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## The Legal Effect of Marital Separation Agreements upon Community Property Status: Is It Time to Amend the Constitutional Definition of Wife's Separate Property.

Teresa A. Hunter

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**THE LEGAL EFFECT OF MARITAL SEPARATION  
AGREEMENTS UPON COMMUNITY PROPERTY STATUS: IS IT  
TIME TO AMEND THE CONSTITUTIONAL DEFINITION OF  
WIFE'S SEPARATE PROPERTY?**

**TERESA A. HUNTER**

	<i>Page</i>
I. Separation and Separation Agreements .....	160
II. Separation and Separation Agreements in Texas .....	160
III. Origin of Community Property in Texas .....	163
IV. Legal Effect of Separation in Texas .....	166
V. Need for Change of Legal Effect of Separation in Texas ..	168
VI. Separation in Other Community Property Jurisdictions ..	170
VII. Recommendations for Texas .....	173
VIII. Conclusion .....	176

During a lifetime of marriage a couple faces a sixty to eighty percent chance that marital discord will lead to some sort of separation.<sup>1</sup> In the United States it is estimated that thirty percent of couples who marry eventually divorce and sixty percent will separate at some time during their marriage.<sup>2</sup> These estimates illustrate the need for attention by law makers to the needs of separated couples. A period of marital separation is inherently difficult, and in Texas it is more disconcerting because the couple is in a legal limbo. The law views separation as a continuation of the technical bonds of marriage and regards the couple as united for all intents and purposes,<sup>3</sup> while in actuality the couple is not acting in furtherance of the marriage.<sup>4</sup>

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1. See Bruch, *The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change*, 65 CALIF. L. REV. 1015, 1016 (1977) (citing R. WEISS, MARITAL SEPARATION 11 (1975) and W. GOODE, AFTER DIVORCE 174 (1956)).

2. See *id.* at 1016 n.1.

3. See *Tanton v. State Nat'l Bank*, 125 Tex. 16, 18, 79 S.W.2d 833, 835 (1935) (limited divorce from bed and board unknown in Texas); *Cage v. Cage*, 209 S.W.2d 626, 628 (Tex. Civ. App.—San Antonio 1948, writ ref'd n.r.e.) (only form of Texas divorce is that which dissolves the bonds of matrimony).

4. See *Selby v. Selby*, 148 S.W.2d 854, 856 (Tex. Civ. App.—Amarillo 1941, no writ) (no longer acting together as husband and wife); *Corrigan v. Goss*, 160 S.W. 652, 655 (Tex. Civ. App.—El Paso 1931, writ ref'd) (“no longer . . . acting . . . in their legal capacity of husband and wife”).

This comment will discuss the absence of a definite legal status for separated couples in Texas and the problems concerning property rights encountered by these couples. Consideration will be given to the reasoning that influenced the courts and legislature to ignore the problems of separated couples, and recommendations will be proposed for changes in the existing law.

### I. SEPARATION AND SEPARATION AGREEMENTS

There are three general means of effecting a marital separation<sup>5</sup> in the United States: separation by a judgment of a court, separation by written or oral agreement, or informal separation merely by terminating cohabitation.<sup>6</sup> Separation differs from divorce because the parties are still married, although generally separated from bed and board.<sup>7</sup> Generally, separation agreements are in writing and provide for the distribution of marital property, child custody, and support payments.<sup>8</sup> Regardless of whether the separation agreement entered into is written or oral, its purpose is to determine the rights and obligations of the individual spouses.<sup>9</sup>

### II. SEPARATION AND SEPARATION AGREEMENTS IN TEXAS

Neither the Texas Constitution nor Texas statutes provide for court

5. Separation in matrimonial law is a cessation of spousal cohabitation with or without agreement or by decree of court. *Kau v. Bennett*, 571 P.2d 819, 821 (N.M. Ct. App. 1977); see *Cusack v. Cusack*, 491 S.W.2d 714, 718 (Tex. Civ. App.—Corpus Christi 1973, writ *dism'd*) (living apart without cohabitation constitutes separation).

6. See P. CALLAHAN, *THE LAW OF SEPARATION AND DIVORCE* 40 (3d ed. 1970). An informal separation is established when the parties cease to cohabit without making an agreement to adjust their rights. *Id.*

7. Separation from bed and board assumes a cessation of marital relations and social life together between husband and wife; however, the parties are not restored to a state of unmarried persons. *Accord*, *Novak v. Novak*, 24 N.W.2d 20, 24 (N.D. 1946); see *George v. Reynolds*, 53 S.W.2d 490, 493-94 (Tex. Civ. App.—Eastland 1932, writ *dism'd*); *Kearse v. Kearse*, 262 S.W. 561, 564 (Tex. Civ. App.—Dallas 1924), *aff'd*, 276 S.W. 690 (Tex. Comm'n App. 1930, judgment adopted). See generally Huie, *Commentary on the Community Property Laws of Texas*, 13 TEX. REV. CIV. STAT. ANN. 44 (Vernon 1960).

8. See *Tinsley v. Tinsley*, 512 S.W.2d 74, 75-76 (Tex. Civ. App.—Waco 1974, no writ) (separation agreement determining custody of child, support payments, and property division); *Simpson v. Simpson*, 387 S.W.2d 717, 719 (Tex. Civ. App.—Eastland 1965, no writ) (separation agreement dividing property).

9. See, e.g., *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ) (written separation agreement can settle property rights between husband and wife); *Loston v. Loston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ *dism'd*) (verbal separation agreement held valid); *Callicoatte v. Callicoatte*, 417 S.W.2d 618, 621 (Tex. Civ. App.—Waco 1967, writ *ref'd n.r.e.*) (parol separation agreement settling property interests valid).

ordered separation;<sup>10</sup> therefore, married couples in Texas may only separate informally or by agreement.<sup>11</sup> Despite the absence of any constitutional or statutory authority, Texas courts have long recognized separation agreements.<sup>12</sup> Separation agreements complying with contract formalities have been upheld by the courts.<sup>13</sup> Additionally, separation agreements must meet the following criteria: the husband and wife must be separated<sup>14</sup> or be in the act of executing a separation when the agreement is made;<sup>15</sup> the couple must intend the separation be permanent;<sup>16</sup> and, there must be an equitable division of the community property.<sup>17</sup>

It is clearly settled in Texas case law that an agreement for future sepa-

10. See *Tanton v. State Nat'l Bank*, 125 Tex. 16, 18, 79 S.W.2d 833, 835 (1935) (limited divorce from bed and board unknown in Texas); *Cage v. Cage*, 209 S.W.2d 626, 628 (Tex. Civ. App.—San Antonio 1948, writ ref'd n.r.e.) (only divorce dissolves the bonds of matrimony).

11. See *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ) (separation agreement not dependent on constitutional or statutory authority); *Worden v. Worden*, 222 S.W.2d 254, 257 (Tex. Civ. App.—El Paso), *rev'd on other grounds*, 148 Tex. 356, 224 S.W.2d 187 (1949) (separation by agreement or by either party refusing to live with the other).

12. See, e.g., *Rains v. Wheeler*, 76 Tex. 390, 391, 13 S.W. 324, 325-26 (1890) (upheld fair and equitable division of property between separated couple); *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ) (separation agreements long judicially recognized if fair and equitable); *Loston v. Loston*, 424 S.W.2d 316, 317 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ *dism'd*) (well established that separated spouses may contract between themselves).

13. See, e.g., *Miller v. Miller*, 463 S.W.2d 477, 480 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.) (sufficient consideration to support the agreement); *Smith v. Smith*, 460 S.W.2d 204, 207 (Tex. Civ. App.—Dallas 1970, no writ) (upheld contractual obligation of separation agreement); *Lee v. Lee*, 275 S.W.2d 574, 576 (Tex. Civ. App.—Texarkana 1955, writ *dism'd*) (agreement was interpreted in light of contract law).

14. See, e.g., *Rains v. Wheeler*, 76 Tex. 390, 391, 13 S.W. 324, 325-26 (1890) (separation agreement valid when spouses already separated); *Loston v. Loston*, 424 S.W.2d 316, 317 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ *dism'd*) (if parties actually separated, separation agreement valid); *Blaine v. Blaine*, 207 S.W.2d 989, 994 (Tex. Civ. App.—Dallas 1947, no writ) (contract for future separation void).

15. See *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 409 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.) (Denton, J., dissenting) (agreement valid when made in process of executing a separation); *Simpson v. Simpson*, 387 S.W.2d 717, 719 (Tex. Civ. App.—Eastland 1965, no writ) (husband and wife decided upon marital separation and were in act of carrying it out).

16. See *Loston v. Loston*, 424 S.W.2d 316, 317 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ *dism'd*) (intention to continue to live apart, therefore agreement valid); *Callicoatte v. Callicoatte*, 417 S.W.2d 618, 621 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.) (separation intended as permanent).

17. See *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ); *Wheat v. Wheat*, 239 S.W. 667, 668 (Tex. Civ. App.—San Antonio 1922, no writ).

ration is void as being contrary to public policy.<sup>18</sup> Case law, however, has not clearly defined the term "separate"; instead, the definition appears to be "separate and apart,"<sup>19</sup> although one court has declared the couple must only be separated from bed, but not from board.<sup>20</sup> This definition suggests that the couple's intention determines whether they are separated.<sup>21</sup>

Oral separation agreements, dividing property pursuant to an oral contract, are also enforced.<sup>22</sup> Adherence to the Statute of Frauds is unnecessary for the validity of such agreements,<sup>23</sup> thus allowing the oral partition of community property upon separation.<sup>24</sup> Texas courts ignore the Statute of Frauds when enforcing separation agreements,<sup>25</sup> recognizing separation agreements as an exception to the rules requiring written partition

18. See, e.g., *Simpson v. Simpson*, 387 S.W.2d 717, 719 (Tex. Civ. App.—Eastland 1965, no writ); *Rodriguez v. Rodriguez*, 233 S.W.2d 916, 918 (Tex. Civ. App.—Waco, 1950, no writ); *Blaine v. Blaine*, 207 S.W.2d 989, 994 (Tex. Civ. App.—Dallas 1947, no writ).

19. See *Myles v. Arnold*, 162 S.W.2d 442, 445 (Tex. Civ. App.—El Paso 1942, writ ref'd) (couple living together as husband and wife are not "separate and apart"); *Wheat v. Wheat*, 239 S.W. 667, 668 (Tex. Civ. App.—San Antonio 1922, no writ) (must intend to remain permanently apart).

20. See *Levy v. Goldsoll*, 131 S.W. 420, 421 (Tex. Civ. App. 1910, writ ref'd).

21. See *id.* at 421. The couple, although living in the same apartment, did not occupy the same bedroom and did not intend to act towards one another as husband and wife. *Id.* at 421.

22. See, e.g., *Liston v. Liston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ dismissed) (verbal separation agreement held valid); *Callicoatte v. Callicoatte*, 417 S.W.2d 618, 621 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.) (parol partition upon separation valid and enforceable); *Cantrell v. Woods*, 150 S.W.2d 838, 840 (Tex. Civ. App.—Waco 1941, no writ) (parol partition of property upon separation upheld). *But see* Comment, *Misconceptions of Parol Partitions in Texas in Light of Statute of Frauds Requirements*, 23 BAYLOR L. REV. 75, 91-95 (1971). See generally Comment, *The Effectiveness of Parol Partitions of Community Property*, 22 BAYLOR L. REV. 52 (1970).

23. See *Liston v. Liston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ dismissed) (Statute of Frauds not applicable to separation agreements); *cf.* *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 409 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.) (Denton, J., dissenting) (requirements of article 4624a (current version at TEX. FAM. CODE ANN. § 5.42 (Vernon 1975)) not applicable to a separation agreement partitioning community property).

24. See, e.g., *Liston v. Liston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ dismissed); *Callicoatte v. Callicoatte*, 417 S.W.2d 618, 621 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.); *Cantrell v. Woods*, 150 S.W.2d 838, 840 (Tex. Civ. App.—Waco 1941, no writ).

25. See *Liston v. Liston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ dismissed); *cf.* *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 409 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.) (Denton, J., dissenting) (argued separation agreements are excepted from Statute of Frauds requirements). *But see* *Hilley v. Hilley*, 161 Tex. 569, 572, 342 S.W.2d 565, 567-68 (1961) (separation agreements not included as exception to definition of wife's separate property).

of community property by cohabitating spouses.<sup>26</sup>

### III. ORIGIN OF COMMUNITY PROPERTY IN TEXAS

The community property system of Texas was derived from Spanish civil law and retained when English common law was adopted in 1840.<sup>27</sup> A major consideration for retaining community property was the protection of property rights of married women.<sup>28</sup> Unlike common law, the community property system preserved to the wife the individual ownership of her separate property.<sup>29</sup> Marital partnership, the cornerstone of the Spanish community property system, made the wife co-owner of all wealth accumulated during marriage with the exception of property given "separate" status.<sup>30</sup> This form of ownership was more favorable to the wife than common law rules which gave the husband a freehold estate or inter-

26. A partition agreement by a husband and wife contemplating continued conjugal relations is governed by the Texas Family Code. The validity of a partition agreement by a separated couple, however, is determined by case law precedent, which only requires the agreement be fair and equitable. *See, e.g.,* *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 409 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.) (Denton, J., dissenting); *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ); Comment, *The Effectiveness of Parol Partition of Community Property*, 22 BAYLOR L. REV. 52, 58 (1970).

27. *See Rompel v. United States*, 59 F. Supp. 483, 486 (W.D. Tex.) (community property the law of Texas before and after becoming a state), *rev'd on other grounds*, 326 U.S. 367 (1945); 1840 Tex. Gen. Laws, ch. 2, § 1, at 3, 2 H. GAMMEL, LAWS OF TEXAS 177 (1898).

28. *See, e.g.,* *Dickson v. Strickland*, 114 Tex. 176, 202, 265 S.W. 1012, 1022 (1924) (state's obvious purpose of first regulations of marital rights to exclude rules of common law that precluded wife's interest in separate estate); *Barkley v. Dumke*, 99 Tex. 150, 152, 87 S.W. 1147, 1147 (1905) (application of common law rules would lead to gross injustice for married women); *Cartwright v. Hollis*, 5 Tex. 152, 163-64 (1849) (community system preserved to wife ownership of her separate property). *See generally* Huie, *The Texas Constitutional Definition of Wife's Separate Property*, 35 TEXAS L. REV. 1054, 1054-55 (1957).

29. *See, e.g.,* *Dickson v. Strickland*, 114 Tex. 176, 202, 265 S.W. 1012, 1022 (1924) (disabilites under common law as to wife's property rights not adopted); *Barkley v. Dumke*, 99 Tex. 150, 152, 87 S.W. 1147, 1147 (1905) (protect the wife's right to hold property); *Cartwright v. Hollis*, 5 Tex. 152, 164 (1849) (rules preserved wife's separate property). *See generally* L. SIMPKINS, SPEER'S TEXAS FAMILY LAW § 12.2 (5th ed. 1976); Huie, *The Texas Constitutional Definition of Wife's Separate Property*, 35 TEXAS L. REV. 1054, 1056 (1957).

30. *Accord*, NOVISIMA RECOPIACION, Book 10, Title 4, Law 1 (1805), in 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 12 (1943); Matienzo, *Commentary to Novisima Recopilacion*, Book 10, Title 4, Law 1, Gloss I, Nos. 1-3 in 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 72-74 (1943); *see* *Lifson v. Dorfman*, 491 S.W.2d 198, 200 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.); *George v. Taylor*, 296 S.W.2d 620, 623 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.). Under Spanish law property acquired after marriage by gift or inheritance or the like became the separate property of the acquiring spouse. NOVISIMA RECOPIACION, Book 10, Title 4, Law 2 (1805), in 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 13 (1943); *see* *Graham v. Franco*, 488 S.W.2d 390, 392-95 (Tex. 1972).

est in the real property of his wife.<sup>31</sup> Under common law the husband was also entitled to the possession, use, and income of the property.<sup>32</sup> By virtue of marriage, the wife's tangible personal property became vested in her husband.<sup>33</sup>

Texas not only adopted the Spanish doctrine of marital partnership, but also the Spanish definitions of separate and community property.<sup>34</sup> To secure the married woman's property rights, the definition of the wife's separate property was written into the state constitution of 1845.<sup>35</sup> This definition is regarded as exclusive<sup>36</sup> and has remained unchanged.<sup>37</sup> The origin of the constitutional definition of marital property requires Texas courts to consider Spanish rules when applying community property principles,<sup>38</sup> thus avoiding an incorrect application of common law

31. See *Dickson v. Strickland*, 114 Tex. 176, 202, 265 S.W. 1012, 1022 (1924). Under common law upon marriage the wife's legal existence is extinguished, and all her personal property rights and a lifetime freehold estate on her realty vests in the husband. *Cartwright v. Hollis*, 5 Tex. 152, 155 (1849). The community property system makes the wife an equal owner of all community property; unlike under common law the wife does not take her title through or under her husband. *Rompel v. United States*, 59 F. Supp. 483, 486 (W.D. Tex.), *rev'd on other grounds*, 326 U.S. 367 (1945).

32. See *Bank of America v. Banks*, 101 U.S. 240, 243 (1879); *Hollis v. Francois*, 5 Tex. 195, 200 (1849). See generally L. SIMPKINS, SPEER'S TEXAS FAMILY LAW § 12.2 (5th ed. 1976).

33. See, e.g., *Bank of America v. Banks*, 101 U.S. 240, 243 (1879); *Jackson v. Jackson*, 91 U.S. 122, 124 (1875); *Dickson v. Strickland*, 114 Tex. 176, 202, 265 S.W. 1012, 1022 (1924). See generally 1 AMERICAN LAW OF PROPERTY § 5.6 (1952). The wife, however, does receive the advantages of dower as long as the husband dies first. See 1 AMERICAN LAW OF PROPERTY § 5.6 (1952).

34. See *Lee v. Lee*, 112 Tex. 392, 398, 247 S.W. 828, 830 (1923) (principles of civil law basis of laws relating to community property). See generally NOVISIMA RECOPIACION, Book 10, Title 4, Law 1 (1805), in 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 12-13 (1943); Matienzo, *Commentary to Novisima Recopilacion, Book 10, Title 4, Law 1, Gloss 1, Nos. 3-7*, in 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 73-76 (1943).

35. See TEX. CONST. art. VII, § 19 (1845). The definition of wife's separate property reads, "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; . . ." *Id.*

36. Texas courts hold the constitutional definition of the wife's separate property denies separate status to property acquired by means other than those defined therein. See, e.g., *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972); *Hilley v. Hilley*, 161 Tex. 569, 572, 342 S.W.2d 565, 567-68 (1961); *Arnold v. Leonard*, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925).

37. See TEX. CONST. art. XVI, § 15. The Spanish definition of the wife's separate property was changed to read "spouse's separate property" in the Texas Family Code. See TEX. FAM. CODE ANN. § 5.01(a) (Vernon 1975).

38. See *Sandoval v. Priest*, 210 F. 814, 816 (5th Cir. 1914) (take judicial notice of laws in force prior to Texas independence); *Leake v. Saunders*, 126 Tex. 69, 73, 84 S.W.2d 993, 994 (1935) (common law principles not applicable because marital rights have their origin in civil law of Spain); cf. *Rompel v. United States*, 59 F. Supp. 483, 486 (W.D. Tex.) (community property "law of Texas stems from the civil law"), *rev'd on other grounds*, 326 U.S. 367

marital property principles to the community property system.<sup>39</sup>

The most significant presumption of the marital partnership doctrine is that all property acquired during the marriage is a result of the joint and equal effort of the spouses.<sup>40</sup> The doctrine is not realistically applicable, however, after a couple separates.<sup>41</sup> Upon separation the couple abandons the joint efforts that furthered the success of the marriage, and their "will to union" is no longer present.<sup>42</sup> Spanish law required cohabitation for the community in "gains and acquêts"<sup>43</sup> to continue.<sup>44</sup> If there ceased to be cohabitation, the partnership in "gains and acquêts" terminated because the partnership was based on a mutual sharing of the burdens of marriage.<sup>45</sup> Once a couple had separated the subsequent "gains and acquêts" of each became his or her property.<sup>46</sup> The constraints of the Texas definition of separate property, therefore, should not be applicable to sep-

(1945). See generally R. BALLINGER, COMMUNITY PROPERTY § 257 (1895).

39. See *Leake v. Saunders*, 126 Tex. 69, 73, 84 S.W.2d 993, 994 (1935) (common law principles not applicable); *Edrington v. Mayfield*, 5 Tex. 363, 367 (1849) (must look to Spanish rules for guidance not to common law). See generally R. BALLINGER, COMMUNITY PROPERTY § 257 (1895).

40. See, e.g., *In re Holloway's Estate*, 175 F.2d 672, 674 (9th Cir. 1949); *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972); *Hardee v. Vincent* 136 Tex. 99, 103, 147 S.W.2d 1072, 1073 (1941). See generally TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975).

41. See *Selby v. Selby*, 148 S.W.2d 854, 856 (Tex. Civ. App.—Amarillo 1941, no writ) (no longer acting together so spouse may acquire own property unencumbered by marital relation); *Corrigan v. Goss*, 160 S.W. 652, 655 (Tex. Civ. App.—El Paso 1931, writ ref'd) (no longer acting in legal capacity of husband and wife). See generally Huie, *Commentary on the Community Property Laws of Texas*, 13 TEX. REV. CIV. STAT. ANN. 44 (Vernon 1960).

42. See *Selby v. Selby*, 148 S.W.2d 854, 856 (Tex. Civ. App.—Amarillo 1941, no writ); *Corrigan v. Goss*, 160 S.W. 652, 655 (Tex. Civ. App.—El Paso 1931, writ ref'd).

43. Under Spanish community property law the term "gains and acquêts" referred to earnings, gains, and acquisitions of husband and wife. See generally W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971).

44. See Matienzo, *Commentary to Novisima Recopilacion, Book 10, Title 4, Law 1, Gloss I., Nos. 56, 57*, in 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 112-13 (1943).

45. Accord, *id.* Texas courts have similarly held property acquired by separated spouses, who are no longer acting in their legal capacity as husband and wife, becomes the acquiring spouse's separate property. Cf. *Selby v. Selby*, 148 S.W.2d 854, 856 (Tex. Civ. App.—Amarillo 1941, no writ) (separated spouse may acquire property unencumbered by marital relation); *Corrigan v. Goss*, 160 S.W. 652, 655 (Tex. Civ. App.—El Paso 1931, writ ref'd) (property acquired after separation separate because no longer acting in legal capacity as husband and wife).

46. The subsequent acquisitions and gains became the separate property of the acquiring spouse when the separation was due to the fault of neither party. Matienzo, *Commentary to Novisima Recopilacion, Book 10, Title 4, Law 1, Gloss I., Nos. 56, 57*, in 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 112-13 (1943); accord, W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 506 (2d ed. 1971). Other community property jurisdictions have adopted statutes reflecting the Spanish rule. See CAL. CIV. CODE § 5118 (Deering 1971); N.M. STAT. ANN. § 40-3-8 (1978).



arated couples if interpreted in light of Spanish rules.<sup>47</sup>

#### IV. LEGAL EFFECT OF SEPARATION IN TEXAS

Despite the cessation of the conjugal partnership in "gains and acquêts," mere separation will have no effect on the rules determining the separate or community character of property in Texas.<sup>48</sup> Case law has modified the rules to allow separating couples to alter contractually the status of their existing community property.<sup>49</sup> Agreements dividing existing community property may be made whereby each spouse receives individual ownership of specific parts of the community property.<sup>50</sup> The criteria governing separation agreements can be distinguished from the rules controlling the partition of community property by unseparated couples.<sup>51</sup> The courts strictly adhere to the constitutional and statutory provisions when considering partition of community property by unseparated couples,<sup>52</sup> requiring the division be in writing.<sup>53</sup> For separation

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47. *Cf. Sandoval v. Priest*, 210 F. 814, 816 (5th Cir. 1914) (judicial notice taken of Spanish rules influencing Texas laws); *Graham v. Franco*, 488 S.W.2d 390, 395 (Tex. 1972) (adopted Spanish law without intention to change it); *Leake v. Saunders*, 126 Tex. 69, 73, 84 S.W.2d 993, 994 (1935) (laws derived from civil law of Spain). *See generally* R. BALLINGER, COMMUNITY PROPERTY § 255 (1895). The application of Spanish rules to community property principles in other community property jurisdictions will be discussed in depth in a subsequent section of this comment.

48. *See, e.g., Cage v. Cage*, 209 S.W.2d 626, 628 (Tex. Civ. App.—San Antonio 1948, writ ref'd n.r.e.) (only divorce dissolves bonds of matrimony); *George v. Reynolds*, 53 S.W.2d 490, 493 (Tex. Civ. App.—Eastland 1932, writ dismissed) (if still married, though separated, property acquired is community); *Kearse v. Kearse*, 262 S.W. 561, 564 (Tex. Civ. App.—Dallas 1924), *aff'd*, 276 S.W. 690 (Tex. Comm'n App. 1925, judgment adopted) (separated wife does not forfeit subsequent gains by husband).

49. *See Rains v. Wheeler*, 76 Tex. 390, 392, 13 S.W. 324, 325-26 (1890) (separated couple can divide property); *Amarillo Nat'l Bank v. Liston*, 464 S.W. 395, 409 (Tex. Civ. App.—Amarillo 1970, no writ) (Denton, J., dissenting) (separation agreements to partition existing community property valid); *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ) (not dependent on constitutional or statutory authorization).

50. *See, e.g., Standard v. Standard*, 199 S.W.2d 180, 181 (Tex. Civ. App.—Austin 1947, no writ); *Moor v. Moor*, 255 S.W. 231, 234 (Tex. Civ. App.—San Antonio 1900, writ ref'd); *Batla v. Batla*, 51 S.W. 664, 665 (Tex. Civ. App. 1899, no writ).

51. A partition agreement by a husband and wife contemplating continued conjugal relations is governed by TEX. FAM. CODE ANN. § 5.42 (Vernon 1975). The validity of a partition agreement by a separated couple, however, is determined by case law precedent, and the only requirement is that it be fair and equitable. *Accord, Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 409 (Tex. Civ. App.—Amarillo 1970, no writ) (Denton J., dissenting); *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ); *Loston v. Loston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

52. *See* TEX. FAM. CODE ANN. § 5.42 (Vernon 1975). This section reads,

(a) At any time, the spouses may partition between themselves, in severalty or in

agreements there are no writing or recordation requirements,<sup>54</sup> and the partition need only be equitable.<sup>55</sup>

Although Texas courts acknowledge separation agreements, couples must meticulously construct their agreements. Should subsequent litigation prove necessary, vague or ambiguous agreements will not withstand judicial scrutiny.<sup>56</sup> Texas law allows separating couples to adjust contrac-

equal undivided interests, all or any part of their community property. They may exchange between themselves the interest of one spouse in community property for the interest of the other spouse in other community property. A partition or exchange must be in writing and subscribed by both parties.

(b) Subject to the rules stated in Subsections (c) and (d) of this section, property or a property interest transferred to a spouse under a partition or exchange becomes his or her separate property.

(c) A partition or exchange does not prejudice the rights of preexisting creditors.

(d) A partition or exchange agreement may be recorded in the deed records of the county in which the parties, or one of them, reside and in the county or counties in which the real property affected is located. As to real property, a partition or exchange agreement is not constructive notice to a good faith purchaser for value or a creditor without actual notice unless the instrument is acknowledged and recorded in the county in which the real property is located.

*Id.*; see *Bowman v. Simpson*, 546 S.W.2d 99, 102 (Tex. Civ. App.—Beaumont 1977, writ ref'd) (partition must be in accordance with statute); *Evans v. Muller*, 510 S.W.2d 651, 654 (Tex. Civ. App.—Austin 1974), *rev'd on other grounds*, 516 S.W.2d 923 (Tex. 1975) (requirements of Texas Family Code section 5.42(a) not met therefore transfer void). See generally Comment, *Misconceptions of Parol Partitions in Texas in Light of Statute of Frauds Requirements*, 23 BAYLOR L. REV. 75 (1971); Comment, *The Effectiveness of Parol Partition of Community Property*, 22 BAYLOR L. REV. 52 (1970).

53. See, e.g., *Free v. Bland*, 369 U.S. 663, 664 n.1 (1962) (manner of property partition required by the statute); *Bowman v. Simpson*, 546 S.W.2d 99, 102 (Tex. Civ. App.—Beaumont 1977, writ ref'd) (must be in accordance with statute); *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ) (validity of agreement governed by art. 16, sec. 15 of constitution which requires writing). See generally Comment, *Misconceptions of Parol Partitions in Texas in Light of Statute of Frauds Requirements*, 23 BAYLOR L. REV. 75 (1971); Comment, *The Effectiveness of Parol Partition of Community Property*, 22 BAYLOR L. REV. 52 (1970).

54. See *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ) (only requirement for separation agreement is to be fair and equitable); *Loston v. Loston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ) (agreement valid if fair and equitable). *But see* TEX. FAM. CODE ANN. § 5.42 (Vernon 1975) (provides for recordation of partitions by cohabitating couples).

55. See *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ) (agreements recognized if fair and equitable); *Wheat v. Wheat*, 239 S.W. 667, 668 (Tex. Civ. App.—San Antonio 1922, no writ) (if fair and equitable agreement upheld); *Moor v. Moor*, 255 S.W. 231, 234 (Tex. Civ. App.—San Antonio, 1900 writ ref'd) (only in case of death of husband is wife entitled as a matter of law to equal one half of community estate).

56. See, e.g., *Pritchard v. Estate of Tuttle*, 534 S.W.2d 946, 951 (Tex. Civ. App.—Amarillo 1976, no writ) (oral agreement invalid because conversation did not intend partition); *Motheral v. Motheral*, 514 S.W.2d 475, 478 (Tex. Civ. App.—Corpus Christi 1974,

tually present property rights but prohibits the alteration of the status of future acquired property from a community to a separate character.<sup>57</sup> The Texas Supreme Court declared unconstitutional any attempt by the legislature to alter the constitutionally defined separate and community property in absence of a constitutional amendment.<sup>58</sup> The Texas Supreme Court also expanded this interpretation, ruling that since the legislature is powerless to alter the character of property, then any attempt by individuals to change the character of unacquired property will also be ineffectual.<sup>59</sup>

#### V. NEED FOR CHANGE OF LEGAL EFFECT OF SEPARATION IN TEXAS

To avoid future controversies over community and separate property, the constitutional definition of separate property as interpreted by Texas courts, although contrary to Spanish law, limits the contractual power of a married couple upon separation.<sup>60</sup> In contravention of public policy, current Texas law encourages divorce rather than mere separation.<sup>61</sup> Incentive to divorce is provided by the inability of a married couple to determine their future rights and obligations in marital property except by

writ ref'd n.r.e.) (separation agreement void because ambiguous); *Thurman v. Fatheree*, 325 S.W.2d 183, 186 (Tex. Civ. App.—San Antonio 1959, writ dismissed) (agreement unenforceable because too vague, indefinite and uncertain).

57. See *Williams v. Williams*, 569 S.W.2d 867, 870 (Tex. 1978) (future acquisitions are community); *George v. Reynolds*, 53 S.W.2d 490, 493 (Tex. Civ. App.—Eastland 1932, writ dismissed) (separated husband and wife cannot determine status of future property).

58. See *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963); *Arnold v. Leonard*, 114 Tex. 535, 541, 273 S.W. 799, 805 (1925).

59. See, e.g., *Williams v. Williams*, 569 S.W.2d 867, 870 (Tex. 1978) (agreements dividing future acquired property are constitutionally invalid); *Hilley v. Hilley*, 161 Tex. 569, 572, 342 S.W.2d 565, 567 (1961) (parties may not stipulate whether property is separate or community); *King v. Bruce*, 145 Tex. 647, 656, 201 S.W.2d 803, 809 (1947) (if legislature cannot alter status of property neither can individuals).

60. See, e.g., *Routh v. Routh*, 57 Tex. 589, 600 (1882) (separation of husband and wife does not work forfeiture of subsequently acquired rights in property); *George v. Reynolds*, 53 S.W.2d 490, 493 (Tex. Civ. App.—Eastland 1932, writ dismissed) (husband and wife have no power to change by agreement status of future acquired property); *Kearse v. Kearse*, 262 S.W. 561, 564 (Tex. Civ. App.—Dallas 1924) (community continues with the existence of the marriage), *aff'd*, 276 S.W. 690 (Tex. Comm'n App. 1925, judgment adopted). *But see Jernigan v. Scott*, 518 S.W.2d 278, 284 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (allowed to finally dispose of all matters of controversy, present and future).

61. Cases indicate once the marital relationship is formed, unless terminated by death or divorce, it secures to either spouse a community interest in all property subsequently acquired by either party. See, e.g., *Routh v. Routh*, 57 Tex. 589, 595 (1882); *George v. Reynolds*, 53 S.W.2d 490, 493 (Tex. Civ. App.—Eastland 1932, writ dismissed); *Kearse v. Kearse*, 262 S.W. 561, 564 (Tex. Civ. App.—Dallas 1924), *aff'd*, 276 S.W. 690 (Tex. Comm'n App. 1925, judgment adopted). *But see Jernigan v. Scott*, 518 S.W.2d 278, 284 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

divorce.<sup>62</sup> Rather than being allowed to determine their rights in all existing and future acquired property at the time of separation,<sup>63</sup> a couple is compelled to recontract periodically for the division of all gains and acquisitions acquired subsequent to their separation.<sup>64</sup> If the couple fails to recontract or they separate without an agreement,<sup>65</sup> each spouse acquires an individual one-half interest in the other's post-separation gains and acquisitions lacking the constitutional status of "separate property."<sup>66</sup>

Currently a spouse in Texas is generally liable for the unintentional torts committed by the other spouse.<sup>67</sup> Damages awarded against one spouse may be satisfied from the couple's community property.<sup>68</sup> Community liability for torts committed after separation could cause inequitable results by subjecting the post-separation earnings and acquisitions of the innocent spouse to the satisfaction of damages arising out of the other spouse's tortious conduct.<sup>69</sup> The potential for financial injustice to the innocent spouse further indicates the need for change in the existing law governing separated couples.

Post-separation debts also create special problems for separated couples. In Texas all debts incurred during marriage are presumed debts

62. See *Jernigan v. Scott*, 518 S.W.2d 278, 284 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); *George v. Reynolds*, 53 S.W.2d 490, 493-94 (Tex. Civ. App.—Eastland 1932, writ dismissed); *Kearse v. Kearse*, 262 S.W. 561, 564 (Tex. Civ. App.—Dallas 1924), *aff'd*, 276 S.W. 690 (Tex. Comm'n App. 1925, judgment adopted).

63. See *George v. Reynolds*, 53 S.W.2d, 490, 493 (Tex. Civ. App.—Eastland 1932, writ dismissed) (property acquired after separation agreement is community); *Kearse v. Kearse*, 262 S.W. 561, 564 (Tex. Civ. App.—Dallas 1924), *aff'd*, 276 S.W. 690 (Tex. Comm'n App. 1925, judgment adopted) (do not forfeit gains subsequent to separation agreement).

64. See *Jernigan v. Scott*, 518 S.W.2d 278, 283 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

65. An informal separation without an agreement happens when a couple merely ceases to cohabit. Cf. *Cusack v. Cusack*, 491 S.W.2d 714, 718 (Tex. Civ. App.—Corpus Christi 1973, writ dismissed) (living apart without cohabitation may be basis for divorce).

66. See *George v. Reynolds*, 53 S.W.2d 490, 493-94 (Tex. Civ. App.—Eastland 1932, writ dismissed); *Kearse v. Kearse*, 262 S.W. 561, 564 (Tex. Civ. App.—Dallas 1924), *aff'd*, 276 S.W. 690 (Tex. Comm'n App. 1925, judgment adopted).

67. See TEX. FAM. CODE ANN. § 5.61 (Vernon 1975).

68. See *Anda v. Black*, 562 S.W.2d 497, 501 (Tex. Civ. App.—San Antonio 1978, no writ); *Maness v. Reese*, 489 S.W.2d 660, 665 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.); TEX. FAM. CODE ANN. § 5.61(d) (Vernon 1975).

69. A comparison of the case law holding property acquired after separation to be community with case law holding community property subject to tortious liability of either spouse suggests property acquired by either spouse after separation is subject to tortious liability of either spouse. Compare *George v. Reynolds*, 53 S.W.2d 490, 493 (Tex. Civ. App.—Eastland 1932, writ dismissed) and *Kearse v. Kearse*, 262 S.W. 561, 564 (Tex. Civ. App.—Dallas 1924), *aff'd*, 276 S.W. 690 (Tex. Comm'n App. 1925, judgment adopted) with *Anda v. Black*, 562 S.W.2d 497, 501 (Tex. Civ. App.—San Antonio 1978, no writ) and *Maness v. Reese*, 489 S.W.2d 660, 665 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

of the community,<sup>70</sup> and generally the community property is liable for the payment of these debts, unless the creditor agrees to look exclusively to the contracting spouse for repayment.<sup>71</sup> Under this view, since a separated couple is still married, either spouse may be held responsible for the debts incurred by the other after separation.<sup>72</sup> The Texas Family Code offers some relief by providing that "the community property subject to a spouse's sole management, control, and disposition is not subject to . . . any nontortious liabilities that the other spouse incurs during marriage."<sup>73</sup> To be relieved of liability, however, a spouse must prove a debt contracted by the other spouse provided no benefit to the community.<sup>74</sup> The Family Code further provides a judge may make an equitable determination of the order "which particular separate or community property will be subject to execution and sale to satisfy a judgment" when any combination of community and separate property is the subject of liability.<sup>75</sup> The noncontracting spouse may, therefore, still become liable for the post-separation indebtedness of the other spouse.<sup>76</sup>

#### VI. SEPARATION IN OTHER COMMUNITY PROPERTY JURISDICTIONS

Before recommending specific changes of Texas law affecting separated couples, it will be valuable to consider the approach other community property jurisdictions have taken to resolve problems confronted by sepa-

70. See *Coghlan v. Sullivan*, 489 S.W.2d 229, 230 (Tex. Civ. App.—El Paso 1972, no writ); *Cockrell v. Lovejoy*, 44 S.W.2d 1040, 1044 (Tex. Civ. App.—El Paso 1931), *aff'd*, 63 S.W.2d 1009 (Tex. Comm'n App. 1933, judgment *aff'd*).

71. See, e.g., *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975); *Broussard v. Tian*, 156 Tex. 371, 373, 295 S.W.2d 405, 406 (1956); *Gleich v. Bongio*, 128 Tex. 606, 612, 99 S.W.2d 881, 884 (1937).

72. See *Williamson v. McElroy*, 155 S.W. 998, 1000 (Tex. Civ. App.—Dallas 1913, no writ) (community property liable for community debt); *Word v. Colley*, 143 S.W. 257, 259 (Tex. Civ. App.—Texarkana 1912, no writ) (obligation created by a spouse during marriage is a community obligation). *But see In re Estate of Nikiporez*, 574 P.2d 1204, 1208-09 (Wash. Ct. App. 1978) (when separated "one spouse may not claim benefits of the community . . . against the other").

73. TEX. FAM. CODE ANN. § 5.61(b)(2) (Vernon 1975).

74. *Cf. Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975) (debts contracted during marriage presumed community unless shown creditor agreed to look solely to separate property of contracting spouse).

75. TEX. FAM. CODE ANN. § 5.62 (Vernon 1975).

76. See *Moore v. Wooten*, 265 S.W. 210, 214 (Tex. Civ. App.—Beaumont 1924), *rev'd on other grounds*, 280 S.W. 742 (Tex. Comm'n App. 1926, judgment adopted) (community estate subject to community debts). A judge is given the discretion to determine the order that separate or community property will be subject to liability for a judgment; even community property under a spouse's sole management and control may be subject to nontortious liabilities of the other spouse. See TEX. FAM. CODE ANN. § 5.62 (Vernon 1975).

rated couples.<sup>77</sup> Unlike Texas, the other community property jurisdictions have provided statutory recognition of separation agreements.<sup>78</sup> Statutory recognition of a "separated" status would reduce the uncertainty surrounding the effect and validity of separation agreements in Texas.<sup>79</sup> Statutes recognizing separation agreements generally provide that a couple upon separation may contract for the disposition of any property owned by both or either of them, the support of either spouse, and the support and custody of their children.<sup>80</sup> Furthermore, the spouses may release each other from all marital obligations,<sup>81</sup> except those provided for

77. See J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 91 (1975). The eight community property states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. See *id.* at 91 n.32.

78. See ARIZ. REV. STAT. ANN. § 25-317 (West 1976); CAL. CIV. CODE § 4802 (Derring 1972); NEV. REV. STAT. § 123.080 (1977); N.M. STAT. ANN. § 40-2-8 (1978); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978); *cf.* IDAHO CODE § 32-906 (1963) (statute provides for property conveyed by one spouse to another to be separate property of grantee spouse); LA. CIV. CODE ANN. art. 2329 (West Supp. 1980) (spouses may dissolve community regime by matrimonial agreement at any time).

79. The ambiguity of Texas law pertaining to separation agreements is evidenced by a comparison of cases and the rules set out by such cases. Must a separation agreement be written; or is an oral agreement valid? Compare *Liston v. Liston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ *dism'd*) (oral separation agreement valid) with *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 408 (Tex. Civ. App.—Amarillo 1970, writ *ref'd n.r.e.*) (oral separation agreement not valid). Can spouses determine all existing and future acquired property rights? Compare *George v. Reynolds*, 53 S.W.2d 490, 493 (Tex. Civ. App.—Eastland 1932, writ *dism'd*) (cannot determine status of future acquired property) with *Jernigan v. Scott*, 518 S.W.2d 278, 283 (Tex. Civ. App.—San Antonio 1974, writ *ref'd n.r.e.*) (ability to settle present and future property rights). Are separation agreements controlled by constitutional and statutory provisions or only by case law? Compare *King v. Bruce*, 145 Tex. 647, 656, 201 S.W.2d 803, 809 (1947) (constitutional provision defining separate property restricts individual's ability to establish separation agreements) and *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 408 (Tex. Civ. App.—Amarillo 1970, no writ) (separation agreements must adhere to requirements of section 5.42, Texas Family Code) with *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ) (validity of separation agreements "not dependent on constitutional or statutory authorization").

80. "[T]he parties may enter into a written separation agreement containing provisions for disposition of any property . . . , maintenance of either of them, and support, custody . . . of their children." ARIZ. REV. STAT. ANN. § 25-317(A) (West 1976); *accord*, CAL. CIV. CODE § 4802 (Derring 1972); NEV. REV. STAT. § 123.080 (1977); N.M. STAT. ANN. § 40-2-8 (1978); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978); *cf.* IDAHO CODE § 32-917 (1963) (providing for marriage settlement contracts); LA. CIV. CODE ANN. art. 2329 (West Supp. 1980) (husband and wife may contract to terminate community property regime).

81. See *Wick v. Wick*, 489 P.2d 19, 20-21 (Ariz. 1971) (settlement of obligations arising from the marriage); *In re Jones' Estate*, 50 P. 766, 766 (Cal. 1897) (release from all obligations of future acts and debts but not a release by either one in estate of the other in case of death).

in the contract.<sup>82</sup> The policy reason for allowing separated couples to re-adjust contractually their rights and obligations is to encourage amicable settlement of disputes.<sup>83</sup>

The rules of contract law have been deemed controlling by the courts of other community property jurisdictions confronted with questions relating to the effect and construction to be given separation agreements.<sup>84</sup> In furtherance of this judicial reasoning, several of the jurisdictions have enacted statutes stipulating the mutual consent of the parties is sufficient consideration to support the separation agreement.<sup>85</sup> The prevailing practice for the courts in these jurisdictions is to uphold separation agreements dividing not only existing property, but also future acquired property.<sup>86</sup> This practice is followed assuming the contract is voluntary, free from fraud, and fair and equitable.<sup>87</sup> California and Nevada both interpret separation agreements to include future property despite constitutional provisions pertaining to separate property that are substantively identical to Texas.<sup>88</sup> Several jurisdictions have alleviated the problems associated with post-separation debts by affording the couple the opportunity to record a contract or publish legal notice of the agreement.<sup>89</sup> This procedure provides notice to creditors and other interested parties of the change of the parties' marital status and their property rights.<sup>90</sup>

82. See ARIZ. REV. STAT. ANN. § 25-317 (West 1976); CAL. CIV. CODE § 4802 (Deering 1972); NEV. REV. STAT. § 123.080 (1977); N.M. STAT. ANN. § 40-2-8 (1978); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978).

83. ARIZ. REV. STAT. ANN. § 25-317 (West 1976); accord, CAL. CIV. CODE § 4802 (Deering 1972); NEV. REV. STAT. § 123.080 (1977); N.M. STAT. ANN. § 40-2-8 (1978); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978).

84. See *In re Estate of Wilson*, 134 Cal. Rptr. 749, 755 (Ct. App. 1976) (applies contract rules of consideration); *Adkins v. Adkins*, 365 P.2d 439, 441 (N.M. 1961) (separation agreements controlled by rules applicable to contracts). The description of separation agreements as contracts assumes contract law will govern. See CAL. CIV. CODE § 4802 (Deering 1972); NEV. REV. STAT. § 123.080 (1977); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978).

85. See CAL. CIV. CODE § 4802 (Deering 1972); NEV. REV. STAT. § 123.080 (1977); N.M. STAT. ANN. § 40-2-9 (1978).

86. See, e.g., *Boland v. Commissioner*, 118 F.2d 622, 624 (9th Cir. 1941); *In re Estate of Harber*, 449 P.2d 7, 16 (Ariz. 1969); *MacKenzie v. Sellner*, 361 P.2d 165, 166 (Wash. 1961).

87. See, e.g., *In re Henry's Estate*, 430 P.2d 937, 940 (Ariz. Ct. App. 1967); *McCahan v. McCahan*, 190 P. 460, 463 (Cal. Dist. Ct. App. 1920); *Adkins v. Adkins*, 365 P.2d 439, 441 (N.M. 1961); *Lee v. Lee*, 178 P.2d 296, 302 (Wash. 1947).

88. See *Boland v. Commissioner*, 118 F.2d 622, 624 (9th Cir. 1941); CAL. CONST. art. I, § 21; NEV. CONST. art. 4, § 31; cf. *Jones v. Jones*, 478 P.2d 148, 151 (Nev. 1971) (enforcement of separation agreement).

89. See N.M. STAT. ANN. § 40-2-5 (1978); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978).

90. See WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978). "Recording such contract and publishing notice of the making thereof shall constitute notice to all persons of such separation and of the facts contained in the recorded document." *Id.*

The most liberal statutes affecting separated couples in community property jurisdictions are those permitting the post-separation earnings and acquisitions of each spouse to become his or her separate property.<sup>91</sup> California and Nevada courts have circumvented the restrictive provisions of their respective constitutions by interpreting these statutes in light of the original community property laws of Spain and Mexico.<sup>92</sup> Inequities that exist in Texas law are avoided in other community property jurisdictions by declaring post-separation earnings and accumulations the separate property of the acquiring spouse.<sup>93</sup>

#### VII. RECOMMENDATIONS FOR TEXAS

The greatest obstacle to change in Texas law concerning the property rights of separated couples is the constitutional definition of separate property.<sup>94</sup> This narrow definition confines the supreme court to a strict interpretation,<sup>95</sup> thereby limiting the problem solving ability of the legislature and individuals.<sup>96</sup> The Texas courts' interpretations mandate separate property be limited to the types of property mentioned in the constitution.<sup>97</sup> California and Nevada both have constitutional definitions substantively indetical to Texas; however, liberal interpretation by the courts prevents the definition from interfering with legislative power or contractual rights of individuals to alter the status of property.<sup>98</sup> If the

91. See CAL. CIV. CODE § 5118 (Deering 1972); IDAHO CODE § 32-909 (1963); LA. CIV. CODE ANN. art. 2334 (West 1971); N.M. STAT. ANN. § 40-3-8 (1978); WASH. REV. CODE ANN. § 26.16.140 (Supp. 1979). *But see* Suter v. Suter, 546 P.2d 1169, 1173 (Idaho 1976) (exclusion from community property of post-separation earnings held unconstitutional).

92. See, e.g., Robbins v. United States, 5 F.2d 690, 692 (N.D. Cal. 1925), *rev'd on other grounds*, 269 U.S. 315 (1926); Spreckels v. Spreckels, 48 P. 228, 231 (Cal. 1897); Nixon v. Brown, 214 P. 524, 528 (Nev. 1923); McDonald v. Senn, 204 P.2d 990, 992 (N.M. 1949).

93. See *In re Marriage of Barnert*, 149 Cal. Rptr. 616, 622 (Ct. App. 1978) (amendment designed to remedy inequities); West v. Ortego, 325 So. 2d 242, 246 (La. 1975) (future income should belong to party earning it).

94. "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of the wife . . ." TEX. CONST. art. 16, § 15; see, e.g., Williams v. Williams, 569 S.W.2d 867, 870 (Tex. 1978); King v. Bruce, 145 Tex. 647, 656, 201 S.W.2d 803, 808 (1947); Arnold v. Leonard, 114 Tex. 535, 541, 273 S.W. 799, 801 (1925).

95. See Arnold v. Leonard, 114 Tex. 535, 541, 273 S.W. 799, 805 (1925).

96. See Williams v. Williams, 569 S.W.2d 867, 870 (Tex. 1978); King v. Bruce, 145 Tex. 647, 656, 201 S.W.2d 803, 809 (1947); Arnold v. Leonard, 114 Tex. 535, 541, 273 S.W. 799, 805 (1925).

97. See, e.g., Moss v. Gibbs, 370 S.W.2d 452, 455 (Tex. 1963); King v. Bruce, 145 Tex. 647, 656, 201 S.W.2d 803, 809 (1947); Arnold v. Leonard, 114 Tex. 535, 541, 273 S.W. 799, 805 (1925).

98. *Accord*, Woodal v. Commissioner, 105 F.2d 474, 478 (9th Cir. 1939); *In re Marriage of Barnert*, 149 Cal. Rptr. 616, 622 (Ct. App. 1978); see CAL. CIV. CODE §§ 4702, 5118 (Deer-



Texas constitutional definition of separate property were interpreted in light of the Spanish law,<sup>99</sup> Texas courts would not have to adhere to the strict limitations upon the legislative or individual ability to alter status of property.<sup>100</sup> Additionally, property acquired subsequent to separation would be given the status of separate property.<sup>101</sup> Constitutional amendment of the definition of separate property is necessary because of the Texas Supreme Court's unwillingness to give the present definition more than a strict interpretation.<sup>102</sup>

An amendment of the present constitutional definition should reflect the Spanish rules regarding the status of property acquired after separation.<sup>103</sup> Giving constitutional effect to the Spanish rules would give the supreme court greater latitude to adopt a more liberal position regarding the status of property acquired after separation.<sup>104</sup> Furthermore, an amendment would free the legislature from the restrictions imposed by Texas courts' present interpretation of separate property.<sup>105</sup> Family Code revisions should set out the requisites for an effective agreement, the applicable subject matter, and the necessary consideration for a valid

ing 1972); NEV. REV. STAT. § 123.080 (1977).

99. *See, e.g.*, *Graham v. Franco*, 488 S.W.2d 290, 295 (Tex. 1972) (substantive rights of spouses in separate and community property taken from Spain); *Dickson v. Strickland*, 114 Tex. 176, 202, 265 S.W. 1012, 1022 (1924) (adopted Spanish community property laws); *Burr v. Wilson*, 18 Tex. 368, 370 (1857) (Texas community property laws a continuation of Spanish rules).

100. *Cf.* *Spreckels v. Spreckels*, 48 P. 228, 231 (Cal. 1897) (Spanish rules are an influence); *West v. Ortego*, 325 So. 2d 242, 245-46 (La. 1975) (interpretation of Spanish rules influences Louisiana law governing future acquisitions of separated couple); *Nixon v. Brown*, 214 P. 524, 528 (Nev. 1923) (citing Spanish law); *McDonald v. Seen*, 204 P.2d 990, 994 (N.M. 1949) (law of Spain and Mexico serve as model for statutes).

101. *Accord*, CAL. CIV. CODE § 5118 (Deering 1972); LA. CIV. CODE ANN. § 2334 (West 1971); N.M. STAT. ANN. § 40-3-8 (1978); WASH. REV. CODE ANN. § 26.16.140 (1978); *cf. In re Marriage of Imperato*, 119 Cal. Rptr. 590, 593 (Ct. App. 1975) (post-separation earnings are separate property of acquiring spouse); *West v. Ortego*, 325 So. 2d 242, 245-46 (La. 1975) (earnings by either spouse separate following separation).

102. *See, e.g.*, *Williams v. Williams*, 569 S.W.2d 867, 870 (Tex. 1978) (strict interpretation of definition of separate property); *King v. Bruce*, 145 Tex. 647, 756, 201 S.W.2d 803, 809 (1947) (strict interpretation limiting individuals); *Arnold v. Leonard*, 114 Tex. 535, 541, 273 S.W. 799, 805 (1925) (strict interpretation limiting legislature).

103. *Cf.* *Graham v. Franco*, 488 S.W.2d 390, 395 (Tex. 1972) (not intended to change the Spanish rules); *Dickson v. Strickland*, 114 Tex. 176, 202, 265 S.W. 1012, 1022 (1924) (Spanish law basis of community property system of Texas); *Burr v. Wilson*, 18 Tex. 368, 370 (1857) (Texas laws are continuation of Spanish jurisprudence). *See* Appendix A, Proposed Constitutional Amendment.

104. *Cf.* *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972) (test more akin to that prevailing under Spanish and Mexican law when determining status of tort recovery suggests application of similar test to post separation).

105. *See* *Arnold v. Leonard*, 114 Tex. 535, 541, 273 S.W. 799, 805 (1925) (strict interpretation limiting legislature).

agreement.<sup>106</sup>

To be effective an agreement should be in writing,<sup>107</sup> made after separation,<sup>108</sup> fair and equitable in the division of property,<sup>109</sup> entered into without coercion,<sup>110</sup> and recorded when affecting real property.<sup>111</sup> Legal notice should also be given that would place present and future creditors on notice of the changed marital situation of the couple.<sup>112</sup> The subject matter encompassed by the separation agreement should be confined to the disposition of the couples' marital property, provide for spousal and/or child support, and resolve any controversy over child custody.<sup>113</sup> Consideration should also be given to the enactment of Family Code sections providing for a "separate property" status for each spouse's post-separation earnings and acquisitions.<sup>114</sup>

106. See, e.g., ARIZ. REV. STAT. ANN. § 25-317 (West 1976); CAL. CIV. CODE § 4802 (Deering 1972); NEV. REV. STAT. § 123.080 (1977). See Appendix B, § 2, Proposed Statutory Amendments.

107. Requiring the agreement to be in writing would resolve the conflict over application of the Statute of Frauds to separation agreements. Compare *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 409 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.) (required agreement be in writing) with *Loston v. Loston*, 424 S.W.2d 316, 318 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ dismissed) (Statute of Frauds not applied to separation agreements). See generally Comment, *Misconceptions of Parol Partitions in Texas in Light of Statute of Frauds Requirements*, 23 BAYLOR L. REV. 75 (1971). See Appendix B, § 2(b).

108. This requirement, well settled in Texas law, should continue to be a requisite for a valid separation agreement to prevent an agreement from encouraging divorce. See, e.g., *Rains v. Wheeler*, 76 Tex. 390, 395, 13 S.W. 324, 325-26 (1890); *Loston v. Loston*, 424 S.W.2d 316, 317 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ dismissed); *Myles v. Arnold*, 162 S.W.2d 442, 445 (Tex. Civ. App.—El Paso 1942, writ ref'd). See Appendix B, § 2(a).

109. See *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ); *Wheat v. Wheat*, 239 S.W. 667, 668 (Tex. Civ. App.—San Antonio 1922, no writ). See Appendix B, § 2.

110. See *Harding v. Harding*, 461 S.W.2d 235, 237 n.1 (Tex. Civ. App.—San Antonio 1970, no writ). See Appendix B, § 2(a).

111. See N.M. STAT. ANN. §§ 40-2-5, 40-2-6 (1978); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978). See Appendix B, § 2(d).

112. Cf. WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978) (legal notice may be given in newspaper to place creditors on notice of changed situation of the couple). See Appendix B, § 2(d).

113. Accord, ARIZ. REV. STAT. ANN. § 25-317 (West 1976); CAL. CIV. CODE § 4802 (Deering 1972); see *Tinsley v. Tinsley*, 512 S.W.2d 74, 76 (Tex. Civ. App.—Waco 1974, no writ) (separation agreement determining custody of child, support payments, and property division); *Simpson v. Simpson*, 387 S.W.2d 717, 719 (Tex. Civ. App.—Eastland 1965, no writ) (separation agreement dividing property). See Appendix B, § 2(a).

114. Accord, CAL. CIV. CODE § 5118 (Deering 1972); LA. CIV. CODE ANN. art. § 2334 (West 1971); N.M. STAT. ANN. § 40-3-8 (1978); WASH. REV. CODE ANN. § 26.16.140 (1978); see *In re Marriage of Barnert*, 149 Cal. Rptr. 616, 622 (Ct. App. 1978). See Appendix B, § 1.

## VIII. CONCLUSION

The present constitutional definition of married women's separate property has served to protect the wife's property rights<sup>115</sup> and to preserve the community property system in Texas.<sup>116</sup> The policy reasons for the constitutional definition no longer apply,<sup>117</sup> since there is no present danger of the legislature reducing the property rights of married women or abandoning the community property system.<sup>118</sup> The needs and customs of the people of Texas have changed since the adoption of the original Texas Constitution in 1845. These changes indicate the necessity of altering the constitutional definition of separate property. The definition should be amended to be capable of realistically meeting the problems faced by the citizens of Texas in the future, rather than problems that confronted the founding fathers of our state.

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115. See, e.g., *Dickson v. Strickland*, 114 Tex. 176, 202, 265 S.W. 1012, 1022 (1924) (disabilities under common law as to wife's property rights not adopted); *Barkley v. Dumke*, 99 Tex. 150, 152, 87 S.W. 1147, 1148 (1905) (designed to protect the wife's right to hold property); *Cartwright v. Hollis*, 5 Tex. 152, 166 (1849) (such laws have the object of preserving wife's property rights).

116. See Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEXAS L. REV. 1054, 1057-58 (1957).

117. *Id.*

118. *Id.* at 1070.

APPENDIX A

PROPOSED CONSTITUTIONAL AMENDMENT\*

Article 16, section 15 of the Texas Constitution should be amended to read, in part, as follows:

“All property both real and personal, of the spouse owned or claimed by him or her before marriage, and that acquired afterward by gift, devise or descent, and that acquired after a marital separation,<sup>1</sup> shall be his or her separate property; . . .”

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\* Underscored language proposed.

1. See CAL. CIV. CODE § 5118 (Deering 1972); N.M. STAT. ANN. § 40-3-8 (1978); Matienzo, *Commentary to Novisima Recopilacion, Book 10, Title 4, Gloss I, Nos. 56, 57*, in 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 112-13 (1943).

## APPENDIX B

## PROPOSED STATUTORY AMENDMENTS\*\*

Section 1. Section 5.01, Marital Property Characterized, of the Texas Family Code should be amended to read as follows:

- (a) A spouse's separate property consists of:
- (1) the property owned or claimed by the spouse before marriage;
  - (2) the property acquired by the spouse during marriage by gift, devise or descent;
  - (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage; and
  - (4) the earnings and property acquired by the spouse and the minor children living with or in custody of the spouse while living separate and apart from the other spouse.<sup>1</sup>
- (b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Section 2. A new section should be added to the Texas Family Code to read as follows:

Marriage Settlement and Separation Contracts

- (a) To promote amicable settlements of disputes between parties to a marriage, a married couple, upon their permanent separation or dissolution of their marriage, may agree in writing to an immediate separation and make provisions for:<sup>2</sup>
- (1) disposition of any property presently owned or hereinafter acquired by either of them;
  - (2) maintenance and support of either of them;
  - (3) maintenance, support, custody and visitation of their children;
  - (4) release from all marital obligations except those stated in the contract.
- (b) A marital settlement or separation agreement must be in writing.<sup>3</sup>
- (c) A marital settlement or separation agreement does not prejudice the

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\*\* Underscored language proposed.

1. See CAL. CIV. CODE § 5118 (Deering 1972); LA. CIV. CODE ANN. art. 2334 (West 1971); N.M. STAT. ANN. § 40-3-8 (1978); WASH. REV. CODE ANN. § 26.16.140 (Supp. 1978).

2. See ARIZ. REV. STAT. ANN. § 25-317 (West 1976); CAL. CIV. CODE § 4802 (Deering 1972); NEV. REV. STAT. § 123.080 (1977); N.M. STAT. ANN. § 40-2-8 (1978); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978).

3. See ARIZ. REV. STAT. ANN. § 25-317 (West 1976); CAL. CIV. CODE § 4802 (Deering 1972); NEV. REV. STAT. § 123.080 (1977); N.M. STAT. ANN. § 49-2-8 (1978); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978).

rights of preexisting creditors.<sup>4</sup>

(d) A marital settlement or separation agreement must be recorded in the office of the recorder of the county in which parties, or one of them, reside and in every county in which real estate may be situated which is granted or affected by such contract. As to real property a marital settlement or separation agreement is not constructive notice to a good faith purchaser for value or a creditor without actual notice unless the instrument is acknowledged and recorded in the county in which the real property is located.<sup>5</sup>

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4. See TEX. FAM. CODE ANN. § 5.41(d) (Vernon 1975).

5. See N.M. STAT. ANN. §§ 40-2-5, 40-2-6 (1978); TEX. FAM. CODE ANN. § 5.42(d) (Vernon 1975); WASH. REV. CODE ANN. § 26.09.070 (Supp. 1978).