subject to constitutional limitations and prohibitions which apply to all property, real and personal, separate and community, without regard to the purported authority conferred by the statute. The most significant single point in the *Eggemeyer* decision is the Texas Supreme Court's recognition that the action of the trial court in divesting the husband of his undivided one-third separate property interest in the family farm and transferring his title to his wife "was not grounded upon the police power; consequently, *the taking . . . would not have been a constitutional act even if the legislature had expressly authorized the divestiture of one person's property and its vesting in another person.*"⁵¹

While it is true that the only issue before the supreme court in *Eggemeyer* was whether a trial court may, in a divorce decree, divest one spouse of separate realty and transfer title to such property to the other spouse, it seems clear that the constitutional prohibition which the court found applicable to separate realty is not confined to that class of property, but is equally applicable to *all* property.⁵² Properly understood and applied, the term "property" means, and includes all rights in things, and therefore, is not the res, but the right in the res.⁵³ Thus, the property which is protected from divestiture, except by substantive as well as procedural due course, includes "all rights in things," without regard to classification as separate realty, separate personalty, community realty or community personalty. None of such property is exempt from this protection under the Texas Constitution. The similar protection of property afforded by the fifth amendment to the United States Constitution is also applicable under the fourteenth amendment, to state action.

THE CONFUSING INFLUENCE OF COMMON LAW AND EQUITY ON TEXAS COMMUNITY PROPERTY RIGHTS

Part of the problem in correctly construing section 3.63 and the predecessor statutes has been the failure, or refusal, of courts to recognize and apply the correct legal principles which must be applied to property rights of the spouses in a divorce proceeding in Texas. To quote Mr. Justice Holmes' remark in another setting:

51. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 141 (Tex. 1977) (emphasis added).

52. See TEX. CONST. art. I, § 19.

53. *Gulf, C. & S.F. Ry. v. Fuller*, 63 Tex. 467, 469 (1885).

“[A] page of history is worth a volume of logic.”⁵⁴ The original predecessor statute⁵⁵ was passed by a legislature comprised largely of immigrants to Texas from jurisdictions where the courts applied common law principles in disposing of property upon divorce. Moreover, the trial and appellate judges who construed and applied the statute were products of the training and influence of common law concepts of property rights. At common law, the courts applied the Judeo-Christian theory that the marriage of the husband and wife resulted in a merger of their identities into one person—the husband. The legal title to property acquired by their joint efforts during marriage was vested in the husband, who had full power to manage, control, and dispose of it, except the dower rights of the wife.⁵⁶ As between husband and wife, however, the wife owned an equitable right, title and interest in such property.⁵⁷

While Texas adopted the common law as the rule of decision,⁵⁸ it refused to adopt it as a rule of property law. Instead, Texas adopted the civil law community property system.⁵⁹ Historically, the community property system was the basis upon which the Mexican and Spanish governments, prior to the establishment of the Republic of Texas, recognized and enforced property rights in the geographic area now known as Texas.⁶⁰ Under the civil law community property system, the marriage of a husband and wife did not cause their identities to merge, but rather resulted in the creation of a partnership for the duration of the marriage.⁶¹ All property acquired during the marriage was presumed to have been acquired as a result of the joint and equal efforts of the spouses, who owned it in equal undivided shares.⁶² All property which a spouse owned prior to marriage, and that which a spouse acquired during the marriage by gift or inheritance was deemed the separate property of such spouse, since such acquisition was clearly not attributable to joint efforts by the spouses in the acquisition of property.⁶³ Upon termination of the marriage, either by death or by divorce, the separate property of the

54. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

55. 1841 Tex. Gen. Laws, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898).

56. L. SIMPKINS, SPEER'S TEXAS FAMILY LAW § 12:2 (5th ed. 1976).

57. *Id.*

58. TEX. CONST. art. IV, § 13 (1836).

59. See TEX. CONST. art. VII, § 19 (1845).

60. *Smith v. Smith*, 1 Tex. 621, 625-27 (1846).

61. See L. SIMPKINS, SPEER'S TEXAS FAMILY LAW § 12:2 (5th ed. 1976).

62. See *Hardee v. Vincent*, 136 Tex. 99, 102, 147 S.W.2d 1072, 1073 (1941).

63. TEX. CONST. art. XVI, § 15.

spouses was returned or delivered to the spouse who owned it, and the community property was partitioned in such manner as would insure each spouse getting one-half of the entire value of such property.⁶⁴ The dissolution of the marriage was treated as a dissolution of the partnership, and the approach to the disposition of the property owned by the spouses at that time was essentially the same approach as would have been applicable to the disposition of the assets of any partnership.⁶⁵ Thus, the disposition of property of the spouses upon divorce was entirely consistent with the nature and scope of the rights of the spouses under the applicable law. It is, indeed, unfortunate that the early Texas courts and decisions failed to recognize and apply the basic community property partnership rights approach to the disposition of property on hand at the time of divorce. If basic partnership principles are applied upon dissolution of the marriage by divorce, the court, under section 3.63, could compel an "accounting" between the spouses as partners during their marriage. Debts and claims as between them could be alleged, contested, proved, determined, and provisions made for the satisfaction of them as could be done in the case of any other partnership accounting. Such an approach would accord each spouse the kind of due process that is required as a basis for the exercise of the power of the trial court under section 3.63.

THE "DIVISION" OF THE "ESTATE OF THE PARTIES"

A contributing factor to the erroneous approach to the power of the court under section 3.63 of the Family Code has been the misinterpretation of that section's phrase "estate of the parties" to include any and all property, separate or community, owned by the spouses at the time of divorce.⁶⁶ The *Eggemeyer* decision pointed out that the statute does not authorize a division of the "estates" of the parties, but only the "estate" of the parties, and "[t]he only 'estate of the parties' is community property."⁶⁷ Thus, the authority of a

64. W. DEFUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 226 (2d ed. 1971).

65. See *United States v. Stapf*, 309 F.2d 592, 600 (5th Cir. 1962) (dissenting opinion); *Rompel v. United States*, 59 F. Supp. 483, 486 (W.D. Tex.), *rev'd*, 326 U.S. 367 (1945); *Newland v. Newland*, 529 S.W.2d 105, 109 (Tex. Civ. App.—Fort Worth 1975, writ *dism'd*). A commentator has likened the theory of dissolution of marriage in California to the dissolution of a business partnership. Grant, *How Much of a Partnership is Marriage?*, 23 *HASTINGS L.J.* 249, 250 (1971).

66. See, e.g., *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W. 21, 22 (1923); *Dorfman v. Dorfman*, 457 S.W.2d 417, 421 (Tex. Civ. App.—Texarkana 1970, no writ); *Earnest v. Earnest*, 223 S.W.2d 681, 685 (Tex. Civ. App.—Amarillo 1949, no writ).

67. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977). The court stated that

trial court on divorce, under section 3.63, to make a division of the "estate of the parties" is limited to community property. This construction of the statute is certainly a logical one. In order for the court to "divide" property belonging to the parties, it seems reasonable to assume that the parties must have a joint or undivided interest in the property which the court is authorized to divide.

The statute does not purport to authorize the court to "divest" the property of the parties, but only to "divide" such property.⁶⁸ Obviously, the statute envisions a partition of property in which the spouses own undivided interests. It is well settled law that a partition is not a conveyance of the property or divestiture of the rights of the owners therein.⁶⁹

The pre-*Eggemeyer* Texas decisions governing division of the community property are not only inconsistent with the historical origins, policy and rationale of the civil law theory, but are also incorrect in their interpretation of the legal consequences of a division of the community. Prior to *Hailey v. Hailey*,⁷⁰ courts apparently believed that in order to allow the trial court authority to "divide" the community unequally so that more than one-half of the community realty could be awarded to one spouse it was necessary to find that such action was not a divestment of the other spouse's title to real estate. This was true because of the then express statutory prohibition denying a divorce court the right to "compel either party to divest himself or herself of the title to real estate."⁷¹ The early decision in *Tiemann v. Tiemann*⁷² held that a decree granting all of a community property homestead to the wife was invalid since it divested the husband of his title.⁷³ Unfortunately, the correct rationale and result of the *Tiemann* decision was subsequently changed by the court's decision in *Hailey*⁷⁴ which held that division of the

"[u]nder former article 4638, we construed 'the estate of the parties' to mean community property." *Id.* at 139 (citing *Reardon v. Reardon*, 163 Tex. 605, 359 S.W.2d 329 (Tex. 1962); *Hailey v. Hailey*, 160 Tex. 372, 331 S.W.2d 299 (1960); *Mansfield v. Mansfield*, 308 S.W.2d 80 (Tex. Civ. App.—El Paso 1958, writ dismissed); see McKnight, *Commentary to Title I, Texas Family Code*, 5 TEX. TECH L. REV. 337 (1974).

68. TEX. FAM. CODE ANN. § 3.63 (Vernon 1975) authorizes "a division of the estate of the parties." (emphasis added).

69. See, e.g., *Houston Oil Co. v. Kirkindall*, 136 Tex. 103, 109, 145 S.W.2d 1074, 1077 (1941); *Chace v. Gregg*, 88 Tex. 552, 558, 32 S.W. 520, 522 (1895); *Spires v. Hoover*, 466 S.W.2d 344, 347 (Tex. Civ. App.—El Paso 1971, writ refused n.r.e.).

70. 160 Tex. 372, 331 S.W.2d 299 (1960).

71. See Tex. Rev. Civ. Stat. art. 4638 (1925).

72. 34 Tex. 522 (1871).

73. *Id.* at 525.

74. 160 Tex. 372, 331 S.W.2d 299 (1960).

community in a divorce decree was merely a partition and not a conveyance divesting either spouse of title.⁷⁵ Thereafter, the court in *Reardon v. Reardon*⁷⁶ reaffirmed *Hailey* and held the statutory prohibition inapplicable even though all of the community realty was decreed to one of the spouses.⁷⁷ The constitutionality of the trial court's action was not questioned. The basis for the *Hailey* decision was the rule governing partition suits between joint owners of interests in realty.⁷⁸ Reliance in divorce cases, however, on the basic rationale underlying the rule applied in non-divorce partition cases is clearly a distortion. In a typical non-divorce partition decree, the court vests each of the joint owners with separate ownership of a portion of the common tract. This is not treated as a conveyance or divestment; it is considered to be merely a partition of possession and not title.⁷⁹ A non-divorce partition "has the effect only to dissolve the tenancy in common, and leave the title as it was before, *except to locate such rights as the parties may have*, respectively, in the distinct parts of the premises, and to extinguish such rights in all other portions of that property."⁸⁰ Again it is said that "[p]artition of land means the division of it according to quantity and value *in proportion to the interest of each owner*."⁸¹ Where the tract is not susceptible of a partition in kind, the partition by sale, and division of the proceeds, or by owelty must be accomplished in a manner which will insure that each owner of interest in the property receives his or her pro rata share of the value of their right therein.⁸² In a partition of community property by a divorce court under the present state of Texas case law, however, the decree frequently is made without regard to the proportionate one-half undivided interest of each owner in the property. In such cases, the operational effect of the decree does not preserve the title, or interest, or value thereof, of each of the joint or common owners of community property interests, and does not partition to each owner

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

76. 163 Tex. 605, 359 S.W.2d 329 (1962).

77. *Id.* at 607, 359 S.W.2d at 330.

78. *See Hailey v. Hailey*, 160 Tex. 372, 376-77, 331 S.W.2d 299, 303 (1960) (citing *Chace v. Gregg*, 88 Tex. 552, 32 S.W. 520 (1895)).

79. *E.g.*, *Houston Oil Co. v. Kirkindall*, 136 Tex. 103, 109, 145 S.W.2d 1074, 1077 (1941); *Chace v. Gregg*, 88 Tex. 552, 558, 32 S.W. 520, 522 (1895); *Spires v. Hoover*, 466 S.W.2d 344, 347 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.).

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

81. *Zanderson v. Sullivan*, 91 Tex. 499, 502, 44 S.W. 484, 485 (1898) (emphasis added).

82. *See White v. Smyth*, 147 Tex. 272, 279, 214 S.W.2d 967, 973 (1948) (sale); *Sayers v. Pyland*, 139 Tex. 57, 62-63, 161 S.W.2d 769, 772 (1942) (owelty).

a divided or segregated interest of equal value in a segregated tract. On the contrary, such a decree actually divests the property rights of a spouse. The very objectives of the two types of partitions are in opposition. In a non-divorce partition, the intent is to sever the undivided possession of the joint owners and enable each to hold an exclusive possession to a segregated part of the tract.⁸³ In a partition on divorce, the court is primarily interested in achieving an equitable distribution of the entire community property.⁸⁴ The law encourages partition suits⁸⁵ because they promote the productivity of cotenants by guaranteeing to each his own rights in the property.⁸⁶

The present Texas decisional law that condones the division of community property by partition upon divorce into unequal portions or shares because of the unequal comparative age, earning capacity, or other factors unrelated to the ownership rights of the respective spouses is contradictory to the basic policy underlying the use of partition between the owners of undivided interests in property. Moreover, the rationale of the decision in *Eggemeyer* indicates that such action, under section 3.63, is an unconstitutional divestment of property.⁸⁷

Significantly, court decisions and legislative enactments recognize and protect a spouse's one-half interest in the community property at all times except upon divorce. During the marriage, each spouse is given sole management of certain forms of community, such as personal earnings and income from his or her separate property.⁸⁸ Neither spouse may contract with respect to the community

83. *Irons v. Fort Worth Sand & Gravel Co.*, 284 S.W.2d 215, 219 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.).

84. See TEX. FAM. CODE ANN. § 3.63 (Vernon 1975). The partitioning court in a non-divorce suit may adjust the equities. See *Spires v. Hoover*, 466 S.W.2d 344, 347 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.). These equities, however, are of a different nature from those adjusted by a divorce court. An example would be reimbursement to a cotenant for expenditures incurred in improving the property, not consideration of disparity in earning capacity, age or fault. Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 215-16 (1975).

85. TEX. REV. CIV. STAT. ANN. art. 6082 (Vernon 1970) gives all cotenants an absolute right to partition.

86. *Lichtenstein v. Lichtenstein Bldg. Corp.*, 442 S.W.2d 765, 768 (Tex. Civ. App.—Corpus Christi 1969, no writ).

87. See *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140-41 (Tex. 1977) (citing TEX. CONST. art. I, § 19).

88. TEX. FAM. CODE ANN. § 5.22(a) (Vernon 1975). The special community is now usually referred to as sole management community and is defined by the statute as that which the spouse "would have owned if single . . ." *Id.* Included are "personal earnings; revenue from separate property; recoveries for personal injuries; and the increase and mutations of, and the revenue from . . ." special community. *Id.*

property committed by law to the other's sole management.⁸⁹ In addition, a transaction by one spouse regarding the joint community is binding only upon the contracting spouse and only to the extent of that spouse's interest.⁹⁰ In *Cooper v. Texas Gulf Industries, Inc.*,⁹¹ it was pointed out that with respect to management, a spouse "stands in the same position as any other joint owner of property."⁹² The court also observed that "[t]he rights of the wife, like the rights of the husband and the rights of any other joint owner, may be affected only by a suit in which the wife is called to answer."⁹³ Juxtaposed against these statements is the sometimes expressed opinion that in a divorce partition "[n]either the husband nor the wife is entitled, as a matter of right, to their interest in the community estate."⁹⁴ The law also recognizes and protects a deceased spouse's one-half undivided interest in, and share of, the community property. The Texas Probate Code preserves to the children of a deceased spouse that partner's one-half of the community estate.⁹⁵ This is true even though there may be a disparity between the deceased spouse and the surviving spouse in earning capacity, age, fault or financial well-being.⁹⁶ The illogic of having the two rules, one for divorce and one for probate administration, is best illustrated by *Pritchard v. Estate of Tuttle*.⁹⁷ There, a divorce suit was pending but the husband had the good foresight to die before the pending divorce proceeding could be concluded. The court held that it had no authority or discretion to divide the deceased husband's one-half interest in the community, such wide discretion being limited to a divorce proceeding.⁹⁸

A similar rule is applicable where a divorce court fails to dispose

89. *Jamail v. Thomas*, 481 S.W.2d 485, 488 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

90. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 205 (Tex. 1974); *Williams v. Saxon*, 521 S.W.2d 88, 90 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). These cases represent a change from the old rule that, in the absence of fraud, the husband has the right of sole disposition of the nonhomestead community. See *Krueger v. Williams*, 163 Tex. 545, 548, 359 S.W.2d 48, 50 (1962).

91. 513 S.W.2d 200 (Tex. 1974).

92. *Id.* at 202.

93. *Id.* at 202.

94. *Roberts v. Roberts*, 535 S.W.2d 373, 374 (Tex. Civ. App.—Tyler 1976, no writ).

95. TEX. PROB. CODE ANN. § 45 (Vernon 1956); see *Valdez v. Ramirez*, 558 S.W.2d 88, 90 (Tex. Civ. App.—San Antonio 1977, writ granted).

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

97. 534 S.W.2d 946 (Tex. Civ. App.—Amarillo 1976, no writ).

98. *Id.* at 950.

of all the community property. In such situations, the divorced parties become tenants in common, each owning equal undivided interests in the property.⁹⁹ Any "equities" which might have existed at the time of the divorce proceeding vanish, and the wide discretion to divide the property in consideration of one spouse's fault, age, or earning capacity ceases. The present state of the case law in Texas allows a single instance, divorce, in which a court is free to divest, by unequal partition, the community property interests of one spouse and vest that interest in the other spouse on equity grounds. At all other times the vested rights of each spouse in community property are properly guaranteed, protected and preserved.

Unquestionably the community is meant to be included within a court's discretionary authority to divide the "estate of the parties" granted by section 3.63.¹⁰⁰ It is significant that Texas decisions have held that this discretion is very wide, and that the court's division of community property need not be equal.¹⁰¹ The freedom to make an unequal division of the community illustrates the severe departure Texas law has taken from the original civil law concept.¹⁰² The guiding principle is presumably that of co-ownership with the husband and wife having equal right to wealth accumulated during marriage.¹⁰³ Of the eight community property states, only two

99. *E.g.*, *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970); *Taylor v. Catalon*, 140 Tex. 38, 41-42, 166 S.W.2d 102, 104 (1942); *Wade v. Wade*, 295 S.W.2d 939, 940-41 (Tex. Civ. App.—San Antonio 1956, no writ).

100. TEX. FAM. CODE ANN. § 3.63 (Vernon 1975); *see, e.g.*, *In re Marriage of Long*, 542 S.W.2d 712, 716-17 (Tex. Civ. App.—Texarkana 1976, no writ); *Tullis v. Tullis*, 456 S.W.2d 172, 173 (Tex. Civ. App.—El Paso 1970, writ dismissed); *Dobbs v. Dobbs*, 449 S.W.2d 119, 120 (Tex. Civ. App.—Tyler 1969, no writ). The authority to "order a division of the estate of the parties in a manner that the court deems just and right," is given in TEX. FAM. CODE ANN. § 3.63 (Vernon 1975). This authority dates from an 1841 Texas statute. *See* 1841 Tex. Gen. Laws, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898).

101. *See, e.g.*, *In re Marriage of McCurdy*, 489 S.W.2d 712, 717, 719 (Tex. Civ. App.—Amarillo 1973, writ dismissed); *Bryant v. Bryant*, 478 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1972, no writ); *Roye v. Roye*, 404 S.W.2d 92, 95 (Tex. Civ. App.—Tyler 1966, no writ). A reversal of the trial court's division requires a showing of abuse of discretion, but as a practical matter abuse of discretion is extremely hard to prove. *See Roberts v. Roberts*, 535 S.W.2d 373, 374 (Tex. Civ. App.—Tyler 1976, no writ) (upheld grant of entire community tract worth \$80,000.00 to wife). *But cf.* *Cooper v. Cooper*, 513 S.W.2d 229, 235 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (abuse of discretion shown).

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

103. *See* Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEXAS L. REV. 1054, 1055 (1957); Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 209-11 (1975). As Justice Steakley stated, "[T]he conceptual basis of community property is the notion that spouses should

states, California¹⁰⁴ and Louisiana,¹⁰⁵ follow the civil law concept of equality in division of property on divorce.¹⁰⁶ In amending its law, however, California appears to have placed more importance on removal of the hostility and faultfinding inherent to an unequal division of property than a desire to return to the principles of the civil law.¹⁰⁷ This reasoning is questionable since a marriage in which allegations of adultery or other charges of fault may be made is already less than harmonious.¹⁰⁸

A more satisfactory basis for a change to equal division of community property is a recognition that fault, age, and earning capacity as well as other equitable matters, are not grounds for the divestment of a cotenant's fifty percent interest in community property in the partition aspect of a divorce suit.¹⁰⁹ As mentioned previously, Texas has always looked to the civil law community property theory for the foundation of rules governing marital property rights.¹¹⁰ Again, the basic principle is that of a partnership between the spouses. Some cases have gone so far as to state that a marriage is essentially equivalent to a business partnership.¹¹¹ There is no dis-

share as equal partners in the benefits and burdens of the marriage." *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 149 (Tex. 1977) (dissenting opinion).

104. CAL. CIV. CODE § 4800 (Deering Supp. 1978).

105. LA. CIV. CODE ANN. art. 2406 (West 1971).

106. For a general discussion of the various community property states' laws concerning division of property on divorce 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).

107. See Hayes, *California Divorce Reform: Parting is Sweeter Sorrow*, 56 A.B.A.J. 660, 663 (1970); Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A. L. Rev. 1306, 1316 n.84 (1970) (quoting Assembly Report 8062).

108. Cf. *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977) (abolished interspousal tort immunity). This reasoning has been approved in other jurisdictions. See, e.g., *Lewis v. Lewis*, 351 N.E.2d 526, 532 (Mass. 1976); *Lundberg v. Hagen*, 316 A.2d 177, 179 (N.H. 1974); *Freehe v. Freehe*, 500 P.2d 771, 777 (Wash. 1972).

109. The equitable considerations that may properly be adjusted between the parties, such as reimbursement for improvements or advancements as distinguished from the equities that are considered by a divorce court and that result in the taking of a spouse's fifty percent interest in property, are discussed p. 60-64 *infra*.

It has been argued by one writer that equal division of marital property is compelled by the ERA. 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). This is true, the writer asserts, because there is discriminatory treatment as a matter of practice. *Id.* at 221. This point is debatable since section 3.63 itself does not, *prima facie*, discriminate in favor of either spouse. *Accord*, *Schaab v. Schaab*, 531 P.2d 954, 957 (N.M. 1974).

110. See p. 47 *supra*.

111. See *United States v. Stapf*, 309 F.2d 592, 600 (5th Cir. 1962) (dissenting opinion); *Rompel v. United States*, 59 F. Supp. 483, 486 (W.D. Tex.), *rev'd*, 326 U.S. 367 (1945); *Newland v. Newland*, 529 S.W.2d 105, 109 (Tex. Civ. App.—Fort Worth 1975, writ *dism'd*). A commentator has likened the theory of dissolution of marriage in California to the dissolu-

pute that a marriage is a special relationship between two persons and has characteristics distinct from those of a commercial partnership.¹¹² But these differences provide no basis for the deprivation of property rights contrary to the constitutional right of due process.¹¹³ The ownership characteristics are basically identical between a business partnership and a marital partnership. In the case of a business partnership on dissolution, each partner is entitled to his share of the assets and profits in proportion to the amount invested.¹¹⁴ The same should be true with a marriage except that the spouses are treated as making an equal investment. No more support can be given warranting a denial of due process simply because marriage is a special relationship than can be given because of the special relationship of parent and child or brother and sister.

EDUCATION, SKILL AND EARNING CAPACITY AS A COMMUNITY ASSET
SUBJECT TO VALUE DIVISION OR TO CLAIMS FOR REIMBURSEMENT

The reason Texas lawmakers chose to except marital property from the general adoption of the common law was to protect the wife's interests in the marriage.¹¹⁵ The common law did not recognize the wife's existence except through her husband who became, upon marriage, the owner of all the wife's property.¹¹⁶ The civil law treated the wife as a co-owner or partner with the husband. Given this original concern for the rights of the wife in drafting marital property law, it is not surprising that the effect of the law's divergence from civil law concepts has largely been to the wife's benefit. The discretionary division of property has generally been used in favor of the wife, giving her a greater than equal share of the community, or even a portion of the husband's separate estate. This is true, of course, because the husband most often has a higher

tion of a business partnership. Grant, *How Much of a Partnership is Marriage?*, 23 HASTINGS L.J. 249, 250 (1971).

112. See *Hanzelik v. Hanzelik*, 294 So. 2d 116, 119 (Fla. Dist. Ct. App. 1974). The dissent in *Eggemeyer* emphasized this fact and the state's special interest in marriage as supportive of a divorce court's power to divest a spouse of property. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 147-49 (Tex. 1977) (dissenting opinion).

113. See U.S. CONST. amends. V & XIV, § 1; TEX. CONST. art. I, § 19 (due course of law).

114. *Butler v. Thomasson*, 256 S.W.2d 936, 939 (Tex. Civ. App.—Eastland 1953, no writ).

115. See Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEXAS L. REV. 1054, 1055 (1957); McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. W.L. REV. 117, 121 (1971).

116. See McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. W.L. REV. 117, 121 (1971).

earning capacity. Frequently, the husband comes into the marriage with a larger separate estate, at least where his employment career has already begun. A discretionary division permits a court to consider these and other equitable factors.¹¹⁷ Therefore any assertion that the constitution forbids the divestiture of more than fifty percent of the community will be resisted as resulting in hardship and inequity to the divorced wife. This is particularly the result where one spouse, typically the wife, has supported the other and put him or her through college or professional school.¹¹⁸ When a divorce occurs shortly after completion of the education there are little or no community assets to be equally divided. In addition, the separate property of the wife likely has been consumed for tuition and living expenses. A decree denying some form of compensation to the comparatively uneducated wife in these situations would indeed be harsh. Prior to *Eggemeyer*, the greater education and earning capacity were factors which could be, and were, considered by the divorce court in making its discretionary division of property under section 3.63. Those considerations could justify granting all available separate property and all community personal property to the wife, thereby alleviating the hardship.¹¹⁹ However, if the divorce occurs very shortly after or during the educational process, the wife is not substantially compensated since the husband's newly acquired skills have not yet begun to generate income. If an effective alternative method of compensating the working spouse can be devised which recognizes the changes necessitated by *Eggemeyer*, the result will be a more equitable division of property on divorce.

One method of compensating the working spouse for her interest in the student spouse's education that has been suggested is to treat the education as a community property asset subject to division.¹²⁰ This would give the wife a fifty percent share of its value. The

117. See, e.g., *Roberts v. Roberts*, 535 S.W.2d 373, 374 (Tex. Civ. App.—Tyler 1976, no writ); *Ramirez v. Ramirez*, 524 S.W.2d 767, 771 (Tex. Civ. App.—Corpus Christi 1975, no writ); *In re Marriage of McCurdy*, 489 S.W.2d 712, 717, 719 (Tex. Civ. App.—Amarillo 1973, writ dismissed).

118. Even though the wife is not always the spouse who supports the other through medical or law school she is probably most often the one who does. For this reason references in the article will be to the wife as the working spouse and to the husband as the student partner.

119. See, e.g., *Roberts v. Roberts*, 535 S.W.2d 373, 374 (Tex. Civ. App.—Tyler 1976, no writ); *Ramirez v. Ramirez*, 524 S.W.2d 767, 771 (Tex. Civ. App.—Corpus Christi 1975, no writ); *In re Marriage of McCurdy*, 489 S.W.2d 712, 717, 719 (Tex. Civ. App.—Amarillo 1973, writ dismissed).

120. See Comment, *The Interest of the Community in a Professional Education*, 10 CALIF. W.L. REV. 590, 591 (1974).

advantage of such a proposal is that the wife is not limited to the actual cost of the education as would be the case if the expenditures were treated as an implied loan.¹²¹ The husband would not be allowed to leave the marriage with an extremely valuable education asset at the comparatively slight cost of actual tuition expenses and books.

There is a practical difficulty with treating the education as a community asset subject to division. Obviously the mind or the expertise of the student spouse may not be divided physically. One solution would be to divide the total community property so as to give the student the value of the education, and grant the wife other community of equivalent value. As stated previously, however, usually a couple seeking a divorce soon after the graduation from medical or law school has few community assets. Nevertheless, the basic problem is not unique; it is recognized in the typical partition suit concerning land and cotenants when it may not be possible to divide the property into equal tracts. In such cases, the court may grant to one cotenant a more valuable portion, perhaps with improvements, and adjust the imbalance by means of owelty—a lien or charge on the more valuable tract.¹²² Owelty could certainly be utilized in a divorce partition by placing a lien on the student spouse's separate property, or by a judgment lien which could be asserted as in the case of any other judgment creditor.

A further conceptual problem is that of arriving at a value of this community property. Unquestionably, it would be hard to fairly and accurately place a value on the property, but the same is true in placing a value on pain and suffering, an injured back or a damaged brain.¹²³ One commentator has suggested two possible formulas.¹²⁴ The first, the cost value method, would call for adding the direct purchase cost and the cost opportunity.¹²⁵ Another method, the income capacity value method, would consider the projected earning

121. *See id.* at 592-97. There would be an evidential obstacle in showing that the funds were actually loans between the husband and wife. *But cf.* *Padgett v. Padgett*, 487 S.W.2d 850, 853 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.) (assuming loan without explanation).

122. *See Cleveland v. Milner*, 141 Tex. 120, 127, 170 S.W.2d 472, 476 (1943); *Sayers v. Pyland*, 139 Tex. 57, 61-62, 161 S.W.2d 769, 772 (1942).

123. Courts do not hesitate to allow damages in a personal injury action for impairment of earning capacity. *See Dallas Ry. & Terminal Co. v. Guthrie*, 146 Tex. 585, 587, 210 S.W.2d 550, 552 (1948); *McIver v. Gloria*, 140 Tex. 566, 568, 169 S.W.2d 710, 712 (1943).

124. Comment, *The Interest of the Community in a Professional Education*, 10 CALIF. W.L. REV. 590, 603 (1974).

125. *Id.* at 603-04.

capacity of the student.¹²⁶ The difficulty in fixing a value on the education asset should not prevent adoption of an otherwise acceptable method of compensating the wife in such situations.

A major problem is posed, however, in treating the education as a community asset subject to division. This requires a finding that the education is a property right. The few courts that have addressed the issue have all rejected the notion that an education is community property subject to division.¹²⁷ In *Stern v. Stern*¹²⁸ the trial court had referred to an attorney's education and his marriage to the daughter of a prominent man as "assets." The New Jersey Supreme Court in rejecting that reasoning stated that "a person's earning capacity, even where its development has been aided and enhanced by the other spouse . . . should not be recognized as a separate, particular item of property" ¹²⁹ In *Todd v. Todd*¹³⁰ the court reasoned:

If a spouse's education preparing him for the practice of law can be said to be "community property," a proposition which is extremely doubtful even though the education is acquired with community moneys, it manifestly is of such a character that a monetary value for division with the other spouse cannot be placed upon it.

. . . .
At best, education is an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses.¹³¹

It is interesting to note that while California refuses to recognize that education acquired during marriage is community property subject to division, it does recognize that the goodwill of a professional practice may be community property which is subject to division in a divorce.¹³² The intangible characteristics and difficulty in evaluation are apparently not considered obstacles in the case of goodwill. The differing result is questionable and the logic, if any, is illusive. Texas has reached a contrary decision on the issue of

126. *Id.* at 604-12.

127. See *Todd v. Todd*, 78 Cal. Rptr. 131, 134-35 (Ct. App. 1969); *In re Marriage of Graham*, 555 P.2d 527, 529 (Colo. Ct. App. 1976); *Stern v. Stern*, 331 A.2d 257, 260 (N.J. 1975).

128. 331 A.2d 257 (N.J. 1975).

129. *Id.* at 260.

130. 78 Cal. Rptr. 131 (Ct. App. 1969).

131. *Id.* at 134-35.

132. *E.g.*, *In re Marriage of Foster*, 117 Cal. Rptr. 49, 52 (Ct. App. 1974); *In re Marriage of Lopez*, 113 Cal. Rptr. 58, 67 (Ct. App. 1974); *Golden v. Golden*, 75 Cal. Rptr. 735, 737-38 (Ct. App. 1969); *accord*, *In re Marriage of Lukens*, 558 P.2d 279, 282 (Wash. Ct. App. 1976).

dividing professional goodwill.¹³³ In *Nail v. Nail*¹³⁴ the supreme court rejected the idea of granting the wife a share of the value of the goodwill of her husband's medical practice.¹³⁵ In arriving at the decision that goodwill was not an earned or vested property right subject to division, the court distinguished "professional" goodwill from the goodwill of a business. The former was said to attach to the professional personally as a result of confidence in his abilities.¹³⁶ Going further, the court said the goodwill of the husband "did not possess value or constitute an asset separate and apart from his person, or from his individual ability to practice his profession."¹³⁷ Finally, the court observed that the goodwill would be extinguished by death, retirement or disablement, sale of the practice or by loss of patients. All of the arguments offered by the court concerning goodwill apply equally well to an education asset. It is just as much a right personal to the owner which is extinguished upon death or any of the other events. It is interesting to note that the court, in *Nail*, observed that it was not considering a case where goodwill was an asset "that may be an element of damages by reason of tortious conduct."¹³⁸ It is difficult to understand why "goodwill" should be treated as a property right when the husband is being sued for a tort against the wife, but not a property right that has value when the action is a divorce suit, very possibly brought about by a tort or other misconduct. Nevertheless, unless the rationale of *Nail* can be restricted to goodwill, or is distinguished so as to be inapplicable to education, there is substantial doubt whether Texas courts will adopt the view that education is property which may have status as "community" which is subject to division by the courts under section 3.63.

Significantly, some of the courts that have refused to treat a community education as property subject to division upon divorce, have acted to soften the economic hardship to the wife by considering the education of the husband as an equitable factor in the discretionary division of property.¹³⁹ The *Todd* court did not do so because California statutorily requires an equal division of community.¹⁴⁰ The practice in Texas decisions also has been to consider

133. See *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972).

134. 486 S.W.2d 761 (Tex. 1972).

135. *Id.* at 764.

136. *Id.* at 763-64.

137. *Id.* at 764.

138. *Id.* at 764.

139. See *In re Marriage of Graham*, 555 P.2d 527, 529 (Colo. Ct. App. 1976); *Stern v. Stern*, 331 A.2d 257, 260 (N.J. 1975).

140. See CAL. CIV. CODE § 4800 (Deering Supp. 1978).

the education of the spouses as a factor in making a discretionary division of property in a "fair, just and equitable," but unequal manner.¹⁴¹ However, the rationale of *Eggemeyer* indicates this practice is no longer permitted.

It is apparent that rejection of the idea that a husband's education is community property subject to division avoids a possible extension of the notion that the increased value of a skill is community property. If the medical or legal expertise the husband has acquired is treated as community property, then the same classification should be given to the skill the wife has acquired from, and during the course of, her employment. Her earning capacity has increased as a result of several years employment. The argument can be made that there is no good reason to treat the increase in her earning capacity differently from the increase in the husband's earning capacity from the standpoint of its classification as property, because in both cases there was joint effort by both spouses. Consequently, the value of the education or skill acquired by either spouse should be considered by the court and treated as property subject to division. It is obvious that any "enhancement in value" of existing skills as a result of efforts of either or both spouses during marriage raises the problem of taking such enhancement into consideration in dividing the "property" upon divorce. The difficulties and problems which flow from treating education as property should not interfere with the recognition of education as property. Clearly, the fact that it is an intangible does not detract from its status as property.

Another approach to a viable solution to the problems resulting from *Eggemeyer* is found in the theory of reimbursement.¹⁴² Basically, reimbursement is an equitable right that arises where one marital estate has been benefitted by another.¹⁴³ The right may be a reimbursement for the enhanced value of property where improvements have been erected.¹⁴⁴ The other circumstance that gives rise to the right of reimbursement occurs when funds have been ad-

141. *Cooper v. Cooper*, 513 S.W.2d 229, 233-34 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); *Dobbs v. Dobbs*, 449 S.W.2d 119, 120 (Tex. Civ. App.—Tyler 1969, no writ).

142. See generally Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 21 BAYLOR L. REV. 137 (1969); McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 449-55 (1976).

143. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 450 (1976).

144. *Dakan v. Dakan*, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935) (husband's separate realty improved with community and wife's separate funds).

vanced from one estate to another.¹⁴⁵ Reimbursement as a method of compensating the wife for the husband's education acquired during the marriage is not subject to the practical difficulties that have been shown to be inherent to classifying education as community property subject to division. The reimbursement method would not fall prey to the troublesome extension of the rule to the expertise acquired by the wife while working. The only funds spent on the working wife would be for living expenses, and such expenditures are not reimbursable.¹⁴⁶ Thus reimbursement would properly be limited to community and separate property of the wife expended upon the husband's education. A college education is not considered a necessity which a spouse is obligated to furnish.¹⁴⁷

The right of reimbursement permitted in a divorce proceeding is not inconsistent with the rules governing a typical partition suit between cotenants. *Eggemeyer* prohibits divorce courts from divesting separate realty of one spouse and vesting it in the other spouse on the ground that such equitable factors as diversity of age and earning capacity require such action. This does not mean that all equitable considerations are foreclosed. A court partitioning land between cotenants in a non-divorce proceeding may adjust the equities.¹⁴⁸ The equities that may be considered are those relating to *how* the property is to be divided.¹⁴⁹ An example is deciding which cotenant is to receive the improved section of a tract. Reimbursement for expenditures or improvements is also an equitable remedy granted in partition suits.¹⁵⁰ Some of the equitable factors which divorce courts have considered in dividing the property are disparity in earning power,¹⁵¹ size of estates, age and physical condition,¹⁵² future

145. See *Colden v. Alexander*, 141 Tex. 134, 147, 171 S.W.2d 328, 334 (1943) (community payment of debt on husband's separate realty).

146. *Norris v. Vaughan*, 152 Tex. 491, 503, 260 S.W.2d 676, 683 (1953); *McKnight, Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 450 (1976).

147. Cf. *Woodruff v. Woodruff*, 487 S.W.2d 791, 793 (Tex. Civ. App.—Texarkana 1972, no writ) (college education not a necessity husband obligated to furnish for minor children).

148. E.g., *Sayers v. Pyland*, 139 Tex. 57, 61, 161 S.W.2d 769, 772 (1942); *Spires v. Hoover*, 466 S.W.2d 344, 347 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.); see *Tompkins v. Hooker*, 200 S.W. 193, 197 (Tex. Civ. App.—Texarkana 1917, no writ).

149. *Moseley v. Hearrell*, 141 Tex. 280, 283, 171 S.W.2d 337, 338-39 (1943).

150. *Cleveland v. Milner*, 141 Tex. 120, 127, 170 S.W.2d 472, 476 (1943); *Whitmire v. Powell*, 103 Tex. 232, 236, 125 S.W. 889, 890 (1910); Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 215 (1975). Other equities adjudged by a court on a partition include an accounting for rents and profits, waste, fraud and taxes paid. *Sayers v. Pyland*, 139 Tex. 57, 61, 161 S.W.2d 769, 771 (1942).

151. *Roye v. Roye*, 404 S.W.2d 92, 96 (Tex. Civ. App.—Tyler 1966, no writ).

152. *Roberts v. Roberts*, 535 S.W.2d 373, 374 (Tex. Civ. App.—Tyler 1976, no writ).

need,¹⁵³ educational background¹⁵⁴ and fault.¹⁵⁵ One court even considered the loss of an advantageous marriage as important in dividing property.¹⁵⁶ It is these factors which divorce courts no longer have discretion to consider as a basis for the divestment of separate property or an unequal value division of community property.

A difficult question arises as to the method of reimbursement to apply—enhanced value¹⁵⁷ or funds advanced.¹⁵⁸ The latter theory is applied when one estate pays a debt or obligation of another estate. For example, the husband may have purchased realty before the marriage but still owes all or part of the purchase money. If the community or the wife's separate estate pays the money due, the land remains the husband's separate property but the advancing estate has a right of reimbursement.¹⁵⁹ The right is limited, however, to the amount actually advanced.¹⁶⁰ Herein is the disadvantage in applying the funds advanced theory to money spent on a husband's education. The potential value of the medical or legal knowledge acquired is worth much more than the actual cost of acquiring it. Particularly is this true where a state supported law school is attended. The husband terminates the marriage with something of a windfall. Of course, a logical argument can be made that the wife should get no more than what she actually spent and reasonably should not share in the increased earning capacity of the husband.

One method of allowing the wife to benefit beyond the actual cost would be to apply the enhanced value theory of reimbursement. Under this theory, the reimbursement is for the amount of enhancement at the time of partition, not the original cost.¹⁶¹ The right of reimbursement creates no right or title to the property improved, only a charge or lien on it.¹⁶² There is authority that under the

153. *Hearn v. Hearn*, 449 S.W.2d 141, 145 (Tex. Civ. App.—Tyler 1969, no writ).

154. *Dobbs v. Dobbs*, 449 S.W.2d 119, 120 (Tex. Civ. App.—Tyler 1969, no writ).

155. *In re Marriage of Long*, 542 S.W.2d 712, 716 (Tex. Civ. App.—Texarkana 1976, no writ).

156. *Roberson v. Roberson*, 420 S.W.2d 495, 503 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.).

157. *See Dakan v. Dakan*, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935).

158. *See Colden v. Alexander*, 141 Tex. 134, 147, 171 S.W.2d 328, 334 (1943).

159. *See id.* at 147, 171 S.W.2d at 334.

160. *McKnight, Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 452 (1976).

161. *E.g.*, *Lindsay v. Clayman*, 151 Tex. 593, 600, 254 S.W.2d 777, 781 (1952); *Dakan v. Dakan*, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935); *Ogle v. Jones*, 143 S.W.2d 644, 645 (Tex. Civ. App.—Waco 1940, writ ref'd); *cf. Sharp v. Stacy*, 535 S.W.2d 345, 351 (Tex. 1976) (good faith improvement to property of third party).

162. *E.g.*, *Dakan v. Dakan*, 125 Tex. 305, 319, 83 S.W.2d 620, 628 (1935); *Lamar Life*

enhanced value theory the amount of reimbursement is the lesser of the actual cost or enhanced value.¹⁶³ This limitation may be a result of recognition that the community receives enjoyment during the marriage where community funds improve a separate estate¹⁶⁴ or it may be based upon the voluntariness of the expenditure where separate property improves the community.¹⁶⁵ There is an additional possibility that when the limitation rule was first expressed in a supreme court opinion,¹⁶⁶ only depreciation of improvements had to be considered.¹⁶⁷ Imposition of the limitation rule results in inequity in the situation where a student spouse is put through school by the other spouse. Limiting the reimbursement to the actual cost permits the student spouse to receive a windfall. Such an inequitable situation results even though the theory of reimbursement is an equitable rule invented to prevent economic hardship or unfairness.¹⁶⁸ Courts should not adhere to such rigid rules in the application of equitable principles.¹⁶⁹ It should be realized that economic conditions are different today than when the rules of reimbursement were first espoused. In fact, the leading case, *Dakan v. Dakan*,¹⁷⁰ from which the limitation rule originated, recognized the need for flexibility in applying the rules of reimbursement. There it was stated that courts should be liberal in upholding the doctrine of reimbursement.¹⁷¹

An additional problem exists when relying upon reimbursement for a solution to the financial hardship of an equal property division.

Ins. Co. v. Jordan, 163 S.W.2d 215, 216-17 (Tex. Civ. App.—Waco 1942, writ ref'd w.o.m.); *White v. Hebbard*, 89 S.W.2d 482, 486 (Tex. Civ. App.—El Paso 1936, no writ).

163. See *Girard v. Girard*, 521 S.W.2d 714, 718 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ); McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 451-52 (1976). *Contra*, Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 21 BAYLOR L. REV. 137, 153-54 (1969).

164. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 452 (1976).

165. *Id.* at 452.

166. See *Dakan v. Dakan*, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935). “[I]n 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.” *Id.* at 320, 83 S.W.2d at 628.

167. See McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 452 (1976).

168. See *Horlock v. Horlock*, 533 S.W.2d 52, 60 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd).

169. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 452 (1976).

170. 125 Tex. 305, 83 S.W.2d 620 (1935).

171. *Id.* at 318, 83 S.W.2d at 627.

Early leading cases on reimbursement for improvements used language which referred to reimbursement for *funds*.¹⁷² A recent civil appeals case illustrates the harshness of the rule.¹⁷³ A construction worker used 350 hours of his time and talent in remodeling his wife's separate house at a substantial savings in cost. The appeals court held the community was entitled to no compensation for the improvement because no funds were spent.¹⁷⁴ If the husband had instead spent the 350 hours at his job, received wages and then hired a third party to remodel the house, reimbursement would have been permitted. Such meaningless distinctions serve no purpose other than encouraging the marital partnership to employ more extravagant procedures. In the case of a spouse working to provide economic support for the family and education expenses during the time the husband enhances his skill, education and earning capacity, there is no difficulty in classifying the wife's earnings. These are community funds spent on the husband's separate estate and the community is entitled to reimbursement. But as to the husband's efforts, including studying and attending class, no reimbursement would be permitted. This is true even though his time and work would have benefitted the community by way of earnings if the husband were employed instead of enrolled in school. It is unfortunate that this dubious distinction has been carved out of the rules governing reimbursement. The leading case on reimbursement, *Dakan*, contains language supporting reimbursement for labor. "[T]he community estate must be reimbursed for the cost of the buildings erected, by *joint labors or funds* upon the separate property of one of the spouses"¹⁷⁵

EDUCATION, SKILL AND EARNING CAPACITY AS SEPARATE PROPERTY

Another approach to a solution to the problem is to translate "education" or "skill" into a recognition of it as "earning capacity," and as a right which belongs to, and is owned by, each spouse as his or her separate property. Earning capacity is clearly a right which has been judicially recognized in tort actions to recover for the value of the loss of it, damage to it or interference with it as a

172. See *id.* at 317-18, 83 S.W.2d at 627; *Ogle v. Jones*, 143 S.W.2d 644, 645 (Tex. Civ. App.—Waco 1940, writ ref'd).

173. See *Hale v. Hale*, 557 S.W.2d 614 (Tex. Civ. App.—Texarkana 1977, no writ).

174. *Id.* at 615.

175. *Dakan v. Dakan*, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935) (emphasis added).

result of the wrongful acts of others.¹⁷⁶ Courts have had no difficulty in recognizing that earning capacity is a right which has measurable value. Earning capacity has also received legislative recognition and protection in the form of workmen's compensation acts¹⁷⁷ and tort claims acts.¹⁷⁸ Significantly, the recovery for loss of "earning capacity during marriage" is specially classified by section 5.01 of the Family Code as community property.¹⁷⁹ It can be forcibly argued, however, that the skill, training or education of a spouse is separate property. As the Texas Supreme Court held in *Arnold v. Leonard*,¹⁸⁰ the legislative classification of property as separate or community is not valid if contrary to the classification required by the application of the constitutional definition of separate and community property.¹⁸¹ The fact that the courts have created erroneous precedent of long standing is clearly no ground for maintaining it. In *Graham v. Franco*¹⁸² the court finally terminated a long line of precedent which erroneously classified the right of a spouse to recover for tortious injuries to his or her person as community property.¹⁸³ Prior case law had reasoned that a cause of action to sue for damages for a tort was "property within the legal sense of that term."¹⁸⁴ In *Northern Texas Traction Co. v. Hill*¹⁸⁵ the court declared unconstitutional the provisions of article 4615 which made all personal injury recoveries of the wife her separate property.¹⁸⁶ The rationale of the decision was that since the cause of action covered by the statute was property acquired during marriage by a mode other than gift or inheritance, it must be classified, on constitutional grounds, as community property.¹⁸⁷ The decision, and the rationale supporting

176. See *Dallas Ry. & Terminal Co. v. Guthrie*, 146 Tex. 585, 587, 210 S.W.2d 550, 552 (1948); *McIver v. Gloria*, 140 Tex. 566, 568, 169 S.W.2d 710, 712 (1943).

177. See TEX. REV. CIV. STAT. ANN. art. 8306 (Vernon 1967).

178. See TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon Supp. 1978).

179. TEX. FAM. CODE ANN. § 5.01(a)(3) (Vernon 1975).

180. 114 Tex. 535, 273 S.W. 799 (1925).

181. *Id.* at 540, 273 S.W. at 802.

182. 488 S.W.2d 390 (Tex. 1972).

183. *Id.* at 396.

184. See *Ezell v. Dodson*, 60 Tex. 331, 332 (1881).

185. 297 S.W. 778 (Tex. Civ. App.—El Paso 1927, writ ref'd).

186. *Northern Texas Traction Co. v. Hill*, 297 S.W. 778, 780 (Tex. Civ. App.—El Paso 1927, writ ref'd) (construing Tex. Rev. Civ. Stat. art. 4615 (1925)). The statute provided that: All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation.

Tex. Rev. Civ. Stat. art. 4615 (1925).

187. *Northern Texas Traction Co. v. Hill*, 297 S.W. 778, 779-80 (Tex. Civ. App.—El Paso

it, were clearly wrong and the decision has since been overruled.¹⁸⁸ The statute correctly classified the recovery of such damages as compensation to the wife for injury to her body, and for the pain and suffering which she sustained. The New Mexico Supreme Court in a community property jurisdiction, had so held under a constitutional definition classifying property in a manner similar to that in the Texas Constitution.¹⁸⁹ The court reasoned that the wife owned her right to personal security prior to marriage; therefore, damages recovered as compensation for injury to, or interference with that right belonged to her as her separate property.¹⁹⁰ Finally, in 1972, the Texas Supreme Court, in *Graham*, adopted the rationale of the New Mexico court and held that the damages recovered by a spouse for personal injuries had status as the separate property of the spouse.¹⁹¹ In the final analysis, the status of the property of the wife is fixed by the provisions of the Texas Constitution and neither the legislature nor the courts can affect that classification. However, the court in *Graham* made an incorrect distinction between recovery for loss of earning capacity and for other injuries by holding the former to be community property.¹⁹² Unquestionably, a spouse has a cause of action for recovery of damages to, or loss of, earning capacity.¹⁹³ It is clearly "a right in a thing" and, therefore, "property." Every person has, and owns, prior to marriage an "earning capacity." It is a very personal right which remains the separate property of the spouse during marriage, and a property right which the person continues to own as separate property upon dissolution of the marriage by death or divorce. The enhancement of the earning capacity of a spouse during marriage does not change its status as separate property, though it may result in recognition of equitable claims of reimbursement to the estate of the other spouse or the community. While the "earnings" generated by the earning capacity of a spouse during marriage are community property, the earning capacity per se of a spouse remains separate property throughout the marriage. Thus, it seems obvious that the portion of section 5.01 of the Family Code which purports to classify a spouse's "earning capacity during

1927, writ ref'd).

188. See *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972).

189. See *Soto v. Vandeventer*, 245 P.2d 826, 832 (N.M. 1952).

190. *Id.* at 832-33.

191. *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972).

192. *Id.* at 396.

193. See *Dallas Ry. & Terminal Co. v. Guthrie*, 146 Tex. 585, 587, 210 S.W.2d 550, 552 (1948); *McIver v. Gloria*, 140 Tex. 566, 568, 169 S.W.2d 710, 712 (1943).

marriage" as community property suffers the same fatal constitutional infirmity as other and prior legislative attempts to fix a status to property of spouses contrary to the constitution.

DAMAGES FOR BREACH OF THE MARRIAGE CONTRACT

The decision in *Eggemeyer* and the subsequent application of the constitutional limitations on divestment of *any* kind of property of the spouses will force trial courts seeking to evolve an "equitable decree with respect to the rights of the parties" to evaluate the feasibility of recognizing and enforcing a cause of action in favor of a spouse for recovery of damages in a "fault" divorce proceeding as against the other spouse who breached the obligations of the marriage contract. Apparently, no Texas appellate court has rendered a decision directly on the question of whether such a right is recognizable and enforceable. There have been only a few Texas appellate cases which have considered the question whether marriage is a contract. Those decisions are not in accord and seem to express at least three views.

The first view arises from an early decision of the Texas Supreme Court, in *Rice v. Rice*,¹⁹⁴ which espoused the view that in Protestant countries marriage is almost universally recognized as a mere contract, subject to the control and regulation of the state, and results from an agreement by and between assenting competent parties.¹⁹⁵ Subsequently, the Texas Commission of Appeals, in *Wilemon v. Wilemon*,¹⁹⁶ cited *Rice* with approval and additionally observed that "statutes prescribe the grounds upon which that contract may be dissolved."¹⁹⁷

The second view, discussed by the Texas Supreme Court in *Grigsby v. Reib*,¹⁹⁸ is that marriage is not merely a civil contract but instead a status created by mutual consent.¹⁹⁹ The court noted further, without authority, that a "status cannot be created by contract."²⁰⁰ This is clearly incorrect. There are several examples of status created by contract, such as those of principal, agent

194. 31 Tex. 174 (1868).

195. *Id.* at 178.

196. 250 S.W. 1010 (Tex. Comm'n App. 1923, opinion adopted).

197. *Id.* at 1012. See also *Edelstein v. Brown*, 80 S.W. 1027 (Tex. Civ. App. 1904, no writ).

198. 105 Tex. 597, 153 S.W. 1124 (1913).

199. *Id.* at 607-08, 153 S.W. at 1130.

200. *Id.* at 607, 153 S.W. at 1129.

and partner.²⁰¹ The thrust of the opinion is, however, simply the recognition of "common law marriage." The opinion makes reference to "the excellent opinion" in *Ingersol v. McWillie*²⁰² which was "approved by this court."²⁰³ Examination of *Ingersol* reflects the court's recognition of the rule in Texas that "a marriage may be valid and binding upon the parties, although entered into not in accordance with the terms of the statute requiring license and solemnization by a minister or officer."²⁰⁴ The other Texas decision cited by the court in *Grigsby* in support of the proposition that marriage is a status rather than a contract is *Simmons v. Simmons*,²⁰⁵ which simply held that when competent parties enter into an agreement to become husband and wife and thereafter live together in sexual cohabitation holding themselves out publicly as husband and wife, they have transformed their agreement to marry into a consummated marriage which the law will recognize.²⁰⁶ This traditional common law rationale is analogous to the approach of equitable recognition and enforcement of other types of oral contracts which are enforced as between parties where there is evidence of performance, reliance, detriment, consideration and other factors which evidence the existence of a contractual relationship even though certain statutory requisites are unsatisfied.²⁰⁷

In *Gowin v. Gowin*²⁰⁸ the action was brought by the wife against her husband during marriage to recover damages for cruel treatment, physical and mental pain, and "immaterialization of the pecuniary inducements," all of which she alleged constituted breach of the marriage contract.²⁰⁹ The commission of appeals affirmed the judgment of the court of civil appeals denying recovery.²¹⁰ It should be noted, however, that the question for decision was carefully framed and limited to: "Does breach of the marital obligations by one spouse give rise to a justiciable right in the other of such nature as that the one may sue for, and recover, damages from the other

201. See Note, 5 TEXAS L. REV. 411, 412-14 (1927).

202. 30 S.W. 56 (Tex. Civ. App.), writ ref'd, 87 Tex. 647, 30 S.W. 869 (1895).

203. *Grigsby v. Reib*, 105 Tex. 597, 607, 153 S.W. 1124, 1129 (1913).

204. *Ingersol v. McWillie*, 30 S.W. 56, 61 (Tex. Civ. App.), writ ref'd, 87 Tex. 647, 30 S.W. 869 (1895).

205. 39 S.W. 639 (Tex. Civ. App. 1897, no writ), cited in *Grigsby v. Reib*, 105 Tex. 597, 607, 153 S.W. 1124, 1129 (1913).

206. *Id.* at 640-41.

207. TEX. BUS. & COMM. CODE ANN. § 2.201(c) (Tex. UCC) (Vernon 1968).

208. 292 S.W. 211 (Tex. Comm'n App. 1927, judgment adopted).

209. *Id.* at 212.

210. *Id.* at 215.

as for breach of a contract, in the *absence* of a divorce or prayer therefor."²¹¹ Subsequently, the San Antonio Court of Civil Appeals in *McGlothlin v. McGlothlin*,²¹² cited *Gowin* with approval and then, after noting that the suit before the court was brought *after* a divorce had been granted and the property rights settled by the decree, held that since a cause of action for the breach of marital obligations "did not exist during the marriage, we cannot say that one was created by the divorce."²¹³ This was simply a conclusion of the court, with no citation of authority. The court relied upon *Gowin* to determine the very question which the court in *Gowin* emphasized was *absent* there: Whether a cause of action exists to recover damages for breach of the contractual obligations of marriage "in the absence of a divorce or a prayer therefor."²¹⁴ Moreover, in *McGlothlin*, the suit was brought to recover damages for "alienation of affection, criminal conversation and loss of consortium" in a separate action instituted subsequent to the judgment in a prior divorce action between the spouses and after the property division as between the parties had been adjudicated.²¹⁵

A third view is that marriage is both a status *and* a contract. It is sometimes expressed that "marriage is more than a contract"²¹⁶ and that "[m]arriage is pre-eminently supported by contract entered into by the parties before the consummation of the status itself"²¹⁷

It should be noted, however, that in all of these decisions the courts acknowledge that marriage is, to some extent, a contract. This is obviously a correct premise. The parties to the marriage, in addition to acquiring a status, either expressly or impliedly covenant, promise and agree to do certain acts and things and to refrain from doing certain acts and things, to undertake certain obligations, and to assume certain liabilities. The exchange of consideration between the parties is obvious. The contractual relationship, with the inherent obligations, liabilities and many other legal implications, is so affected with a public interest that it is not terminable at the

211. *Id.* at 212 (emphasis added).

212. 476 S.W.2d 333 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

213. *Id.* at 335.

214. See *Gowin v. Gowin*, 292 S.W. 211, 212 (Tex. Comm'n App. 1927, judgment adopted).

215. *McGlothlin v. McGlothlin*, 476 S.W.2d 333, 333 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

216. *Welch v. State*, 151 Tex. Crim. 356, 207 S.W.2d 627, 628 (1948).

217. *Christoph v. Sims*, 234 S.W.2d 901, 904 (Tex. Civ. App.—Dallas 1950, writ ref'd n.r.e.).

will of the parties but only pursuant to, and in accordance with, statutory prerequisites. Courts and legislatures in the United States have consistently referred to the decree of divorce as a judgment which dissolves the bonds of matrimony. A bond is ordinarily understood, and defined, as a binding agreement or covenant. Thus, while marriage is a status, it is certainly also a contract. Texas courts should recognize and treat it as such.

The old and specious argument that the recognition of a claim for breach of the marital contract would promote marital discord is the same reasoning that was finally discredited and spurned by the Texas Supreme Court in *Bounds v. Caudle*²¹⁸ in discarding the doctrine of interspousal tort immunity.²¹⁹ If a happy marriage exists, there will be no reason to assert the cause of action.²²⁰

There is no reason predicated on grounds of public policy that should preclude the recognition of a cause of action on behalf of a plaintiff spouse to recover damages from the defendant spouse in a divorce proceeding based on the "fault" of the defendant spouse, arising from breach of the contractual agreement, duties and obligations, and the termination of the reasonable pecuniary expectations that would be attributable to the full performance of the marriage contract. Neither is there any public policy basis to preclude the divorce court from including appropriate provisions in the divorce decree to subject the property of the defendant spouse to the satisfaction of such a claim which has thus been adjudicated with full due process of law. In fact, the recognition that such a cause of action and right of recovery exists, and will be enforced, would have the effect of providing a stabilizing force to help deter a spouse from abandoning the contractual obligations of a marriage. Such a policy would clearly be in furtherance of the public interest in the encouragement of the preservation of marriage as a basic social institution. At the same time, it would recognize the right of a spouse to recover damages for breach of the contract of marriage in like manner as the law now recognizes the right of one spouse to sue and recover damages from the other spouse for breach of any other contract. Courts in Texas recognize and enforce the right of spouses to contract with each other,²²¹ and afford them the same rights and remedies as any

218. 560 S.W.2d 925 (Tex. 1977), noted in 10 St. Mary's L.J. 205 (1978).

219. *Id.* at 927.

220. *Id.* at 927.

221. See, e.g., *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967); *Griffin v. Griffin*, 535 S.W.2d 42, 44 (Tex. Civ. App.—Austin 1976, no writ); *Coggin v. Coggin*, 204 S.W.2d 47, 53 (Tex. Civ. App.—Amarillo 1947, no writ).

other contracting parties would have.²²² One writer has observed that it is illogical to recognize a right of action to recover damages for breach of all other contracts except the contract of marriage.²²³ Last but not least, such a policy would provide an effective legal basis which courts in fault divorce proceedings could utilize to accomplish the desire to render a decree which will effectively evaluate, adjudge and enforce the full rights and remedies to which the plaintiff spouse is legally and equitably entitled.

CONCLUSION

For over one hundred years Texas divorce courts have been confused by the heavy influence of common law policy, rules and remedies applicable to the property rights of spouses in divorce proceedings, and have been frustrated by a public policy prohibition against permanent alimony. At the same time, there has been a continuing effort by the trial courts to make adequate provision for the post divorce economic welfare of the spouses based on the court's determination of their relative age, physical and mental condition, education, skills, earning capacity, wealth and many other "equity factors." In doing so, the courts established considerable precedent which purported to authorize a trial court in a divorce proceeding to make any division of, and to transfer any or all rights in, the community estate of both parties and the separate estate of either party, without regard to the nature or extent of the ownership rights of the parties. Divestment of property was not ordered in satisfaction of legal obligations established under due process of law, but rather in the exercise of the trial court's discretionary finding that it was "just and right." The recent decision of the Texas Supreme Court in *Eggemeyer* is a "lighthouse case" in which the court emphasizes that constitutional protection of property rights is a basic requirement in any order affecting the property rights of parties in a divorce proceeding. It shows a need for new approaches to a more effective solution to an old and subsisting social problem. The constitutional provision which the supreme court in *Eggemeyer* held

222. L. SIMPKINS, *SPEER'S TEXAS FAMILY LAW* § 22:42, at 509-10 (5th ed. 1976); see, e.g., *Vickers v. Vickers*, 553 S.W.2d 768, 769 (Tex. Civ. App.—Beaumont 1977, no writ) (enforced consent judgment which made husband pay taxes and utilities of wife's residence); *Wilson v. Wolf*, 274 S.W.2d 154, 158 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.) (wife had right to specific performance of contract with husband); *Coggin v. Coggin*, 204 S.W.2d 47, 54 (Tex. Civ. App.—Amarillo 1947, no writ) (judgment on note for money loaned by wife to husband).

223. O. SPEER, *MARITAL RIGHTS IN TEXAS* § 111, at 152 (4th ed. 1961).

prohibits a trial court in a divorce proceeding from divesting title to separate realty out of one spouse and vesting it in the other spouse in the exercise of its power under section 3.63 of the Texas Family Code is equally applicable, in the same manner, to the separate personal property of a spouse, and also to the undivided one-half interest which each spouse owns as community real or personal property. All property is equally protected. The court's determination, in *Eggemeyer*, that the only "estate of the parties" which a trial court has jurisdiction to divide under section 3.63 is community property, clearly removes any statutory basis for a trial court to "divide" any separate personalty. Aside from the constitutional prohibition, it is illogical to conceive of an implied power to "divide" property except as between joint owners. Since separate property is owned solely by a spouse it does not have the characteristic of jointly owned undivided interest which must exist for a valid "division" or partition of property rights. It seems logical, therefore, to construe the jurisdiction of the trial court, under section 3.63, to be confined to a division of the community real and personal property in the same way as a trial court would be compelled to divide by partition the property interest of other joint owners. Thus construed and applied, the language of section 3.63 does not authorize a court to make an unequal division of such property because of "equity factors" such as differences in the age, earning capacity or financial position of the parties. The statute requires "a division . . . in a manner that the court deems just and right, having due regard for the rights of each party" Properly construed, the statute provides that the trial court shall be guided by equity concepts and principles in determining the manner in which the division of the community estate will be made, but that in doing so, the court must insure that the property rights of each spouse in and to an undivided one-half interest in such community estate are duly protected and preserved in such "equitable" division.

Earning capacity is a right which belongs to a spouse as separate property. Damages recovered for injury to, interference with or loss of earning capacity are properly classified as separate property and are distinguishable from damages recovered for loss of earnings of a spouse during marriage which constitute community property. That portion of section 5.22(a) of the Family Code which classifies the earning capacity of a spouse during marriage as community property is an unconstitutional attempt by the legislature to fix the status of such property contrary to that which it has under the constitutional definition as separate property. The increase in edu-

cation and skill and the resulting enhancement in value of the earning capacity of a spouse during marriage by use, or at the expense of, the separate funds or property of the other spouse or the community labor, funds or property creates an equitable right of reimbursement which a divorce court may recognize and enforce in its decree. The court, applying the rule that reimbursement is purely a matter of equity, has discretion to consider the cost to the estate which made it possible to enhance the earning capacity, the benefits which will accrue to the spouse whose earning capacity has been enhanced, and the benefits to, and received by, the community estate of both spouses during their marriage by virtue thereof.

In the divorce decree which dissolves the marriage, the court should consider utilizing the various means and approaches which are available to the court to effectively grant appropriate relief with respect to interspousal claims, such as partnership accounting principles, reimbursement, equitable partition, owelty, equitable liens, injunctions, receivership, judgment liens and other collection remedies and procedures applicable and available in ordinary debtor and creditor relationships. If the interspousal claims are properly asserted and adjudicated in the divorce proceeding, there seems to be no reason why such a judgment on such claims could not be enforced as against any non-exempt property of the debtor ex-spouse in the same manner as against any other debtor. This approach would avoid the constitutional problem which arises from a direct divestment or an unequal division of property as a mode of "equitable division of the property of the spouses," and would also conform to the constitutional requirement of due process, or course of law, as a condition for the taking of property under article I, section 19 of the Texas Constitution.

Marriage is both a status and a contract. In a "fault" divorce proceeding, the trial court should recognize a cause of action for damages for breach of the express and implied contractual obligations of the marriage contract and provide for the recovery thereof. The adjudication of such a claim along with all of the other claims and matters pertinent to the dissolution of the marriage would enable the trial court to effectively evaluate, adjudicate and enforce *all* rights, claims, and remedies, legal and equitable, between the spouses. Such a policy is urgently needed, would serve the public interest, and should be recognized and implemented at the earliest opportunity.