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The Constitutional Redefinition of Texas Matrimonial Property as it Affects Antenuptial and Interspousal Transactions Symposium - Texas Community Property Law in Transition.

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THE CONSTITUTIONAL REDEFINITION OF TEXAS MATRIMONIAL PROPERTY AS IT AFFECTS ANTENUPTIAL AND INTERSPOUSAL TRANSACTIONS

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I. NEEDS FOR CHANGE

On November 4, 1980, the people of Texas overwhelmingly approved a constitutional amendment to allow greater flexibility in interspousal handling of community property interests. Although a rash of estate tax cases concerning inter vivos interspousal transfers provided the immediate impetus for the constitutional amendment,¹ the need for change had been realized for a very long time.²

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1. Estate of McKee v. Commissioner, 47 T.C.M. (P-H) 484, 489 n.7 (1978) (husband's

Prior to the amendment, prospective spouses had been unable to enter into effective pre-nuptial agreements of the sort most commonly desired.³ In *Williams v. Williams*,⁴ the supreme court had stated in dicta that the pre-nuptial agreement involved in that case "was void to the extent that income or other property acquired during marriage should be the separate property of the party who earned or whose property produced such income or acquisition."⁵ It became clear after *Williams* that the Texas Constitution required a provision to deal with agreements covering subsequent acquisitions of property to enable those agreements to pass constitutional muster. Further, doubts had long existed with respect to the validity of partitions of future acquisitions in pre-divorce partitions. Partitions of existing community property in anticipation of divorce had been given judicial sanction in 1890 in *Rains v. Wheeler*,⁶ long before partitions became generally available as a result of the 1948 constitutional amendment. On five occasions the intermediate appellate courts had considered the validity of those partitions to cover after-acquired community property prior to divorce.⁷ In three of those instances, the courts had said that the

estate must include one-fourth of community cash given to wife because his right to post-transfer income from the transferred property arose by operation of law); *Estate of Wyly v. Commissioner*, 69 T.C. 227, 233 (1977) (husband's gross estate included his full community one-half interest of the property transferred in trust for the benefit of his wife), *rev'd*, 610 F.2d 1282 (5th Cir. 1980); *Estate of Castleberry v. Commissioner*, 68 T.C. 682, 686-87 (1977) (in inter-vivos interspousal gift of community property, one-half of donor's one-half community interest is includable in his estate due to right to post-transfer income which arises by law in Texas), *rev'd*, 610 F.2d 1282 (5th Cir. 1980).

2. For a recent proposal for change which was rejected at the polls, see S.J. Res. 11, art. 10, § 11, 64th Leg., Reg. Sess., 1975 Tex. Gen. Laws, at 3188. The proposed amendment would have permitted "spouses to enter into written contracts or other written transactions between themselves that affect their property rights" which "change their community property into separate property if the change does not prejudice the rights of preexisting creditors or . . . that create between themselves a right of survivorship in community property." *Id.* at 3188.

3. See *Burton v. Bell*, 380 S.W.2d 561, 563 (Tex. 1964); see also *Gorman v. Gause*, 56 S.W.2d 855, 856-57 (Tex. Comm'n App. 1933, judgment adopted) (contract to waive and avoid community property laws unenforceable whether executed before or during marriage).

4. 569 S.W.2d 867 (Tex. 1978).

5. *Id.* at 870. For a contemporary discussion of *Williams*, see McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 33 Sw. L.J. 99, 105-08 (1979).

6. 76 Tex. 390, 395, 13 S.W. 324, 325-26 (1890).

7. *Jernigan v. Scott*, 518 S.W.2d 278 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.); *Speckels v. Kneip*, 170 S.W.2d 255 (Tex. Civ. App.—El Paso 1942, writ ref'd);

agreements were effective;⁸ in two, the courts had held that they were not.⁹ Even after the 1948 amendment, spouses remained unable to make effective partitions of future acquisitions in a non-divorce context.¹⁰ The language of the constitution as amended in 1948 merely allowed partition of "existing community property."¹¹

Before the recent amendment to section 15, there were also doubts with respect to a spouse's ability to give future income from property, along with a present gift of the property, to the other spouse. These doubts were entertained in spite of three separate statements by the Texas Supreme Court that the settlor of a trust or the donor of other inter vivos gifts might provide that income from the donated property should be the separate property of the donee.¹² Lower court decisions had reached the same conclusion.¹³

A final problem with the 1948 constitutional amendment was the language which specifically provided that partitions should not prejudice the rights of pre-existing creditors.¹⁴ This limitation on partitions was particularly inappropriate to divorce situations. Further, the ban was limited to partitions and did not apply to interspousal gifts. Property transferred by interspousal gift could not be reached by prior creditors unless the transfer could be shown

George v. Reynolds, 53 S.W.2d 490 (Tex. Civ. App.—Eastland 1932, writ dism'd); Corrigan v. Goss, 160 S.W. 652 (Tex. Civ. App.—El Paso 1913, writ ref'd).

8. Jernigan v. Scott, 518 S.W.2d 278, 284 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); Speckels v. Kneip, 170 S.W.2d 255, 261 (Tex. Civ. App.—El Paso 1942, writ ref'd); Corrigan v. Goss, 160 S.W. 652, 655 (Tex. Civ. App.—El Paso 1913, writ ref'd).

9. Amarillo Nat'l Bank v. Liston, 464 S.W.2d 395, 407 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.); George v. Reynolds, 53 S.W.2d 490, 493-94 (Tex. Civ. App.—Eastland 1932, writ dism'd).

10. See Weaver v. Citizens Nat'l Bank, 490 S.W.2d 887 (Tex. Civ. App.—Waco 1973, no writ) (dealing with a somewhat unusual estate plan under pre-1968 law) (discussed in McKnight, *Family Law: Annual Survey of Texas Law*, 28 Sw. L.J. 66, 74 (1974)).

11. TEX. CONST. art. XVI, § 15 (as amended in 1948); see Williams v. Williams, 569 S.W.2d 867, 870 (Tex. 1978).

12. Strickland v. Wester, 131 Tex. 23, 25, 112 S.W.2d 1047, 1048 (1938) (dictum in case involving a non-trust gift by husband to wife); Cauble v. Beaver-Electra Ref. Co., 115 Tex. 1, 6, 274 S.W.2d 120, 121 (1925) (dictum in case where wife's earnings were found to be her separate property pursuant to an "understanding between husband and wife"); Hutchison v. Mitchell, 39 Tex. 488, 493 (1873) (gift in trust by husband for wife providing the income should be her separate property).

13. Sullivan v. Skinner, 66 S.W. 680, 681-82 (Tex. Civ. App. 1902, writ ref'd); McClelland v. McClelland, 37 S.W. 350, 359 (Tex. Civ. App. 1896, writ ref'd); Monday v. Vance, 32 S.W. 559, 559 (Tex. Civ. App. 1895, no writ); Shepflin v. Small, 23 S.W. 432, 433 (Tex. Civ. App. 1893, no writ).

14. TEX. CONST. art. XVI, § 15 (as amended in 1948).

fraudulent as to creditors, whereas partitioned property could be reached merely if the creditor chose to seize it.¹⁵ All the foregoing problems were effectively cured by the 1980 amendment.

II. VALIDITY OF THE AMENDMENT'S ENACTMENT

The amendment was proposed by joint resolution of the regular legislative session of 1979,¹⁶ to be voted on by the people at the general election of 1980. In its proposal of the amendment, the legislature provided the following explanation of its contents to appear on the ballot: "a Constitutional amendment allowing spouses to agree that income or property arising from separate property is to be separate property."¹⁷ Since this description of the terms of the amendment falls somewhat short of covering all its provisions, some doubts have been expressed as to whether the process of amendment¹⁸ was properly complied with and, thus, whether that the amendment is effective. A review of the outcome of similar situations, however, indicates that the amendment was properly ratified by the people. Challenges to amendments on the ground of inadequate ballot-descriptions have not been successful.¹⁹ Because of the publication requirements of by the constitution,²⁰ there is a

15. See *Stewart Title Co. v. Huddleston*, 608 S.W.2d 611, 612 (Tex. 1980) (property received by wife in divorce partition subject to "judgment liens properly secured against her as a result of preexisting community debts"), *refusing writ n.r.e. per curiam* to 598 S.W.2d 321 (Tex. Civ. App.—San Antonio); *Dean v. First Nat'l Bank*, 494 S.W.2d 222, 226-27 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.) (creditor's suit against ex-wife not a collateral attack on divorce decree awarding wife property attached by creditor).

16. H.J. Res. 54, 66th Leg., Reg. Sess., 1979 Tex. Gen. Laws, at 3227.

17. *Id.* at 3227.

18. TEX. CONST. art XVII, § 1.

19. *Railroad Comm'n v. Sterling Oil & Ref. Co.*, 147 Tex. 547, 553, 218 S.W.2d 415, 416-17 (1949) (amendment permitting direct appeal of interlocutory or permanent injunction to supreme court found to be sufficiently described on ballot as an amendment permitting direct appeal in cases "Involving the Constitutionality of Certain Laws and Orders"); *Hill v. Evans*, 414 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.) (explanation on ballot that amendment repealed poll tax adequate to describe amendment which required annual registration of voters); *Whiteside v. Brown*, 214 S.W.2d 844, 851 (Tex. Civ. App.—Austin 1948, writ dism'd) (ballot-description that amendment's purpose was to readjust and levy taxes to provide building funds for Texas colleges was adequate despite failure to explain amendment would prohibit those colleges from receiving other building funds from state for thirty years).

20. TEX. CONST. art XVII, § 1. The notice requirements necessary to amend the Texas Constitution are these:

A brief explanatory statement of the nature of a proposed amendment, together

presumption that the voter is familiar with the text of the amendment prior to voting.²¹ A ballot-description has been said to be sufficient, therefore, if it identifies the subject of the amendment and adequately distinguishes it from the other propositions on the ballot²²—a test this description obviously meets.

The amendment became effective on November 25, 1980, when the canvass of the November 4, 1980 election was signed. Pursuant to the Election Code, that general election should have been canvassed on November 21, but the actual canvass was not held until November 24 through November 25, 1980.²³ While proclamation of the amendment by the governor is required by the language of our constitution,²⁴ that part of the amending process has long been regarded as irrelevant to the effective date of the amendment.²⁵

Unlike the 1948 amendment, which the new amendment partially repeals, the 1980 amendment does not include a provision making it self-operative, but rather is self-executing by its terms. All antenuptial agreements, therefore, made after the amendment's

with the date of the election and the wording of the proposition as it is to appear on the ballot, shall be published twice in each newspaper in the State which meets requirements set by the Legislature for the publication of official notices of officers and departments of the state government. The explanatory statement shall be prepared by the Secretary of State and shall be approved by the Attorney General. The Secretary of State shall send a full and complete copy of the proposed amendment or amendments to each county clerk who shall post the same in a public place in the courthouse at least 30 days prior to the election on said amendment. The first notice shall be published not more than 60 days nor less than 50 days before the date of the election, and the second notice shall be published on the same day in the succeeding week.

Id.

21. *Hill v. Evans*, 414 S.W.2d 684, 692 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); see *Railroad Comm'n v. Sterling Oil & Ref. Co.*, 147 Tex. 547, 553, 218 S.W.2d 415, 418 (1949).

22. See *Hill v. Evans*, 414 S.W.2d 684, 692 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

23. See 1963 Tex. Gen. Laws, ch. 442, § 13, at 1142; 5 Tex. Reg. 4739, 4812, 4851 (1980). One of the causes for the delay was that six counties had failed to report their votes. See 33 AUSTIN REPORT, No. 3, at 2 (Nov. 23, 1980). The Election Code has been amended since the election involved here and now provides for the returns to be counted between fifteen and twenty-one days after the election. TEX. ELEC. CODE ANN. § 8.38 (Vernon Supp. 1982).

24. See TEX. CONST. art. XVII, § 1. As amended in 1972, the Texas Constitution provides that if "it appears from the [election] returns that a majority of the votes cast have been cast in favor of an amendment, it shall become a part of this Constitution, and proclamation thereof shall be made by the Governor." *Id.*

25. *Torres v. State*, 278 S.W.2d 853, 855 (Tex. Crim. App. 1955); TEX. ATT'Y GEN. OP. No. O-6278 (1944); TEX. ATT'Y GEN. OP. No. O-2841 (1940).

effective date, but before September 1, 1981 (the effective date of the implementing legislation),²⁶ are subject to the provisions of the constitution only and not to those added by the legislature.²⁷

III. STATUTORY IMPLEMENTATION

To implement the constitutional amendment the 67th Legislature passed two acts effective September 1, 1981.²⁸ One of the acts amended the existing sections and added several new sections to subchapter D in chapter 5 of the Family Code, and all but one of these sections are a part of the subchapter on marriage contracts and marital-property partitions. Sections 5.41,²⁹ concerning antenuptial agreements, and 5.42,³⁰ dealing with the partition or exchange of community property, were amended to make provisions for dealing with future acquisitions. Section 5.43 was added to provide for agreements between spouses concerning income or property derived from the separate property of only one of the spouses.³¹ Provisions concerning formalities and recordation were

26. See 1981 Tex. Sess. Law Serv., ch. 782, § 2, at 2965 (Vernon); *id.* ch. 319, § 3, at 896.

27. See text accompanying notes 113-19 *infra*, for a discussion on the amendment's effect on an *invalid* antenuptial agreement or marital partition made prior to the amendment's effective date.

28. See 1981 Tex. Sess. Law Serv., ch. 782, §§ 1-2, at 2964-65 (Vernon); *id.* ch. 319, §§ 1-2, at 895.

29. See TEX. FAM. CODE ANN. § 5.41 (Vernon Supp. 1982).

§ 5.41. Agreement in Contemplation of Marriage

(a) Before marriage, persons intending to marry may enter into a marital property agreement concerning their property then existing or to be acquired, as they may desire.

(b) A minor capable of marrying but not otherwise capable of entering into a binding agreement may enter into a marital property agreement with the subscribed, written consent of the guardian of the minor's estate and with the approval of the probate court after the application, notice, and hearing required in the Probate Code for the sale of a minor's real estate, and if there be no guardian of the minor's estate, with the subscribed, written consent of the minor's managing conservator.

Id.

30. See *id.* § 5.42.

§ 5.42. Partition or Exchange of Community Property

At any time, the spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as they may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes his or her separate property.

Id.

31. See *id.* § 5.43.

§ 5.43. Agreements Between Spouses Concerning Income or Property Derived

taken out of sections 5.41 and 5.42 to form a new section, 5.44.³² The most significant statutory innovation is found in section 5.45,³³ which puts the burden of proving the validity of a property partition on the proponent of the provision. The constitutionality of this last provision, however, is at least suspect in that the legislature, by imposing a new burden of proof, has created an independent standard of validity for a transaction authorized by the Constitution under less exacting terms.³⁴ Section 5.46 expresses the ban on transfers fraudulent as to creditors and provides for recordation of various interspousal transactions.³⁵

From Separate Property

At any time, the spouses may agree that the income or property arising from the separate property then owned by one of them, or which may thereafter be acquired, shall be the separate property of the owner.

Id.

32. *See id.* § 5.44. "§ 5.44. Formalities of Agreements. Each agreement, partition, or exchange agreement made under this subchapter must be in writing and subscribed by all parties." *Id.*

33. *See id.* § 5.45.

§ 5.45. Marital Agreements: Burden of Proof

In any proceeding in which the validity of a provision of an agreement, partition, or exchange agreement made under this subchapter is in issue as against a spouse or a person claiming from a spouse, the burden of showing the validity of the provision is on the party who asserts it. The proponent of the agreement, partition, or exchange agreement or any person claiming under the proponent has the burden to prove by clear and convincing evidence that the party against whom enforcement of the agreement is sought gave informed consent and that the agreement was not procured by fraud, duress, or overreaching.

Id.

34. *Compare* TEX. CONST. art. XVI, § 16 (spouses may partition property existing or to be acquired merely by "written agreement") with TEX. FAM. CODE ANN. § 5.45 (Vernon Supp. 1982) (party asserting validity of constitutional partition must prove informed consent, as well as lack of fraud, duress, and overreaching by clear and convincing evidence). The burden of proof provision is constitutionally unsupported except as an exercise of legislative power to pass laws "more clearly defining the rights of the spouses." TEX. CONST. art. XVI, § 15.

35. *See* TEX. FAM. CODE ANN. § 5.46 (Vernon Supp. 1982).

§ 5.46. Marital Agreements: Rights of Creditors, Recordation

(a) A provision of an agreement, partition, or exchange agreement made under this subchapter is void with respect to rights of a preexisting creditor whose rights are intended to be defrauded by it.

(b) An agreement, partition, or exchange agreement made under this subchapter 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 or to be affected is located. As to real property, an agreement, partition, or exchange agreement made under this subchapter is not constructive notice to a good faith purchaser for value or a creditor without actual notice unless the instrument is acknowledged

Section 5.04 codifies the presumption that income from property is a part of the subject matter of an interspousal gift, and is, therefore, separate property.³⁶ There is no such presumption, of course, with respect to gifts to a spouse by a third person. Such a donor, however, may so define the gift to include income, or the gift in trust, consisting merely of income, may be defined as the donee's separate property.³⁷

The act amending the Probate Code to implement the constitutional provision once again revises section 46 (abolishing joint tenancies), which was originally enacted in 1840 and was previously amended in 1955, 1961, and 1969.³⁸ A new paragraph has been added which provides:

A written agreement between spouses and a bank, savings and loan, credit union, or other financial institution may provide that existing funds or securities on deposit and funds and securities to be deposited in the future and interest and income thereon shall by that agreement be partitioned into separate property and may further provide that the property partitioned by that agreement be held in joint tenancies and pass by right of survivorship.³⁹

The object of this amendment is to provide a simple means of providing for a survivorship account so that community funds on deposit, and accretions to them by way of interest and future community deposits, pass to the surviving spouse as his or her separate property. The amendment to this provision is accompanied by an amendment to Probate Code section 437,⁴⁰ dealing with ownership

and recorded in the county in which the real property is located.

Id.

36. *See id.* § 5.04. The text of this section, entitled "Gifts Between Spouses," provides: "If one spouse makes a gift of property to the other, the gift is presumed to include all the income and property which may arise from that property." *Id.*

37. *See* *McClelland v. McClelland*, 37 S.W. 350, 358-59 (Tex. Civ. App. 1896, writ *ref'd*); *see also* *Commissioner v. Porter*, 148 F.2d 566, 568 (5th Cir. 1945) (*dictum*); *Commissioner v. Terry*, 69 F.2d 969, 969 (5th Cir. 1934) (*dictum*). *See generally* *Counts, Trust Income—Separate or Community Property?*, 30 TEX. B.J. 851 (1967).

38. *See* TEX. PROB. CODE ANN. § 46 (Vernon Supp. 1982).

39. *Id.* § 46.

40. *See id.* § 437. Prior to amendment, the statute provided:

§ 437. Ownership as Between Parties and Others

The provisions of Sections 438 through 440 of this code that concern beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of

interests in multiple-party accounts. The section was amended to omit the previously included reference to the constitutional definition of marital property, which had barred creating a joint account, as set out in sections 438 through 440, thereby altering the community status of the property in the account.

All of the foregoing statutory provisions are examined below in the functional context of drafting pre-marital agreements and marital property partitions.

IV. COMPONENTS OF THE REVISED CONSTITUTIONAL DEFINITION OF COMMUNITY PROPERTY

For the purpose of analysis, the terms of the amendment to article XVI, section 15 of the Texas Constitution may be broken into five components. The first of these components, setting out the broad definition of separate property, provides as follows:

All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse;⁴¹

withdrawal of these persons as determined by the terms of account contracts. A multiple-party account created with community property funds is subject to Article XVI, Section 15, of the Texas Constitution, and will not in any way alter community property rights.

1979 Tex. Gen. Laws, ch. 713, § 31, at 1756. The 1981 amendment omitted the second sentence. See TEX. PROB. CODE ANN. § 437 (Vernon Supp. 1982).

41. See TEX. CONST. art XVI, § 15. Prior to the 1981 amendment, the section read as follows:

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; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

This Amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to the form and manner of the execution of such instruments and providing for their recordation and other rea-

This clause restates the familiar language of the 1845, 1861, 1866, and 1876 constitutions framed in terms of spousal equality.

The second component has also been slightly reworded, and now reads:

and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property;⁴²

With a little modernization of terms, this is also the old, familiar constitutional language.

The third segment of section 15, the heart of the amendment, states:

provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse;⁴³

Thus, in broad, general language, this provision authorizes the *bilateral* partition or exchange of property existing, or to be acquired, by antenuptial agreement or by marital partition or exchange. The reference to community property clearly includes income from separate property, community property, and personal earnings. The language of the 1948 amendment which the provision replaced, referred to "all or any part of their existing community property." The reference to "all or part of their property" in the amendment, therefore, embraces separate property as well. The principal change in this element is the inclusion of future acquisitions of community property within the scope of antenuptial agreements and marital partitions or exchanges. The requirement of writing is unchanged, as is the consequence of partition or ex-

sonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed.

Id. (as amended in 1948).

42. TEX. CONST. art. XVI, § 15.

43. *Id.*

change—that the partitioned or exchanged property becomes the separate property of each spouse. The provision with respect to the impact of such agreements on pre-existing creditors is changed. The rights of pre-existing creditors as they existed prior to the amendment are reduced. As a result of this amendment, creditors' rights are made the same in relation to interspousal transactions as they are with respect to any other debtors' dealings. Spousal arrangements may not, of course, make these creditors victims of fraud, as provided in the fraudulent transfer provisions of the Business and Commerce Code.⁴⁴

Any property that is community property or would be community property by operation of law (earnings or income from separate or community property or personal earnings) may be reciprocally partitioned or exchanged by antenuptial agreement or marital partition under this provision. Some objectives, however, cannot be achieved and other objectives are difficult to draft whatever form is used. For example, this provision does not authorize a *unilateral* antenuptial agreement which merely provides that income from the separate property of *one* spouse will be that spouse's separate property. Such a result can only be achieved by an interspousal agreement. Since by its very nature a partition must *divide* something,⁴⁵ and an exchange must involve give and take, only those transactions having bilateral results can be achieved under this provision. On the other hand, making a continuing fund (including interest payments arising from it) subject to a right of survivorship on dissolution of marriage by death presents significant drafting difficulties—whether the agreement is entered into prior to or during marriage. The creation of a right of survivorship in existing separate property, however, presents no difficulty.⁴⁶

Conversion of separate property into community property cannot be achieved under this provision either by antenuptial agreement or by marital partition or exchange. It can scarcely be argued that the new constitutional provision empowers future spouses or

44. See TEX. BUS. & COM. CODE ANN. §§ 24.02-.03 (Vernon 1968).

45. See McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 35 Sw. L.J. 93, 102 (1981).

46. See *Davis v. East Texas Sav. & Loan Ass'n*, 163 Tex. 361, 367-68, 354 S.W.2d 926, 931 (1962) (savings and loan certificate purchased by husband with his separate funds as a joint tenancy between him and his wife entitled wife to right of survivorship as a third-party beneficiary).

spouses to partition or exchange separate interests so that they become (or will become) community property. If that result were intended, the words "partition" and "exchange" would have to be understood as meaning transform rather than divide—an obviously strained interpretation. Further, such a construction would seem to be foreclosed by the provision that "the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse, or future spouse."⁴⁷

By utilizing this provision of the constitution, transient spouses may now effectively opt out of the Texas community property system. They may have greater ease in doing so, however, if, they enter into their agreement prior to becoming domiciliaries of Texas. In doing so, they should indicate their Texas stay is contemplated by their agreement.⁴⁸ If these spouses come to Texas but ultimately leave the state without having partitioned their community property, they should experience little difficulty in doing so after their departure.

Once community property has been partitioned, however, no certain means seem readily available for reversing the process as long as the spouses are domiciliaries of Texas. Although the view has been expressed that past partitions of existing or future acquisitions may be revoked, or revoked and subsequently reinstated on the same or different terms,⁴⁹ reversing the process of partition presents conceptual difficulties. If the partition is merely a matter of agreement, the agreement can be undone by subsequent agreement, just as a contract may be undone by a later contract to the contrary. But if a partition is more akin to a conveyance, the process is irreversible. Separate property cannot again become com-

47. TEX. CONST. art. XVI, § 15. Even if this latter argument might be met by asserting that the language quoted refers only to the context of division and not to that of transformation, the conversion of property from separate to community does not seem to be anticipated under this provision.

48. See *Castro v. Illies*, 22 Tex. 479, 499-501 (1858) (pre-marital agreement executed in France would control the spouses' property rights in Texas only if there were an express provision that the agreement would apply wherever the couple moved); see also *McLeod v. Board*, 30 Tex. 239, 245-46 (1867) (corpus of antenuptial settlement trust executed in South Carolina passed under terms of trust after death of wife rather than by intestacy laws of Texas). *But cf.* *Huff v. Huff*, 554 S.W.2d 841, 842-43 (Tex. Civ. App.—Waco 1977, writ *dism'd*) (divorce court's giving effect to terms of Louisiana pre-marital agreement instituting marital regime without community property not abuse of discretion in division of property).

49. See *McKnight*, *Texas Family Code and Commentary, Title 1: Husband and Wife*, 5 TEX. TECH L. REV. 281, 376 (1974).

munity in that instance even by deed of gift by each spouse, if (as has long been thought) Texas law does not permit a gift to the community.⁵⁰ The solution of this problem is best achieved by a specific term that, as to future acquisitions, the parties at any time may terminate the partition. Such a provision does not make the transaction any less a partition, but merely makes it possible for the parties to limit the duration of their partition by later agreement.

A closely related issue, although outside the scope of the constitutional amendment, is the ability of a spouse to renounce, disclaim, or contract away any homestead rights, or rights to exempt personalty in the other spouse's separate property which would normally accrue upon the other spouse's death.⁵¹ Although it is settled that persons about to marry can effectively waive these rights by contract,⁵² the ability of that couple to achieve the same result during marriage is open to some question. In attempting to mortgage their homestead merely as security for a loan (not to be used for improvement or purchase money), spouses cannot renounce their homestead claim as to their creditors while in occupancy of the premises as their home.⁵³ Hence, it may be doubted that they may make a binding undertaking between themselves to be enforced when one of them dies. Because of policy considerations, it may be questioned whether a binding undertaking may be entered into prior to marriage with the object of fixing the division of property on divorce. In this and related situations, as close adherence as possible to the formula approved in *Williams v. Williams*⁵⁴ seems advisable.

The fourth segment of the amendment, dealing with the disposition of income from separate property, provides:

and the spouses may from time to time, by written instrument, agree between themselves that the income or property from all or

50. See *Tittle v. Tittle*, 148 Tex. 102, 110-12, 220 S.W.2d 637, 642-43 (1949); *Kellett v. Trice*, 95 Tex. 160, 169-70, 66 S.W. 51, 53-54 (1902); *Rogan v. Williams & Co.*, 63 Tex. 123, 129 (1885).

51. See TEX. CONST. art. XVI, § 52; TEX. PROB. CODE ANN. §§ 271, 272, 283, 284 (Vernon 1980).

52. See *Williams v. Williams*, 569 S.W.2d 867, 870 (Tex. 1978).

53. *Lincoln v. Bennett*, 138 Tex. 56, 59-62, 156 S.W.2d 504, 505-07 (1941).

54. 569 S.W.2d 867, 868-69 (Tex. 1978); see also *Schechter v. Schechter*, 579 S.W.2d 502, 506 (Tex. Civ. App.—Dallas 1978, no writ).

part of the separate property then owned by one of them, or which thereafter might be acquired, shall be the separate property of that spouse;⁵⁵

This specific provision was added so that spouses might agree in writing during marriage that income from the separate property of one of the spouses will be the separate property of the owner of the property. Although this result may be achieved bilaterally in a partition or exchange wherein each spouse receives something, the sort of agreement contemplated here may be in favor of only one of the spouses: a *unilateral* effect. The spouses may agree, for example, that the income from only the wife's separate property will be her separate property. This provision was also designed to deal with those instances of pre-amendment, interspousal gifts of property that did not include the income from the property. This part of the amendment permits the spouses to agree in writing that all the income from property already given by the husband to the wife, for example, will be the wife's separate property. Other types of unilateral agreements, however, are not authorized as the *sole* subject matter of a spousal agreement. Unilateral agreements not authorized by the amendment include agreements that : (1) future earnings of one spouse only shall be the separate property of that spouse, (2) future earnings of only one spouse shall be the separate property of the other spouse, and (3) future profits of one spouse's separate property shall be the separate property of the other spouse.

Although gifts to a spouse by a third person are not covered by the constitutional amendment, such transactions appear to be affected by it. Since spouses can make gifts of property to each other to which include the future income from that property as part of the gift, *a fortiori* a third person may also properly include future income in a gift to a spouse.⁵⁶ But to obviate any dispute as to the donor's intention, the donor in such a case should specify in writing that the income from the subject matter of the gift is to be the

55. TEX. CONST. art. XVI, § 15.

56. There is some pre-amendment authority to support this conclusion. See *Sullivan v. Skinner*, 66 S.W. 680, 681-82 (Tex. Civ. App. 1902, writ ref'd) (husband's creditors could not reach income from property devised to wife with income therefrom as her separate property); *McClelland v. McClelland*, 37 S.W. 350, 359 (Tex. Civ. App. 1896, writ ref'd) (testator's intent given effect so that income received by husband was his separate property).

donee's separate property.⁵⁷ This advice is particularly applicable in the case of gifts in trust, because opinions differ as to what constitutes the subject matter of the gift to the beneficiary. Is the subject matter of the gift the equitable interest in the corpus or the tangible consequences of that interest, that is, the income from the trust which the beneficiary actually receives?⁵⁸ Although the constitution does not expressly forbid a gift by a third person to the community estate, gifts to both spouses have been interpreted as indicating an intention of the donor to make a gift to each spouse as a cotenant of the donation as undivided separate property.⁵⁹ This line of authority remains unaffected by the amendment.

The final provision of the amendment creates a presumption with respect to income from property which is the subject matter of an interspousal gift, providing:

and if one spouse makes a gift of property to the other, that gift is presumed to include all the income or property which might arise from that gift of property.⁶⁰

On various occasions, the Texas Supreme Court has said that such a result can be expressly provided.⁶¹ This provision creates a presumption so that the contrary result (if intended) now must be spelled out specifically. In a sense, this provision is addressed to the Internal Revenue Service to cover situations such as those

57. See *Commissioner v. Porter*, 148 F.2d 566, 568 (5th Cir. 1945). For income arising from a spouse's separate property to be deemed separate, the donor "must, in the most precise and definite way, and by the use of language of unmistakable intent, make that desire and intention clear." *Id.* at 568; see also *Commissioner v. Terry*, 69 F.2d 969, 969 (5th Cir. 1934) (court would not determine possible separate status of income from separate property since no express devise of income made).

58. See generally *Counts, Trust Income—Separate or Community Property?*, 30 *TEX. B.J.* 851 (1967); *Davis, Income Arising From Trusts During Marriage is Community Property*, 29 *TEX. B.J.* 901 (1966); *Newman, Income Distributions From Trusts—Separate or Community Property?*, 29 *TEX. B.J.* 449 (1966).

59. See *Rogan v. Williams & Co.*, 63 *TEX.* 123, 129 (1885); *Bradley v. Love*, 60 *TEX.* 472, 477-78 (1883); *White v. White*, 590 *S.W.2d* 587, 588 (*Tex. Civ. App.—Houston [1st Dist.]* 1979, no writ).

60. *TEX. CONST.* art. XVI, § 15.

61. *Strickland v. Wester*, 131 *TEX.* 23, 25, 112 *S.W.2d* 1047, 1048 (1938) (dictum in case involving a non-trust gift by husband to wife); *Cauble v. Beaver-Electra Ref. Co.*, 115 *TEX.* 1, 6, 274 *S.W.* 120, 121 (1925) (dictum in case where wife's earnings were found to be her separate property pursuant to an "understanding between husband and wife"); *Hutchison v. Mitchell*, 39 *TEX.* 488, 493 (1873) (gift in trust by husband for wife providing the income should be her separate property).

posed by the *Wyly*⁶² and *Castleberry*⁶³ cases, which had held that a donor-spouse was deemed to have retained an interest for estate tax purposes in property given to the other spouse. The immediate need for the amendment was significantly lessened when, after the amendment was proposed, but prior to its effective date, the Fifth Circuit Court of Appeals overruled these decisions.⁶⁴

The reference to property in the phrase "income or property" in this provision (and in the preceding clause of the amendment) is intended to include an interest derived from other property but not unambiguously characterized as "income." The specific situation the draftsman had in mind was a stock dividend declared on a spouse's separate stock and emanating from capitalized surplus earnings of the corporation that could have been the subject matter of a cash dividend.⁶⁵

V. DRAFTING ANTENUPTIAL AGREEMENTS

It is of particular importance in the negotiation of terms of an antenuptial agreement that the parties be represented by independent counsel. Since the binding effect of the agreement must be uppermost in the minds of the draftsmen-negotiators, every possible effort must be made to dispel the basis for any future imputation of fraud on the part of either party to the agreement. Hence, not only independent counsel, but a full disclosure of assets by both parties are virtual requirements to an effective agreement. Those preliminaries accomplished, counsel in a similar position in times past would have begun to consider the gift and estate tax

62. *Estate of Wyly v. Commissioner*, 69 T.C. 227, 230 (1977), *rev'd*, 610 F.2d 1282, 1295-96 (5th Cir. 1980).

63. *Estate of Castleberry v. Commissioner*, 68 T.C. 682, 686, 692 (1977), *rev'd*, 610 F.2d 1282, 1295-96 (5th Cir. 1980).

64. *See Wyly v. Commissioner*, 610 F.2d 1282, 1294 (5th Cir. 1980) (reversing *Wyly* and *Castleberry*).

65. Both Texas and federal cases enunciate the proposition that stock dividends on separate stock are separate property. *E.g.*, *Duncan v. United States*, 247 F.2d 845, 855 (5th Cir. 1957); *Scofield v. Weiss*, 31 F.2d 631, 632 (5th Cir. 1942); *Johnson v. First Nat'l Bank*, 306 S.W.2d 927, 929 (Tex. Civ. App.—Fort Worth 1957, no writ). Criticism has been directed at this conclusion, however, when the dividend is not paid from original capital, but from the capitalization of earnings that might have been declared as cash dividends. *See Jackson, Community Property and Federal Taxes*, 12 Sw. L.J. 1, 13-14 (1958); McKnight, *Texas Family Code and Commentary, Title 1: Husband and Wife*, 5 TEX. TECH L. REV. 281, 352 (1974).

ramifications of the proposed terms of the agreement. These concerns, which so preoccupied draftsmen and counsellors prior to January 1, 1982,⁶⁶ have been virtually swept away by the tax reform act of 1981.⁶⁷ If gift taxes no longer attach to interspousal transactions,⁶⁸ and the incidents of the antenuptial agreements all occur during the marriage of the proposed spouses, the concerns of tax counsel are reduced to those which are encountered in any other transaction having some impact on the ultimate payment of estate taxes. Hence, the ordinary concerns of an estate planner are still called into play by the proposed terms of an antenuptial agreement, although not nearly to the degree as was heretofore the case. The parties, therefore, are now generally free to arrange their marital property as they desire without high-priority tax considerations.

As to its form and substantive content,⁶⁹ the draftsman should take particular care to track the language of the constitution:

persons about to marry . . . may . . . *partition* between themselves all or part of their property, then existing or to be acquired, or *exchange* between themselves the community interest of one . . . future spouse in any property for the community interest of the other . . . future spouse in other community property . . . to be acquired⁷⁰

The use of the term "partition" and "exchange" are particularly emphasized here because those are the kinds of transactions prescribed by the constitutional language. Although Family Code section 5.41 is captioned "Agreement in Contemplation of Marriage,"

66. See Berall, *Estate Planning for the Second Marriage*, 1977 NOTRE DAME EST. PLAN. INST. 343.

67. See Economic Recovery Tax Act of 1981, I.R.C. § 2523 (West Supp. 1982) (removing limitations on amount of deduction allowable on interspousal gifts); see also Weiss & Etkin, *New Law Overhauls Estate and Gift Taxes, Triggering New Planning Strategies*, 55 J. TAX'N 274, 276 (1981).

68. See Weiss & Etkin, *New Law Overhauls Estate and Gift Taxes, Triggering New Planning Strategies*, 55 J. TAX'N 274, 275-76 (1981).

69. A useful model for many antenuptial provisions is found in Smith & Ingram, *Premarital and Marital Planning for Preservation of Separate Property*, in STATE BAR OF TEXAS, *MARRIAGE DISSOLUTION IN TEXAS*, Appendix E, at E1-25 (1980). That agreement was drawn, however, to operate under the law as it stood prior to the constitutional amendment of 1980 and the 1981 federal tax reforms. Some of its provisions, therefore, will need to be up-dated.

70. TEX. CONST. art. XVI, § 15 (emphasis added).

and refers to the "marital property agreement,"⁷¹ the constitutional provision refers only to the process of partition or exchange.⁷² Hence, it is recommended that "partition" or "exchange" be used as the operative verb in drafting the agreement.

"Partition," as used in this context, refers to a division of property in severalty or in undivided shares, neither of which need be equal. This conclusion is evident from an examination of the 1948 language of the constitution, which the 1980 amendment changed:

husband and wife . . . may . . . partition between themselves *in severalty* or into *equal undivided interests* all or any part of their existing community property⁷³

This point is further exemplified by the language of the 1948 statute implementing the 1948 constitutional amendment which allowed partition of existing community property between the husband and wife into unequal shares upon application to, and approval of the district court.⁷⁴ The 1967 and 1969 versions of section 5.42⁷⁵ also allowed unequal partitions in severalty but required (pursuant to the constitution as it then was) that partitions in undivided interests be equal.

A partition must nonetheless constitute a division, and an exchange connotes a swap. Hence, in each partition or exchange transaction something is received by each party. It would, therefore, be possible to draft (but unlikely for clients to desire) a provision for a partition of the husband's earnings in favor of the wife, and the wife's earnings in favor of the husband. A purely *unilateral* agreement, however, is not authorized under the constitutional language providing for a partition or exchange between unmarried persons.⁷⁶

71. See TEX. FAM. CODE ANN. § 5.41 (Vernon Supp. 1982).

72. See TEX. CONST. art. XVI, § 15.

73. See *id.* (as amended in 1948) (emphasis added).

74. 1949 Tex. Gen. Laws, ch. 242, § 1, at 450.

If such instrument purports to exchange property or to partition property between the husband and wife, otherwise than as equal undivided interest in the same property, or as equal shares or units of identical personal property, such instrument shall not be valid unless approved by the Court upon written application of the husband and wife, addressed to the District Court of the county in which they or either of them reside.

Id.

75. 1969 Tex. Gen. Laws, ch. 888, § 1, at 2729; 1967 Tex. Gen. Laws, ch. 309, § 1, at 738.

76. See text accompanying notes 53-57 *supra*.

Although it is not necessary for the antenuptial agreement governed by Texas law to be supported by consideration to be enforceable, the agreement may be supported by consideration. In this instance, the consideration of marriage is sufficient, provided an unconditional agreement to marry has not been previously concluded. The ability of parties to deal with future acquisitions in antenuptial agreements provided by the amendment has virtually disposed of any need to draft these agreements as contractual wills or as contracts to make wills.

It should be noted there may be public policy limitations on provisions that may be included in these agreements with respect to support pending divorce and division of property on divorce.⁷⁷ As noted previously, however, waiver of homestead rights and the right to exempt personalty in the separate property of the other party on his or her death have been construed as effective when contained in an antenuptial agreement.⁷⁸

VI. DRAFTING MARITAL PARTITIONS AND EXCHANGES

The foregoing admonitions with respect to the necessity for independent counsel and full disclosure are equally applicable to drafting partitions for married couples. These agreements as well need not be supported by consideration to be enforceable. The draftsman is again advised to track the language of the constitution on which the agreement is founded, although here the draftsman may have a choice of provisions. He may utilize the partition or exchange provision:

spouses . . . may . . . *partition* between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse . . . in any property for the community interest of the other spouse . . . in other community property then existing or to be acquired . . . ,⁷⁹

or he may use the *agreement* provision when it is appropriate to his objective:

spouses may . . . *agree* between themselves that the income or

77. *But see* Schecter v. Schecter, 579 S.W.2d 502, 506 (Tex. Civ. App.—Dallas 1978, no writ) (pre-nuptial agreement not to seek alimony upon divorce held valid).

78. Williams v. Williams, 569 S.W.2d 867, 871 (Tex. 1978).

79. TEX. CONST. art. XVI, § 15 (emphasis added).

property from all or part of the separate property then owned by one of them, or which thereafter might be acquired, shall be the separate property of that spouse⁸⁰

If future earnings of both spouses are meant to be covered by the document, phrasing should be in terms of partition or exchange. If it is agreed that income of separate property of only one spouse is to be that spouse's separate property, and no other marital property interests are to be affected, phrasing should be in terms of agreement.

With respect to the creation during marriage of joint tenancies out of community property, it seems axiomatic that a right of survivorship as between spouses cannot be achieved except by mutual act of the spouses. Although one spouse can create a "pay on death" account in favor of the other spouse from solely managed community property,⁸¹ to achieve the alternative of survivorship applicable to both spouses, whether or not the community property sought to be dealt with is jointly managed, the joinder of both spouses in the transaction is required.

Two decades of judicial precedents⁸² have caused lawyers to question whether the process of creating a joint tenancy out of community property can now be reduced to a single transaction, or whether the two-step process approved in *Hilley v. Hilley*⁸³ is still required. As a first step, a community interest (*now* along with its income if it is to be included) is transformed into separate property. The way is then open for creation of a joint tenancy from this separate property. While the constitutional revision clearly provides greater freedom for adjustment of spousal interests, *Hilley* continues to be a stumbling block with respect to creation of joint tenancies. As the court explained in *Hilley*, the first step may be achieved by a partition of the community property into divided or undivided shares of separate property, or by a gift of the commu-

80. *Id.* (emphasis added).

81. *See* TEX. PROB. CODE ANN. §§ 436(10), 439(b) (Vernon 1980).

82. *See, e.g.,* *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966); *Hilley v. Hilley*, 161 Tex. 569, 579, 342 S.W.2d 565, 571 (1961); *Bowman v. Simpson*, 546 S.W.2d 99, 102 (Tex. Civ. App.—Beaumont 1977, writ ref'd).

83. 161 Tex. 569, 342 S.W.2d 565 (1961). The procedure announced in *Hilley* was for the spouses to partition the community property as provided by statute and then contract a survivorship agreement with this newly transformed separate property. *See id.* at 579, 342 S.W.2d at 571.

nity by its manager to one of the spouses.⁸⁴ In the instance of a gift, the donee then could convert the separate property into a joint tenancy. In the case of partition, both spouses would do so, acting in concert. But now—in contrast to the state of the law when the facts which produced the *Hilley* dispute arose—the constitution allows partition of future acquisitions. In *Hilley*, the court held that a present community property interest could not be *directly* partitioned to achieve a joint tenancy of securities. Hence, if a dispute should arise with respect to an effort to convert community property into a joint tenancy by a single transaction, the court must be invited to put *Hilley* aside because of the substantially changed constitutional approach to interspousal transactions. The amendment shows that the people of Texas countenance a much broader power of spouses to rearrange their community property interests, thus undercutting the presuppositions on which *Hilley* was based. The decision in *Hilley* rested on at least two grounds: (1) the narrow definition of separate property then provided by the constitution,⁸⁵ and (2) the fact that there was some other existing means of achieving the spouses' objective other than the one they chose to employ.⁸⁶ In light of the constitutional amendment, these two grounds are now unconvincing.

Constitutional partition of marital property clearly comprehends a division of individual interests which are parts of the co-owned whole. The amendment of Probate Code section 46 authorizes spouses, in performing a partition, to go a step further in dealing with funds in an account by attaching an additional characteristic (the right of survivorship) to the partitioned separate shares. When the statute is so analyzed as an original proposition, it is difficult to see why it might constitute an unconstitutional exercise of legislative power, as its 1961 counterpart was construed in *Williams v. McKnight*.⁸⁷

84. See *id.* at 579, 342 S.W.2d at 571.

85. See *id.* at 579, 342 S.W.2d at 571. Property acquired "during marriage in any manner other than by gift, devise, descent, purchase with separate funds, or partition as authorized [by statute], does not and cannot be made to constitute [a spouse's] separate property." *Id.* at 579, 342 S.W.2d at 571.

86. See *id.* at 579, 342 S.W.2d at 571. There may have been an additional ground for this decision in that the spouses did not in fact intend to partition the community property with which they were dealing. See *id.* at 574-75, 342 S.W.2d at 568.

87. 402 S.W.2d 505, 507-08 (Tex. 1966) (construing 1961 Tex. Gen. Laws, ch. 120, § 1, at 233).

In the light of *Hilley* and *Williams*, the question is whether the constitutional provision was changed to such an extent in 1980 as to enable a single step transformation of community funds *in an account* into a joint tenancy under section 46(b) as enacted in 1981. The dispute in *Maples v. Nimitz*,⁸⁸ concerning a purported right of survivorship to a community savings account, arose long before the amendment to the constitution. There, the Texas Supreme Court found that the agreement for the savings association account accomplished only a "fictional" partition of the community estate and was, therefore, ineffectual to create a joint tenancy.⁸⁹ In so doing, the court reaffirmed the decision in *Williams v. McKnight*,⁹⁰ which in turn rested on *Hilley* under the old constitutional language. In *Maples*, the court was careful to note the constitutional change adopted prior to the decision,⁹¹ and therefore, seems to suggest a different approach under the new language. *Hilley* is, even so, still a conceptual stumbling block.

Even though a single transaction arguably may be permitted for conversion of community property into a joint tenancy under the statute, caution advises continued use of two transactions. If spouses wish to convert solely or jointly managed community property into a joint tenancy (regardless of the nature of the property), they should first partition the property (and the future income it may produce)⁹² into divided or undivided shares of separate property (using such terms of transfer as are appropriate to the partic-

88. 615 S.W.2d 690 (Tex. 1981).

89. *See id.* at 695.

90. 402 S.W.2d 505 (Tex. 1966) (construing TEX. REV. CIV. STAT. ANN. art. 852a, § 6.09 (Vernon 1964)). Following *Hilley*, the court in *Williams v. McKnight* held that the spouses could make no effective agreement that their community property in three accounts would be held in joint tenancy with a right of survivorship without first reducing the funds by some means to their separate estates. *See id.* at 508. In *Hilley v. Hilley*, *Williams v. McKnight* and *Maples v. Nimitz*, the supreme court refused to find that the provision in the contracts that any funds contributed to the account would be conclusively presumed to be a gift to the other spouse was sufficient to effect a partition. *See Maples v. Nimitz*, 615 S.W.2d 690, 695 (Tex. 1981); *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966); *Hilley v. Hilley*, 161 Tex. 569, 576, 342 S.W.2d 565, 569 (1961). Absent a specific reference to partition in the agreement, as required by Texas Probate Code section 46(b), the court will not infer an intent to partition the property. *See Maples v. Nimitz*, 615 S.W.2d 690, 695 (Tex. 1981).

91. *See Maples v. Nimitz*, 615 S.W.2d 690, 693 n.3 (Tex. 1981).

92. The future income must be partitioned before recombination. Otherwise the income and all its income will be the spouses' community property.

ular property involved) and then recombine the property as a joint tenancy. Each transaction should be fully executed, with an acknowledgement if real property is involved. If the print is small enough and the spouses can write their names in a confined space, all this can be achieved on a signature-card of the size customarily used by banks for these purposes.⁹³

Probate Code section 46(b) provides for joint tenancy agreements with "a bank, savings and loan [company or association], credit union, or other financial institution."⁹⁴ If one seeks to rely on that section, its scope should be examined. Some question may be raised with respect to the coverage of the phrase, "other financial institutions"—whether, for example, it includes brokerage houses which administer money-market accounts. Although section 46,⁹⁵ found in the Probate Code's chapter on descent and distribution, is not necessarily subject to the definitions contained in section 436⁹⁶ of chapter 11 (nontestamentary transfers), the fact that the act by which section 46 was amended⁹⁷ also contained an amendment to section 437,⁹⁸ which is in chapter 11, suggests that the draftsmen of the act had chapter 11 in mind. Section 436, enacted in 1979, provides that: "Financial institution' means an organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks, and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions."⁹⁹ This definition, if applicable to section 46, seems clearly broad enough to include brokerage houses and money-market accounts maintained by them.

The burden of proof provision of Family Code section 5.45, on the other hand, has no locational nexus to section 46 at all. Section 5.45 changes the burden of proof so that the proponent of any provision of a marital property agreement (including partitions) has

93. For a somewhat different approach to the problem, see McLaughlin, *Joint Accounts, Totten Trusts, and the Poor Man's Will*, 44 *TEX. B.J.* 871, 872-73 (1981).

94. *TEX. PROB. CODE ANN.* § 46(b) (Vernon Supp. 1982).

95. *Id.* § 46.

96. *Id.* § 436 (Vernon 1980) (definitional section of nontestamentary transfer chapter).

97. See 1981 *TEX. Sess. Law Serv.*, ch. 319, §§ 1, 2, at 895 (Vernon).

98. See *TEX. PROB. CODE ANN.* § 437 (Vernon Supp. 1982) ("Ownership as Between Parties and Others").

99. *Id.* § 436(3) (Vernon 1980).

the burden of showing that the transaction was not tainted with fraud or duress.¹⁰⁰ If conversion of a community account to a joint tenancy can be achieved by a single transaction, the provisions of section 5.45 may be inapplicable to it. But if a spousal partition must be performed before the joint tenancy is created, it is difficult to see how the applicability of section 5.45 can be avoided. In the light of the circumstances that usually surround the creation of an apparent joint tenancy account, if one spouse has been instrumental in opening the account and he is the survivor, the burden of proof will be too onerous for him to bear. On the other hand, if it is asserted that a convenience account was meant to be opened rather than a joint tenancy account,¹⁰¹ the maker of such an argument against a surviving spouse (who was not the movant in opening the account) would also have a difficult burden of persuasion.

The right of creditors to reach a joint tenancy by writ of execution, attachment, and garnishment is unclear. In many other states it has been concluded that during marriage only joint creditors of spouses can reach a co-tenancy interest constituting a tenancy by the entireties.¹⁰² In that case, a creditor of only one of the spouses cannot reach entireties property, because the non-debtor spouse's interest is *per tout*, and thus encompasses the entire joint estate. Although that analysis could have produced the opposite conclusion, because the debtor-spouse's interest is also *per tout*, a Texas joint tenancy between spouses has never been characterized as a tenancy by the entireties. It is deemed an ordinary joint tenancy, *per my et per tout*. Each tenant has an aliquot share for purposes of alienation and forfeiture. Hence, a creditor of either could reach one-half of the whole, thereby converting the other half into a tenancy in common, as occurs when one joint tenant sells his share.

It should also be noted that each spouse's interest in a Texas joint tenancy created by spouses is a separate property interest and not a community interest for the purpose of debt-collection, as

100. See TEX. FAM. CODE ANN. § 5.45 (Vernon Supp. 1982).

101. See *Dulak v. Dulak*, 513 S.W.2d 205, 208 (Tex. 1974).

102. See, e.g., *Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022, 1029-30 (5th Cir. 1980) (discussing Florida authorities); *In re Kline*, 370 F. Supp. 152, 154 (W.D. Va. 1973) (applying principle to bankruptcy); *Farmington Prod. Credit Ass'n v. Estes*, 504 S.W.2d 149, 151-52 (Mo. Ct. App. 1974) (addressing rule's relation to realty).

well as for other purposes.¹⁰³ In anticipation of divorce, unless a division of a joint tenancy in personalty was achieved with an intent of a debtor-spouse to defraud a creditor, or the division was made when the debtor-ex-spouse was insolvent, the creditors of the debtor-ex-spouse should not be able to reach the property awarded to the non-debtor ex-spouse. As to postmortem rights of creditors of a deceased spouse to a spousal joint tenancy, the surviving spouse's rights should not be affected by the deceased spouse's creditors. This should be true unless the creation of the joint tenancy amounted to a fraudulent transfer under sections 24.02 or 24.03 of the Business and Commerce Code,¹⁰⁴ or the joint tenancy is a "multiple-party account" within Probate Code section 442,¹⁰⁵ and it almost certainly does not come within that definition.

Partition in anticipation of divorce is greatly eased by the constitutional amendment but still requires careful attention of counsel. Independent counsel will, of course, insist on full disclosure. A writing is certainly desirable and probably required for an effective property settlement in anticipation of divorce. Although the divorce partition rests on a different line of authority from that of the ordinary spousal partition,¹⁰⁶ both types of partition are now probably merged under the constitutional definition.¹⁰⁷ Section 3.631 of the Texas Family Code, enacted in 1981, makes specific reference to "a written agreement concerning the division of all property and liabilities of the parties . . . [which is] binding on the court unless it finds the agreement is not just and right."¹⁰⁸ Since nothing is said in the constitution about judicial partitions on divorce and the rights of future creditors, the problem of future creditors' rights is best handled by a property settlement between the spouses providing for partition of community assets and allocation of liabilities to particular spouses. If the debtor-spouse does not intend to defraud creditors, or that spouse is not made insol-

103. Since a spouse's interest in joint tenancy is separate property, the rule in *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977), is applicable to joint tenancies of realty for purposes of division on divorce.

104. TEX. BUS. & COM. CODE ANN. §§ 24.02, .03 (Vernon 1968).

105. TEX. PROB. CODE ANN. § 442 (Vernon 1980).

106. See *Rains v. Wheeler*, 76 Tex. 390, 395, 13 S.W. 324, 325-26 (1890).

107. See *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 398-401 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.).

108. TEX. FAM. CODE ANN. § 3.631 (Vernon Supp. 1982).

vent by the partition of community property that would have been available for the enforcement of that spouse's debts, the property so partitioned to the non-debtor-spouse is not to be subjected to payment of the debts of the debtor-spouse as would have resulted previously.¹⁰⁹

VII. EFFECTS OF THE AMENDMENT ON EXECUTORY ASPECTS OF PRIOR ANTENUPTIAL AGREEMENTS OR MARITAL PARTITIONS OR EXCHANGES

Executory portions of valid antenuptial agreements entered into under section 5.41, as enacted in 1969 and amended in 1973,¹¹⁰ or article 4610, as enacted in 1967,¹¹¹ may be enforceable in equity by an order of specific performance.¹¹² Hence, no vested rights would have arisen contrary to the agreement. Even if the executory terms of the agreement are unenforceable, a present partition carrying out the terms of executory portions of the agreement and covering future acquisitions will effectively carry out the premarital agreement.¹¹³ Further, a constitutional amendment may expressly or impliedly validate transactions entered into under a statute which allowed such transactions but under which the transactions were constitutionally unenforceable, provided no interference with vested rights results.¹¹⁴ Section 5.41(a),¹¹⁵ effective January 1, 1970, and article 4610,¹¹⁶ effective January 1, 1968, provided that persons

109. *Cf. Stewart Title Co. v. Huddleston*, 608 S.W.2d 611, 612 (Tex. 1980) (property received by wife in divorce partition subject to "judgment liens properly secured against her as a result of preexisting community debts"), *refusing writ n.r.e. per curiam* to 598 S.W.2d 321 (Tex. Civ. App.—San Antonio). *But see Miller v. City Nat'l Bank*, 594 S.W.2d 823, 826 (Tex. Civ. App.—Waco 1980, no writ). After the couple's community property was divided on divorce and had vested in each spouse as separate property, the ex-wife was not personally liable for payment of notes executed by her ex-husband during their marriage. The husband's creditors did not, however, seek to reach particular property awarded to the wife on divorce. *See id.* at 826.

110. 1973 Tex. Gen. Laws, ch. 577, § 31, at 1608; 1969 Tex. Gen. Laws, ch. 888, § 1, at 2729;

111. 1967 Tex. Gen. Laws, ch. 309, § 1, at 735.

112. *Gorman v. Gause*, 56 S.W.2d 855, 857-58 (Tex. Comm'n App. 1933, judgment adopted) (semble); *see also Hornsby v. Hornsby*, 60 S.W.2d 489, 490 (Tex. Civ. App.—San Antonio 1933), *rev'd on other grounds*, 127 Tex. 474, 93 S.W.2d 379 (1936).

113. *See McFadden v. McFadden* 213 S.W.2d 71, 75 (Tex. Civ. App.—Amarillo 1948, mand. overr.).

114. *See Hutchinson v. Patching*, 103 Tex. 497, 502, 129 S.W. 603, 605 (1910).

115. 1969 Tex. Gen. Laws, ch. 888, § 1, at 2729.

116. 1967 Tex. Gen. Laws, ch. 309, § 1, at 735.

intending to marry might "enter into a matrimonial property agreement as they may desire."¹¹⁷ The constitutional amendment, therefore, could have the effect of validating the most commonly expressed desire of agreements executed under those statutes, that is, to make future acquisitions separate property which would otherwise become community property. In *Hutchinson v. Patching*,¹¹⁸ the Supreme Court of Texas held that a constitutional amendment validated a statute creating a school district as well as the prior issuance of bonds by the district, insofar as the issue of bonds complied strictly with the statutory and constitutional requirements.¹¹⁹ The ultimate issue in every such instance must be the intent of the legislature in proposing the amendment.

Marital partitions or exchanges under section 5.42, as enacted in 1969 and amended in 1973,¹²⁰ and article 4624a, as enacted in 1967,¹²¹ would be affected by the amendment in similar respects. Executory portions of valid partitions or exchanges may be enforceable in equity so that no vested rights have arisen contrary to the partition or exchange. Even if executory aspects of a partition or exchange are unenforceable, a present partition or exchange carrying the executory terms into effect with respect to past and future acquisitions would be effective to carry out the prior partition or exchange. Because section 5.42(a), effective January 1, 1970,¹²² and article 4624a, effective January 1, 1968,¹²³ authorized partitions of "all or any part of their community property" (not merely "existing community property" as stated in the constitutional amendment of 1948), it authorized partitions of community property to be acquired. Hence, partitions of future acquisitions made pursuant to those statutes may be validated under the doctrine of *Hutchinson v. Patching*.¹²⁴

The effectiveness of an intention to include the future income from the property with a gift made by one spouse to the other

117. See 1969 Tex. Gen. Laws, ch. 888, § 1, at 2729; 1967 Tex. Gen. Laws, ch. 309, § 1, at 735.

118. 103 Tex. 497, 129 S.W. 603 (1910).

119. *Id.* at 501-02, 129 S.W. at 605.

120. 1973 Tex. Gen. Laws, ch. 577, § 32, at 1608; 1969 Tex. Gen. Laws, ch. 888, § 1, at 2729;

121. 1967 Tex. Gen. Laws, ch. 309, § 1, at 738.

122. 1969 Tex. Gen. Laws, ch. 888, § 1, at 2729.

123. 1967 Tex. Gen. Laws, ch. 309, § 1, at 738.

124. 103 Tex. 497, 502, 129 S.W. 603, 605 (1910).

prior to the effective date of the amendment should be accentuated by the amendment. If the intention to include income in the gift was expressly stated, the gift of income is valid under prior judicial opinions.¹²⁵ If that intention was not expressly stated, the gift may still be valid under the authorities, but a confirmation of that intent may be appropriately executed.

VIII. CONCLUSION

The 1980 constitutional amendment has effected a long-needed change in Texas community property law by affording spouses greater flexibility in interspousal property transactions. Impediments to the creation of pre-marital and spousal agreements dealing with property yet to be acquired have been eliminated. Doubts concerning the ability of one spouse to give the other the future income arising from a present gift of income are dispelled; an interspousal gift of property is now presumed to include the income arising from the property. The amendment has also removed the disparity which had existed between the burden placed on a creditor challenging a marital partition and upon a creditor challenging an interspousal gift; in both situations the creditor now must prove the transfer was fraudulent as to pre-existing creditors. Agreements purporting to transform separate property into community property still are not permitted under the amendment, but agreements affecting the income of one spouse only are allowed. Despite some limitations, Texas spouses and prospective spouses now have more freedom than ever before to deal with their property as they desire.

125. See notes 12-13 *supra*.