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Fitting a Round Peg into a Square Hole: Section 3.63, Texas Family Code and the Marriage That Crosses State Liens Symposium - Texas Community Property Law in Transition.

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**FITTING A ROUND PEG INTO A SQUARE HOLE: SECTION
3.63, TEXAS FAMILY CODE AND THE MARRIAGE THAT
CROSSES STATE LINES**

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The basic statutory authority for a Texas court to divide property in a decree of divorce or annulment is set out in section 3.63 of the Texas Family Code.¹ As originally adopted in the Texas

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1. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982), which reads:

§ 3.63. Division of Property

(a) In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

(b) In a decree of divorce or annulment the court shall also order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage:

(1) property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or

(2) property that was acquired by either spouse in exchange for real or personal property, and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

Family Code, this section authorized the trial court, in a divorce or annulment proceeding, to order a division of the estate of the parties, although the term "estate of the parties" was not defined in the statute.³ In the landmark case of *Eggemeyer v. Eggemeyer*,³ however, the Texas Supreme Court interpreted "estate of the parties" to include only the spouses' community property.⁴ The *Eggemeyer* decision made it clear section 3.63 did not authorize the trial court, in a decree of divorce or annulment, to divide property acquired by the spouses while domiciled in a non-community property jurisdiction.

In 1981, the 67th Legislature amended section 3.63 by adding subsection (b), discussed below.⁵ The amendment was expressly made applicable to all divorce or annulment hearings held on or after September 1, 1981.⁶ Section 3.63(b) now requires the court, in a decree of divorce or annulment, to order a division of real and personal property, wherever situated, that was: (1) acquired by either spouse while domiciled elsewhere and that would have been community property had the spouse who acquired the property been domiciled in Texas at the time of the acquisition; or (2) acquired by either spouse in exchange for property described in section 3.63(b)(1).⁷

The amendment, which in some respects merely codifies a practice already known to Texas courts,⁸ raises important federal and

Id.

2. See 1969 Tex. Gen. Laws, ch. 888, § 3.63, at 2725.

3. 554 S.W.2d 137 (Tex. 1977) (noted in 9 ST. MARY'S L.J. 331 (1977)).

4. See *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977). "The only 'estate of the parties' is community property." *Id.* at 139.

5. See 1981 Tex. Gen. Laws, ch. 712, § 1, at 2656.

6. See *id.* at 2657. "This Act takes effect September 1, 1981, and applies only to suits for divorce or annulment in which a hearing on the issue of divorce or annulment has not been held before that date." *Id.* at 2657.

7. TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1982). Section (b)(2) of this statute is perhaps not as clear a statement as could be desired. The deletion of the word "and" might make the meaning clearer.

8. Texas courts traditionally have looked to the status of the property at the time of acquisition in the jurisdiction where acquired to determine its character upon divorce in Texas. This designation as separate or community was prior to publication of the opinion in *Campbell v. Campbell*, 23 Tex. Sup. Ct. J. 391 (June 4, 1980), *opinion withdrawn*, 24 Tex. Sup. Ct. J. 84, 84 (November 22, 1980), tempered by the perceived discretion of the court to make an equitable division of personal property. See *Muns v. Muns*, 567 S.W.2d 563, 566 (Tex. Civ. App.—Dallas 1978, no writ); *Whittenburg v. Whittenburg*, 523 S.W.2d 797, 798 (Tex. Civ. App.—Austin 1975, no writ); *Gaulding v. Gaulding*, 503 S.W.2d 617, 618 (Tex.

state law issues that merit discussion. In this article, the constitutionality of the amendment and questions which may arise in its application are explored.

I. POSSIBLE FEDERAL CONSTITUTIONAL ISSUES

Section 3.63(b) is very similar to a California statute,⁹ the antecedents of which date back to 1917.¹⁰ A brief history of the California experience will serve to bring some of the federal constitutional issues into focus.

In 1917 California adopted a law which declared that realty situated in California and personal property, wherever situated, which was acquired during marriage while the spouses were domiciled in another jurisdiction would become community property upon the spouses' establishing their domicile in California.¹¹ This rule controlled in the event that property would not have been either spouse's separate property if acquired while the spouses were domiciled in California.¹² In the case of *In re Thornton's Estate*,¹³ the California Supreme Court declared this statute unconstitutional, finding it altered vested property rights arising out of a spouse's acquisition of property in another state, in derogation of his privileges and immunities as a citizen of the United States.¹⁴ The court

Civ. App.—Eastland 1973, no writ).

9. CAL. CIV. CODE § 4803 (West 1970). An analogous statute has been adopted in Arizona, Ariz. Rev. Stat. Ann. § 25-318 (Supp. 1981-82), and was discussed in *In re Marriage of Furimsky*, 595 P.2d 662, 663 (Ariz. 1979). By the same token, some common law jurisdictions have attempted to address, in their divorce statutes, the division of community property, a type of property alien to their jurisprudence. The statute in Hawaii, which is not a community property state, provides for the court, in a divorce, to divide the estate of the parties, "whether community, joint or separate." HAWAII REV. STAT. § 580-47 (Supp. 1981). The statute in Nevada, also not a community property state, allows the court, in a divorce, to make an equitable distribution of, *inter alia*, the "community property of the parties." NEV. REV. STAT. § 125.150 (1979).

10. For a detailed review of the successive statutory changes and court decisions involving the California law on this topic, see *Addison v. Addison*, 399 P.2d 897, 899-900, 43 Cal. Rptr. 97, 99-100 (1965). See generally *In re Miller*, 187 P.2d 722 (Cal. 1947); I. BAXTER, MARITAL PROPERTY § 23.3, at 344 (1973); Annot., 14 A.L.R.3d 391 (1967).

11. 1917 Cal. Stat. ch. 581, § 1, at 827.

12. *Id.* at 287.

13. 33 P.2d 1 (Cal. 1934).

14. *Id.* at 2-3. The court was referring to the privileges and immunities clause of the fourteenth amendment, which reads in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" U.S. CONST. amend. XIV, § 1.

also held that to take the property of one person and to transfer it to another, simply because of a change of citizenship and domicile, was a deprivation of property without due process of law.¹⁵

In 1961 the California legislature introduced the concept of "quasi-community property," which it defined as all personal property, wherever situated, and all real property situated in California, acquired during marriage by a spouse while domiciled in another jurisdiction, that would have been community property if acquired while that spouse was domiciled in California.¹⁶ At the same time, California courts were given authority to divide both community and "quasi-community property" in a decree of divorce.¹⁷

The constitutionality of the 1961 enactment was challenged in the divorce case of *Addison v. Addison*.¹⁸ In *Addison*, the Supreme Court of California expressed serious doubts as to the correctness of *Thornton*.¹⁹ The court distinguished *Thornton* on the ground that the statute invalidated by *Thornton* had altered property rights by the crossing of the boundary into California, while the 1961 enactment became operative only upon rendition of a decree of divorce.²⁰ The court rejected the husband's complaint of deprivation of property without due process of law, finding the state of current domicile had sufficient interest in a divorce pending in its courts to justify the exercise of its police power in altering the vested property rights of divorcing spouses.²¹ The court further rejected the argument that the statute violated the privileges and immunities clauses found in the fourteenth amendment and sec-

15. *In re Thornton's Estate*, 33 P.2d 1, 3 (Cal. 1934). At this point the court was referring to the due process clause of the fourteenth amendment, which reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1; accord *Douglas v. Douglas*, 125 P. 796, 797 (Idaho 1912).

16. 1961 Cal. Gen. Laws, ch. 638, § 2, at 1838.

17. *Id.* at 1839.

18. 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

19. *Id.* at 901, 43 Cal. Rptr. at 101.

20. *Id.* at 901-02, 43 Cal. Rptr. at 101-02; accord *Rothman v. Rothman*, 320 A.2d 496, 502 (N.J. 1974).

21. See *Addison v. Addison*, 399 P.2d 897, 903, 43 Cal. Rptr. 97, 103 (1965). *But see* *Roesch v. Roesch*, 147 Cal. Rptr. 586, 593 (Ct. App. 1978) (where husband had lived in California only seven months after separating from wife and children, who remained in Pennsylvania—the marital domicile for almost entire marriage—California did not have sufficient interest to warrant application of California's quasi-community property statute in husband's California divorce proceeding), *cert. denied*, 440 U.S. 915 (1979).

tion 2 of article IV of the United States Constitution.²² The California court also dismissed the husband's final contention that the law had been applied retroactively. Since the statute was given effect by a decree of divorce rendered after the effective date of the statute, the court determined the statute had been applied prospectively only.²³

In 1970 the California legislature broadened its definition of "quasi-community property" to include *all* property, wherever situated, acquired by a spouse while domiciled in another jurisdiction, which would have been community had the acquiring spouse been domiciled in California at the time of acquisition.²⁴ The description of property set out in this California statute is very similar to the language in section 3.63(b)(1) and (2). The term "quasi-community property", however, does not appear in Section 3.63(b)(1) and (2). Instead, the Texas statute merely describes the property to be divided, without labelling it. Nevertheless, because of the similarity between the California and Texas provisions, the constitutional analysis used by the court in *Addison* could be applied with equal force to section 3.63(b).

A further analogy can be drawn between section 3.63(b) and statutes recently adopted in many common law jurisdictions giving trial courts the power to make an "equitable distribution" of property in a marital dissolution proceeding.²⁵ Because certain such

22. *Addison v. Addison*, 399 P.2d 897, 903, 43 Cal. Rptr. 97, 103 (1965); *see also* U.S. CONST. art. IV, § 2; *id.* amend XIV, § 1.

23. *See Addison v. Addison*, 399 P.2d 897, 904 43 Cal. Rptr. 97, 104. *But see In re Marriage of Bouquet*, 546 P.2d 1371, 1377 n.10, 128 Cal. Rptr. 427, 433 n.10 (1976) (refuting the *Addison* court's disclaimer that the statute had not been applied retroactively).

24. CAL. CIV. CODE § 4803 (West 1970). The significant change was the inclusion of real property situated outside California.

25. All but five of the common law states in the United States have statutes providing for equitable distribution of property on divorce. These five exceptions are Florida, Mississippi, South Carolina, Virginia, and West Virginia. 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 31, at 35-57 (1981 Supp.). Both Florida and South Carolina, however, by virtue of state decisional law, allow a form of equitable division. *E.g.* *Canakaris v. Canakaris*, 382 So. 2d 1197, 1201 (Fla. 1980); *see Freed & Foster, Divorce In The Fifty States: An Overview As Of August 1, 1981*, 7 FAM. L. REP. (BNA) No. 49, at 4056-57 (Oct. 20, 1981). West Virginia allows transfer of title, upon divorce, of items of personalty with short usable life, such as an automobile, as equitable compensation for "loss of the advantages of the marriage state." *See Patterson v. Patterson*, 277 S.E.2d 709, 711 (W. Va. 1981). Some statutory schemes define the term "marital property," and then provide that "marital property" is divisible on divorce. Examples of such "marital property" statutes are Ark. Stat. Ann. § 34-1214 (1962); Colo. Rev. Stat. § 14-10-113 (1974 & Supp. 1980); Del.

statutes allow the divestiture of title to property on divorce to a degree previously unknown in these common law jurisdictions, some of these laws have been attacked on constitutional grounds.²⁶ Traditionally in common law jurisdictions, the court, in a marital dissolution proceeding, was required to award property to the spouse holding title to same.²⁷ Since a husband was the exclusive owner of his own wages and the things bought with them,²⁸ the

Code Ann. tit. 13, § 1513 (Supp. 1981); Ill. Rev. Stat. ch. 40, § 503 (1980); Ky. Rev. Stat. Ann. § 403.190 (Baldwin Supp. 1980); Me. Rev. Stat. Ann. tit. 19, § 722-A (1981); Minn. Stat. §§ 518.54, .58 (Supp. 1981); Mo. Rev. Stat. § 452.330 (Supp. 1982); N.C. Gen. Stat. § 50-20 (1981 Supp.); N.Y. Dom. Rel. Law § 236B(5) (West Supp. 1981-82); Pa. Stat. Ann. tit. 23, § 401(d) (Purdon 1981-82). The "marital property" statutes are patterned after the now-superseded section 307 of the Uniform Marriage and Divorce Act, as amended in 1971. See *Zillert v. Zillert*, 395 A.2d 1152, 1154-55 (Me. 1978). Most of the other statutory schemes specify the types of property that can be divided, without labelling them. See generally *Fleck, Historical Impact And Practical Applications of Alternatives A & B of The Uniform Marriage And Divorce Act as Incorporated in The Illinois Marriage And Dissolution of Marriage Act*, TAX, FINANCIAL & ESTATE PLANNING DEVELOPMENTS IN FAMILY LAW 2 (1981). The Maryland statute, however, directs the court, in a divorce or annulment proceeding, to determine the value of the "marital property" and then to grant a monetary award to one spouse against the other if an adjustment of the equities is desired. The court may not, however, transfer the ownership of property from one spouse to the other. See MD. CTS. & JUD. PROC. CODE ANN. §§ 3-6A-03 to -05 (1980).

26. See, e.g., *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1387-89 (Ill. 1978) (dismissing arguments statute violated constitutional prohibitions against impairment of contractual obligations, denied due process, and equal protection); *Fournier v. Fournier*, 376 A.2d 100, 101-02 (Me. 1977) (rejecting argument that applying statute to property acquired before effective date of statute violated fourteenth amendment's due process clause); *Rothman v. Rothman*, 320 A.2d 496, 503 (N.J. 1974) (holding statute did not amount to deprivation of property without due process); see also *Husband T.N.S. v. Wife A.N.S.*, 407 A.2d 1045, 1048 (Del. 1979); *Corder v. Corder*, 546 S.W.2d 798, 802 (Mo. Ct. App. 1977); *Valladares v. Valladares*, 438 N.Y.S.2d 810, 815-16 (App. Div. 1981). Trial courts in Pennsylvania have differed as to the constitutionality of retroactive application of that state's equitable distribution statute adopted in 1980. See *Retroactivity of Pennsylvania's New Law*, 1 FAIRSHARE No. 8, at 21 (Aug. 1981).

27. See *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1387 (Ill. 1978); *Carter v. Carter*, 419 A.2d 1018, 1020 (Me. 1980); *Paul W. v. Margaret W.*, 8 FAM. L. REP. (BNA) 3013, 3013 (Pa. Ct. Common Pleas 1981); *Allerbach & Jenner, Historical and Practice Notes*, ILL. ANN. STAT. ch. 40, § 503, at 454 (Smith-Hurd 1980).

28. See *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 234 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.) (husband owned his wages under common law which existed in Pennsylvania); *Pechstein v. Pechstein*, 174 S.W.2d 787, 788 (Tex. Civ. App.—San Antonio 1943, no writ) (wife had no interest in husband's wages under common law which existed in Utah); cf. *Mitchim v. Mitchim*, 509 S.W.2d 720, 725 (Tex. Civ. App.—Austin 1974) (retirement benefits earned during marriage, while spouses were domiciled in common law state, belonged to the employee spouse), *rev'd on other grounds*, 518 S.W.2d 362 (Tex. 1975); *Gaulding v. Gaulding*, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1973, no writ) (wife had no community interest in portion of husband's retirement benefits attributable to em-

husband usually received most of the property upon dissolution of the marriage.²⁹ Under the newer equitable distribution statutes, however, the trial court in a marital dissolution proceeding is permitted to equitably divide property acquired during marriage from certain sources, regardless of how title was taken.³⁰ Property made divisible by these statutes, denominated "marital property" in some jurisdictions, is usually defined in terms analagous to community property, i.e., property acquired during marriage by other than gift, devise, or descent.³¹

In the divorce case of *Kujawinski v. Kujawinski*,³² the Supreme Court of Illinois addressed the question of whether a "marital property" statute adopted by the Illinois Legislature deprived the husband, without due process of law, of property rights which had vested in him prior to the effective date of the statute. The court held that the statute did not purport to affect the rights of the husband to own and enjoy property during the marriage.³³ The act merely described certain types of property as "marital property" and provided for Illinois courts to equitably divide such property upon termination of the marriage.³⁴ The statute was found to be a valid exercise of the state's police power to "create a system of property division upon dissolution of marriage that is more equitable than that which previously existed."³⁵ Therefore, the Illinois court reasoned, the statute afforded due process of law. In rejecting the husband's argument that the new divorce law could constitu-

ployment in Tennessee and Kentucky); *Orr v. Pope*, 400 S.W.2d 614, 616-17 (Tex. Civ. App.—Amarillo 1966, no writ) (land in Texas acquired by husband while residing in Oregon held to be his separate property under the common law in effect in Oregon).

29. *Corder v. Corder*, 546 S.W.2d 798, 803 (Mo. Ct. App. 1977); *Paul W. v. Margaret W.*, 8 FAM. L. REP. (BNA) 3013, 3013 (Pa. Ct. Common Pleas 1981); *Muns v. Muns*, 567 S.W.2d 563, 566 (Tex. Civ. App.—Dallas 1978, no writ).

30. See authorities cited in note 25 *supra*. Regarding the reduced significance of title, see *In re Marriage of Howard*, 600 P.2d 93, 94 (Colo. Ct. App. 1979) and *In re Marriage of Fleming*, 400 N.E.2d 625, 627 (Ill. Ct. App. 1980).

31. See statutes cited in note 25 *supra*. The Maine Supreme Court commented: "We have previously noted that our marital property statute is based upon 'the fundamental conception of marriage, having its roots in community property law, as a partnership or shared enterprise.'" *Grant v. Grant*, 424 A.2d 139, 144 (Me. 1981) (quoting *Carter v. Carter*, 419 A.2d 1018, 1022 (Me. 1980)).

32. 376 N.E.2d 1382 (Ill. 1978).

33. *Id.* at 1386.

34. *Id.* at 1386-87.

35. *Id.* at 1388.

tionally be applied only to property acquired after the effective date of the statute, the court observed that such a rule would delay the impact of the legislation "for at least a generation."³⁶ The court concluded that the state's interest in applying the statute retrospectively greatly outweighed the husband's asserted property interest,³⁷ citing a New Jersey Supreme Court case³⁸ and a Missouri Court of Appeals case³⁹ upholding similar statutes on similar grounds.

The New York equitable distribution statute was challenged as violating the constitutional prohibition against the impairment of contracts, in *Valladares v. Valladares*.⁴⁰ This constitutional challenge was rejected on the grounds that marriage is not a contract within the meaning of the prohibitions in the United States Constitution against the impairment of contractual obligations, and further that the marital dissolution law did not authorize the impairment of contractual rights of third parties.⁴¹ The contract argument has been rejected in other states where it has been raised as well.⁴²

The *Valladares* court also considered the argument that the new marital dissolution law denied equal protection of the laws because it divided married persons into two classes: those who commenced dissolution proceedings prior to the effective date of the statute and those who commenced their dissolution actions later.⁴³ This argument was rejected with the observation that new legislation usually creates two classes, i.e., those to whom the statute applies and those to whom it does not.⁴⁴ The court further held that the New York Legislature had a rational basis for using the date of commencement of the marital dissolution proceeding as the basis

36. *Id.* at 1388.

37. *Id.* at 1388.

38. *Id.* at 1388 (citing *Rothman v. Rothman*, 320 A.2d 496 (N.J. 1974)).

39. *Id.* at 1388 (citing *Corder v. Corder*, 546 S.W.2d 798 (Mo. Ct. App. 1977)).

40. 438 N.Y.S.2d 810 (App. Div. 1981).

41. *Id.* at 816; accord *Carner v. Carner*, 444 N.Y.S.2d 715, 717 (App. Div. 1981).

42. See, e.g., *Gluck v. Gluck*, 435 A.2d 35, 37 (Conn. 1980); *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1387 (Ill. 1978); *Corder v. Corder*, 546 S.W.2d 798, 803 (Mo. Ct. App. 1977); see also *Maynard v. Hill*, 125 U.S. 190, 211-14 (1888); *In re Marriage of Franks*, 542 P.2d 845, 850 (Colo. 1975); *Hopkins v. Hopkins*, 540 S.W.2d 783, 786 (Tex. Civ. App.—Corpus Christi 1976, no writ).

43. *Valladares v. Valladares*, 438 N.Y.S.2d 810, 816-17 (App. Div. 1981).

44. *Id.* at 817.

for determining applicability of the new law.⁴⁵

In the case of *In re Marriage of Thompson*,⁴⁶ an Illinois appellate court rejected an argument that the Illinois "equitable distribution" statute denied equal protection of the laws by treating divorcing spouses differently from spouses who continue to be married. The husband complained that a spouse being divorced is subject to the divestiture of property described in the statute, while a spouse who continues to be married is not.⁴⁷ Citing *Kujawinski*, the court said that the legislature may differentiate between persons similarly situated as long as the classification bears a reasonable relationship to a legitimate legislative purpose.⁴⁸ The disparate treatment was deemed justified by the major economic and social impact of marital dissolution on the spouses.⁴⁹

In the case of *In re Marriage of Thornqvist*,⁵⁰ another Illinois appellate court considered the related argument that the Illinois statute violated equal protection clauses of the United States and Illinois Constitutions by treating married persons differently from unmarried persons. The husband complained of the statute's direction that marital property be divided with reference to the spouses' future incomes, while this factor was not considered in litigating the rights of unmarried individuals.⁵¹ Quoting *Kujawinski* and *Thompson*, the court rejected this constitutional attack.⁵²

Like the California "quasi-community property" statute and the "equitable distribution" statutes described above, section 3.63(b) does not impair the right of a spouse to own and control, during marriage, property which "belonged" to him under the law of his domicile at the time the property was acquired. Section 3.63(b) merely requires the Texas court, in a divorce or annulment proceeding, to divide, in a manner which is just and right, property acquired by the spouses while domiciled in another jurisdiction, if that property would have been community property had the ac-

45. *Id.* at 817.

46. 398 N.E.2d 17 (Ill. Ct. App. 1979).

47. *Id.* at 21.

48. *Id.* at 21; see *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1389 (Ill. 1978).

49. *In re Marriage of Thompson*, 398 N.E.2d 17, 22 (Ill. Ct. App. 1979).

50. 399 N.E.2d 176 (Ill. Ct. App. 1979).

51. *Id.* at 180.

52. *Id.* at 180; see *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1389 (Ill. 1978); *In re Marriage of Thompson*, 398 N.E.2d 17, 21 (Ill. Ct. App. 1979).

quiring spouse been domiciled in Texas at the time of acquisition. The experience of other states with analagous statutes suggests that section 3.63(b) does not violate the federal Constitution.

II. POSSIBLE STATE CONSTITUTIONAL ISSUES

State constitutional issues may also arise in connection with section 3.63(b). In dicta contained in the majority opinion in *Eggemeyer*,⁵³ two constitutional problems were raised by the trial court's attempted divestiture of the husband's separate property under what is now section 3.63(a).⁵⁴ The first problem related to the inability of the Texas Legislature to expand, by statutory enactment, the definition of separate property beyond that set out in section 15, article XVI, of the Texas Constitution.⁵⁵ The second problem concerned the lack of a sufficient justifying public purpose to support the taking of one spouse's separate property and awarding it to the other in a decree of divorce.⁵⁶

It would seem that the first constitutional argument raised in *Eggemeyer*, the improper expansion of the constitutional definition of separate property, should not invalidate section 3.63(b). It is apparent the statutory provision does not, on its face, expand or restrict the definition of separate property set out in the Texas Con-

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

54. *Id.* at 139; see TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp. 1982). The language of this subsection comprised the entire body of section 3.63 prior to the 1981 amendment. See 1969 Tex. Gen. Laws, ch. 888, § 3.63, at 2725.

55. See *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). The court noted: Section 15, article XVI of the Texas Constitution declares that a wife's property, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent shall be the separate property of the wife. By reason of legislation, the husband's property is classified the same way. If one spouse's separate property may by divorce decree be changed from the separate property of the one spouse into the separate property of the other, there is a type of separate property which is not embraced within the constitutional definition of the term.
Id. at 140 (footnotes omitted).

56. See *id.* at 140-41. After noting the constitutional impropriety of taking one person's property for the benefit of another private person without some justifying public purpose, the court addressed the due process claim of the husband in the following manner:

There is no contention that the taking of Homer's separate property and its transfer to Virginia is justified by a benefit to the public welfare. The taking was not grounded upon the police power; consequently, the taking from Homer would not have been a constitutional act even if the legislature had expressly authorized the divestiture of one person's property and its vesting in another person.

Id. at 140-41; see U.S. CONST. art. IV, § 2; *id.* amend. XIV, § 1.

stitution. In fact, the statute does not in any way define property acquired by a spouse while domiciled in another jurisdiction; section 3.63(b) merely requires the court to divide a specified type of property in a decree of divorce or annulment. The concern voiced in *Eggemeyer*, however, did not involve express definitions. The concern, rather, was that legislation granting the courts of this state the power to divest one spouse of separate property and to award it to the other in a divorce would implicitly create a new category of separate property, i.e., separate property acquired by one spouse, through a decree of divorce, from the separate estate of the other spouse. The court found this result was beyond the power of the legislature.⁵⁷ The responsive argument to this expressed concern is that section 3.63(b) does not violate the prohibition described in *Eggemeyer* because the property which may be divested under section 3.63(b) by necessity cannot be separate property, as that term is defined in the Texas Constitution. Article XVI, section 15, of the Texas Constitution, defines separate property as “[a]ll property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent”⁵⁸ Since section 3.63(b), by its very terms, authorizes only a division of property that would have been community in character had it been acquired by the spouse while domiciled in Texas, section 3.63(b) does not violate the policy, announced in *Eggemeyer*, against divesting a spouse of property owned or claimed before marriage, or acquired during marriage by gift, devise, or descent.

Some cases have held that the property which “belongs” to a spouse under the laws of a common law jurisdiction will be considered to be that spouse’s separate property upon the spouse’s adopting a Texas domicile.⁵⁹ An equivalence has therefore been es-

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

58. TEX. CONST. art. XVI, § 15. The constitution also includes in its definition of separate property any property set aside to each spouse in a written partition or exchange agreement. See *id.*

59. See, e.g., *Gaulding v. Gaulding*, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1973, no writ); *Orr v. Pope*, 400 S.W.2d 614, 617 (Tex. Civ. App.—Amarillo 1966, no writ); *Pechstein v. Pechstein*, 174 S.W.2d 787, 788 (Tex. Civ. App.—San Antonio 1943, no writ); see also *Gaudion v. Gaudion*, 601 S.W.2d 805, 807 (Tex. Civ. App.—Austin 1980, no writ); *Mitchim v. Mitchim*, 509 S.W.2d 720, 725 (Tex. Civ. App.—Austin 1974), *rev’d on other grounds*, 518 S.W.2d 362 (Tex. 1975); *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 234 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.).

established by Texas courts between the concept of "title ownership" in common law jurisdictions and the concept of "separate property" in Texas. It has been argued that the concepts are not, in fact, equivalent.⁶⁰ The correctness of this view may well be answered by the Texas Supreme Court in a case which it presently has under advisement.⁶¹ If the equivalence is established, then the protections of the *Eggemeyer* decision may extend to such property and make the application of section 3.63(b) to such property unconstitutional. A similar question arises in connection with property, acquired by a spouse while domiciled in a community property jurisdiction other than Texas, which was the spouse's separate property under the laws of such domicile. Is that property

60. *Coote v. Coote*, 592 S.W.2d 52, 55 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (Hughes, J., dissenting); Sampson, *Common Law Property In A Texas Divorce: After Eggemeyer, the Deluge?*, 42 TEX. B.J. 131, 133-34 (1979); accord, *Rau v. Rau*, 432 P.2d 910, 913-14 (Ariz. Ct. App. 1967); *Berle v. Berle*, 546 P.2d 407, 409 (Idaho 1976).

61. Writ of error was granted in *Cameron v. Cameron*, 608 S.W.2d 748 (Tex. Civ. App.—Corpus Christi 1980, writ granted) on the following points:

Point One

The Honorable Court of Civil Appeals erred in holding that the military retirement benefits and United States savings bonds, which were acquired in common law states and would have there been subject to division and/or alimony in lieu thereof, were not and are not subject to division and partial award to Petitioner under Texas law.

POINT THREE

The Honorable Court of Civil Appeals erred in holding that the military retirement benefits, acquired in common law states, are the separate property, under Texas law, of Paul Archibald Cameron, Respondent herein.

POINT FIVE

The Honorable Court of Civil Appeals erred in holding that the income from the military retirement benefits was not subject to division and partial award to Petitioner.

Cameron v. Cameron, 24 Tex. Sup. Ct. J. 415 (May 23, 1981). Even though the recent opinion in *McCarty v. McCarty*, ___U.S. ___, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), holding that federal law preempts the power of state courts to award military retirement benefits to the non-employee spouse on divorce, would defeat Mrs. Cameron's points as to division of military retirement benefits, an issue still remains as to the holding of the court of appeals that United States savings bonds acquired with funds withheld from Mr. Cameron's military pay while residing in common law jurisdictions were his separate property, and, therefore, not subject to division upon divorce because of the holdings in *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 141 (Tex. 1977) and *Campbell v. Campbell*, 23 Tex. Sup. Ct. J. 391, 392-93 (June 4, 1980), *opinion withdrawn*, 24 Tex. Sup. Ct. J. 84, 84 (November 22, 1980).

sufficiently equivalent to the Texas brand of "separate property" that the protections of the *Eggemeyer* decision extend to it, even if the property would have been community if acquired while the spouse was domiciled in Texas?⁶² If so, then the divestiture of property pursuant to section 3.63(b) to such property would be unconstitutional.

The second constitutional principle invoked by the majority in *Eggemeyer* to deny the court, in a divorce proceeding, the power to divide separate property was the prohibition in the Texas Constitution against the taking of vested property rights without due course of law.⁶³ Just as with separate property, title to property coming within the scope of section 3.63(b), in many instances, may be held by one spouse to the exclusion of the other. Where a decree of divorce or annulment divests that spouse of title to such property and awards it to the other, there is clearly a taking of solely-owned property. If the law of Texas is that no sufficient justifying public purpose exists to support the taking of property owned exclusively by one spouse and awarding it to the other, then the application of section 3.63(b) to certain types of property may be held unconstitutional.

It should be recognized that most common law jurisdictions of the United States do not afford the spouse who holds title to property the kind of protection from governmental interference that *Eggemeyer* affords the holder of separate property in Texas. In such jurisdictions, property acquired by a spouse during marriage is always subject to the power of the courts, on dissolution of the marriage, to dispose of that property in accordance with both state and federal law.⁶⁴ This inherent disability arising from the marital

62. In California, for example, the rents, issues, and profits of separate property are also separate property. See CAL. CIV. CODE §§ 5107, 5108 (West 1970). The earnings and accumulations of either spouse while living separate and apart from the other are separate property as well. See *id.* § 5118 (West Supp. 1981). Under Texas law, such income would be community property. See TEX. FAM. CODE ANN. § 5.01 (Vernon 1975).

63. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140-41 (Tex. 1977). The court's statement of this principle is quoted in note 55 *supra*.

64. *E.g.*, *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1388 (Ill. 1978) ("Plaintiff had no reasonable expectation, under the preexisting law, that his property was immune from transfer to his spouse upon termination of the marriage."); accord *United States v. Davis*, 370 U.S. 65, 66 (1962) (Delaware law provided wife with inchoate rights in her husband's property, including rights to intestate succession, dower, and a share of his property upon divorce); *Wiles v. Commissioner*, 499 F.2d 255, 257 (10th Cir.) (Kansas law conferred upon wife, on filing of divorce suit, right to have court marshal all of the parties' property, re-

status limits the degree to which a spouse's ownership rights vest in the property he or she acquires during marriage. Cast in this light, the relevant question is not, therefore, whether section 3.63(b) allows a Texas court to deprive a spouse of rights he may have had, under the laws of another jurisdiction, to own and control property during the marriage. Rather, the question is whether the power of a Texas court applying section 3.63(b) in a divorce or annulment proceeding so far exceeds the power of a court of an earlier domicile applying the marital dissolution laws of that state, that a Texas court's division of property acquired by a spouse while domiciled in the former jurisdiction is unconstitutional. At least in those instances where section 3.63(b) is as restrictive, if not more restrictive, of the court's power in a divorce or annulment proceeding as the law of the earlier domicile, it can be argued that no impairment of rights occurs. It might also be noted that Texas is the only state in the United States which categorically prohibits court-ordered alimony.⁶⁵ The fact that, by divorcing in Texas, a spouse eliminates the risk that he and his assets could be bound to support the other spouse after the divorce alone might lead to the conclusion that the marital dissolution laws of Texas interfere with "vested" rights to a lesser degree than the law of the earlier domi-

ardless of ownership or acquisition, and to divide it in a just and reasonable manner), *cert. denied*, 419 U.S. 996 (1974); *In re Marriage of Engel*, 629 P.2d 3878, 405 (Or. Ct. App. 1981) (spouses' reciprocal equitable right to share in the marital estate is a burden on each party's separate estate); *see Collins v. Commissioner*, 412 F.2d 211, 211-12 (10th Cir. 1969) (under Oklahoma law, wife has vested interest in husband's property conceptually similar to community property); *In re Questions Submitted by the United States District Court*, 517 P.2d 1331, 1332 (Colo. 1974) (wife's interest in marital property is a "species of common ownership"); *Valladares v. Valladares*, 438 N.Y.S.2d 810, 816 (App. Div. 1981) (New York's new divorce law did not impair vested rights of husband because the common law has traditionally required that the court, on dissolution of marriage, "fix support obligations and order one spouse to relinquish property to the other"); *cf. Rau v. Rau*, 432 P.2d 910, 912 (Ariz. Ct. App. 1967) (property acquired by spouse while domiciled in a common law state, when brought to Arizona, remained divisible on divorce in accordance with law of prior domicile); *Berle v. Berle*, 546 P.2d 407, 410 (Idaho 1976) (property acquired by husband while domiciled in New Jersey, when brought to Idaho, carried with it the wife's incidents of ownership in same, including the power of the New Jersey court to divide same on divorce); *Hughes v. Hughes*, 573 P.2d 1194, 1201 (N.M. 1978) (property acquired by husband while domiciled in Iowa, when brought to New Mexico, retained all of the wife's incidents of ownership, claims, rights, and legal regulations under Iowa law, including the power of an Iowa court to divide same on divorce).

65. Freed & Foster, *Divorce In The Fifty States: An Overview As Of August 1, 1981*, 7 *FAM. L. REP.(BNA)* No. 49, at 4059 (Oct. 20, 1981).

cile.⁶⁶ Moreover, where the earlier jurisdiction is one whose courts have expressly ruled that property acquired by its domiciliaries is not vested to the degree that it becomes constitutionally protected from even radical changes in its own divorce laws,⁶⁷ there is little reason to suggest that Texas should afford the property such protection when the change in law is occasioned by removal of the spouse to this state.

A related question is whether Texas' constitutional prohibition against enactment of retroactive laws might invalidate section 3.63(b).⁶⁸ A law is impermissibly retroactive "if it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or adopts a new disability in respect to transactions or considerations already passed."⁶⁹ When the statute is remedial,⁷⁰ however, and does not destroy vested rights,⁷¹ the constitutional prohibition does not apply.⁷²

66. The idea that property division and alimony are but different faces of the same coin is recognized in *Valladares v. Valladares*, 438 N.Y.S.2d 810 (App. Div. 1981), where the court said: "Upon dissolution of the marriage, the common law has traditionally required that the court fix support obligations and order one spouse to relinquish property to the other, whether it be in the form of alimony or in some other form." *Id.* at 816 (App. Div. 1981).

67. See *Fournier v. Fournier*, 376 A.2d 100, 101-02 (Me. 1977); *Corder v. Corder*, 546 S.W.2d 798, 802 (Mo. Ct. App. 1977); *Rothman v. Rothman*, 320 A.2d 496, 503 (N.J. 1974).

68. Tex. Const. art. I, § 16 states: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." *Id.*

69. *French v. Insurance Co. of N. Am.*, 591 S.W.2d 620, 622 (Tex. Civ. App.—Austin 1979, no writ); see *McCain v. Yost*, 155 Tex. 174, 178, 284 S.W.2d 898, 900 (1955); *French v. Insurance Co. of N. Am.*, 591 S.W.2d 620, 622 (Tex. Civ. App.—Austin 1979, no writ); *Southwestern Bell Tel. Co. v. City of Kountze*, 543 S.W.2d 871, 875 (Tex. Civ. App.—Beaumont 1976, no writ).

70. A remedial statute has been variously defined as a "law introducing a new regulation for the advancement of the public welfare or conducive of the public good," *Board of Ins. Comm'rs v. Great S. Life Ins. Co.*, 150 Tex. 258, 266, 239 S.W.2d 803, 809 (1951); a law which affects "only the remedy or procedure," or that "pertains to practice and procedure," and that "is the legal machinery by which the substantive law is made effective," *Harrison v. Cox*, 524 S.W.2d 387, 391 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.); a law which "supplies defects, and abridges superfluities in the former law," *Falls v. Key*, 278 S.W. 893, 896 (Tex. Civ. App.—Fort Worth 1925, writ dis'm'd); a law "prescribing or regulating the use of the courts of the land for the enforcement of rights and obligations arising out of contracts," *Chapin v. Frank*, 236 S.W. 1006, 1009 (Tex. Civ. App.—San Antonio 1921), *rev'd on other grounds sub. nom.*, *Frank v. State Bank & Trust Co.*, 10 S.W.2d 704 (Tex. Comm'n App. 1924, judgmt adopted); and as a law adopted to remedy the condition and prevent the hardship and injustice existing under a prior statute, *O'Connor v. State*, 71 S.W. 409, 411 (Tex. Civ. App. 1902), *rev'd on other grounds*, 96 Tex. 484, 73 S.W. 1041 (1903).

71. In *City of Dallas v. Trammell*, 129 Tex. 150, 101 S.W.2d 1009 (1937), the Texas

It is arguable that to apply section 3.63(b) to property acquired by a spouse prior to the effective date of the statute is to give the statute retroactive effect. Courts of other states facing the question generally have agreed that such an application is retroactive.⁷³

Supreme Court approvingly quoted the Supreme Court of Illinois as follows:

A right to be within the protection of the Constitution, must be a vested right. It must be something more than a mere expectancy based upon an anticipated continuance of an existing law. If before rights become vested in particular individuals the convenience of the State induces the amendment or repeal, such individuals have no cause to complain.

Id. at 161, 101 S.W.2d at 1014. In *DuPre v. DuPre*, 271 S.W.2d 829, 831 (Tex. Civ. App.—Dallas 1954, no writ), the court observed:

While it is true that vested rights may not be destroyed or impaired, “[a] right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of exemption of a demand made by another.

Id. at 831; *accord*, *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 285 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d n.r.e.) (legislature’s repeal of statute imposing strict liability on parents for malicious acts of their children not unconstitutionally retroactive as to a person who suffered such injury before the statute’s repeal, but who did not file suit until after such repeal, since there cannot be a vested right in a mere rule of law). See generally *Coulter v. Melady*, 489 S.W.2d 156, 159 (Tex. Civ. App.—Texarkana 1972, writ ref’d n.r.e.) (court rejected claim by relatives of intestate decedent that statute prohibiting filing of annulment proceedings after death of a spouse was unconstitutionally retroactive, since statute became effective prior to woman’s death when the relatives’ interest in property was nothing more than an expectancy), *cert. denied*, 414 U.S. 823 (1973); *DuPre v. DuPre*, 271 S.W.2d 829, 832 (Tex. Civ. App.—Dallas 1954, no writ) (statute increasing age until which a parent must support his child from sixteen to eighteen years was not unconstitutionally retroactive as to divorced father of child who had not yet reached age sixteen).

72. See *Pratt v. Story*, 530 S.W.2d 325, 328 (Tex. Civ. App.—Tyler 1975, no writ); *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 283-84 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d n.r.e.); *Exxon Corp. v. Brecheen*, 519 S.W.2d 170, 183 (Tex. Civ. App.—Houston [1st Dist.]), *rev’d on other grounds*, 526 S.W.2d 519 (Tex. 1975).

73. *Accord* *Ford v. Ford*, 605 S.W.2d 756, 759 (Ark. Ct. App. 1980), *rev’d on other grounds*, 616 S.W.2d 3 (Ark. 1981); *In re Marriage of Bouquet*, 546 P.2d 1371, 1377 n.10, 128 Cal. Rptr. 427, 433 n.10 (1976); *Stevens v. Stevens*, 390 A.2d 1074, 1076 (Me. 1978); see *Corder v. Corder*, 546 S.W.2d 798, 804 (Mo. Ct. App. 1977); *Rothman v. Rothman*, 320 A.2d 496, 499 (N.J. 1974); *Valladares v. Valladares*, 438 N.Y.S.2d 810, 815-16 (App. Div. 1981). In *In re Marriage of Furimsky*, the Arizona Supreme Court found that state’s “quasi-community property” statute not to apply retroactively because of the failure of the legislature to indicate its intention of retroactive application. See *In re Marriage of Furimsky*, 595 P.2d 662, 663 (Ariz. 1979). The Arizona Legislature subsequently responded to *Furimsky* by amending the statute to expressly provide for “retrospective” operation. 1980 Ariz. Sess. Laws, ch. 113, § 7. *Contra* *Addison v. Addison*, 399 P.2d 897, 904, 43 Cal. Rptr. 97, 104 (1965); *In re Marriage of Walton*, 104 Cal. Rptr. 472, 477 (Ct. App. 1972); *Rothman v. Rothman*, 320 A.2d 496, 503 (N.J. 1974). The finding of the *Addison* court that the statute was not being applied retroactively was based on the rationale that the legislative act “neither creates nor alters rights except on divorce or separate maintenance,” and since the divorce

Nonetheless, in most instances, such statutes have been held not to violate state constitutional prohibitions against retroactive laws, usually on the grounds either that the statutes were remedial and did not disturb vested rights, or that overriding public interest justified retroactive application, regardless of the rights involved.⁷⁴ Even were this application deemed valid, it could be argued further that section 3.63(b) could not constitutionally be applied to divorce or annulment proceedings initiated prior to the effective date of the statute. A similar argument was rejected by the Supreme Court of California in *Addison*, which held that the law at the time of judgment was controlling.⁷⁵ Another argument in this same vein could be made that to apply section 3.63(b) to property acquired by a spouse before he became subject to Texas property laws constitutes retroactive application of the law. No authorities

involved there was granted after the enactment, the application was prospective. See *Addison v. Addison*, 399 P.2d 897, 904, 43 Cal. Rptr. 97, 104 (1965). This determination by the court was quoted approvingly in *Rothman v. Rothman*, 320 A.2d 496, 503 (N.J. 1974), but was later repudiated by the California Supreme Court in *In re Marriage of Bouquet*, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976). The *Bouquet* court found that the statute, in fact, had been applied retroactively in *Addison*. See *In re Marriage of Bouquet*, 546 P.2d 1371, 1377 n.10, 128 Cal. Rptr. 427, 433 n.10 (1976).

74. *E.g.*, *Husband T.N.S. v. Wife A.M.S.*, 407 A.2d 1045, 1048 (Del. 1979); *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1388 (Ill. 1978); *Fournier v. Fournier*, 376 A.2d 100, 102 (Me. 1977). In the case of *In re Marriage of Bouquet*, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976), the California Supreme Court went a step further by upholding the retroactive application of a statutory amendment which deprived a wife of a community interest in her husband's earnings after separation. Prior to the amendment, the earnings of the wife after separation were her separate property although the earnings of the husband were community property. After the amendment, the earnings of both spouses after separation were separate property. On the basis of police power, the court held the amendment governed all property rights that had not been finally adjudicated by a judgment from which the appeal time had lapsed. See *id.* at 1378, 128 Cal. Rptr. at 434.

75. *Addison v. Addison*, 399 P.2d 897, 904, 43 Cal. Rptr. 97, 104 (1965); accord *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1386 (Ill. 1978) (Illinois equitable division statute properly applied, in accordance with its terms, to actions commenced prior to its effective date with respect to issues on which judgment had not been entered); *Morse v. Morse*, 571 P.2d 1147, 1148 (Mont. 1977) (proper to apply Montana's equitable division statute to a divorce tried prior to its effective date but in which judgment was entered after its effective date); *cf.* *Husband B. v. Wife B.*, 396 A.2d 169, 171 (Del. Super. Ct. 1978) (justifying application of new law allowing post-divorce alimony in divorce proceeding filed and tried prior to effective date of statute; rights of parties to alimony not fixed until entry of decree, which occurred after effective date of statute); *Gibbons v. Gibbons*, 432 A.2d 80, 82 (N.J. 1981) (statutory amendment removing gifts from category of equitably distributable property correctly applied retroactively to action instituted, tried, and on appeal at time amendment took effect).

could be found discussing the applicability of the prohibition against retroactive laws, as contained in the various state constitutions, to a situation involving a change of domicile.⁷⁶

Although Texas laws establishing new grounds for divorce, and eliminating defenses to divorce, have been held to be remedial,⁷⁷ no Texas authorities have been found expressly holding the laws relating to property division upon divorce or annulment to be remedial.⁷⁸ Courts of other states, however, have held their laws pertaining to division of property upon divorce to be remedial and, therefore, immune from attack under those states' constitutional prohibitions against retroactive laws.⁷⁹ If the marital dissolution

76. An argument that such a statute could not be constitutionally applied to persons married before the effective date of the statute has been rejected. See *Carner v. Carner*, 444 N.Y.S.2d 715, 717 (App. Div. 1981).

77. *Hopkins v. Hopkins*, 540 S.W.2d 783, 786 (Tex. Civ. App.—Corpus Christi 1976, no writ) (abolition of defenses of recrimination and adultery not unconstitutionally retroactive since spouse had no vested right in these defenses); accord *In re Marriage of Walton*, 104 Cal. Rptr. 472, 476 (Cal. Ct. App. 1972); *Buchholz v. Buchholz*, 248 N.W.2d 21, 23 (Neb. 1976). *Chalmers v. Chalmers*, 320 A.2d 478, 483 (N.J. 1974); *Gleason v. Gleason*, 256 N.E.2d 513, 517 n.5 (N.Y. Ct. App. 1970).

78. *But see Gowin v. Gowin*, 292 S.W. 211, 214 (Tex. Comm'n App. 1927, judgment adopted) (state, although not bound to do so, may establish the remedy of divorce and, contemporaneously, an adjustment of property rights); *Falls v. Key*, 278 S.W. 893, 896 (Tex. Civ. App.—Fort Worth 1925, writ dismissed) (statute requiring husband's signature for wife to convey separate realty not unconstitutionally retroactive as to land owned by wife prior to the adoption of the statute; wife had no vested right in the procedure necessary for her to dispose of land).

79. See *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1388 (Ill. 1978); *Corder v. Corder*, 546 S.W.2d 798, 804 (Mo. Ct. App. 1977); *Rothman v. Rothman*, 320 A.2d 496, 499 (N.J. 1974); see also *Dishon v. Oliver*, 402 A.2d 1292, 1294 (Me. 1979) ("statutes providing procedures for the division of property upon divorce are remedial in nature, and the Legislature may change these procedures without offending constitutional principles."); *Hopkins v. Hopkins*, 540 S.W.2d 783, 786 (Tex. Civ. App.—Corpus Christi 1976, no writ) (state legislature has broad power to regulate and change conditions for obtaining a divorce and to amend laws which govern marital relationship); *State Bd. of Regis. For Prof. Eng'rs v. Wichita Eng'g Co.*, 504 S.W.2d 606, 608 (Tex. Civ. App.—Fort Worth 1973, writ refused n.r.e.) (constitutional rules against retroactive laws must yield to a state's right to safeguard the public safety and welfare). *But see Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 141 (Tex. 1977) (taking of husband's separate property to give to wife upon divorce not justified by any benefit to public welfare). Arizona is a notable exception to this rule, however. In Arizona, the divisibility upon divorce of property held in joint tenancy with a right to survivorship is controlled by the law that existed at the time the property was acquired, *Batesole v. Batesole*, 535 P.2d 1314, 1316 (Ariz. Ct. App. 1975), not by the law in effect at the time of the court proceeding, *Jankowski v. Jankowski*, 561 P.2d 327, 328 (Ariz. Ct. App. 1977). Thus, a 1973 statutory amendment allowing trial courts on divorce to "equitably divide" joint tenancy property which, under prior law, could only be partitioned equally, applied only prospectively, to property acquired after the effective date of the amendment. See

laws of Texas are deemed to be remedial, and not to affect vested rights, section 3.63(b) would not come within the prohibition against retroactive laws set out in the Texas Constitution.

III. OTHER POSSIBLE ISSUES

A. *Foreign Realty*

Section 3.63 requires the court to divide the property in question, "wherever situated."⁸⁰ A court having personal jurisdiction of the parties may, by operation of its decree alone, dispose of real property located in Texas and personal property located in Texas or in other jurisdictions.⁸¹ It may not, however, by direct operation of its decree, pass title to realty in other jurisdictions.⁸² A decree purporting to pass title to out-of-state realty is not entitled to full faith and credit in the situs state.⁸³ However, the decree may be enforced in that jurisdiction as a matter of comity.⁸⁴ The court does have the power to order a realty owner over whom the court has personal jurisdiction to execute the necessary documents to effect a conveyance of that land in accordance with the law of the situs, under penalty of contempt.⁸⁵ Another alternative available to

Wayt v. Wayt, 600 P.2d 748, 749 (Ariz. 1979).

80. See TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982). If the Texas court fails to divide out-of-state realty, a spouse may be foreclosed from later asserting an interest in land held in the other spouse's name. See *Estabrook v. Wise*, 348 So. 2d 355, 357 (Fla. Ct. App. 1977), cert. denied, 354 So. 2d 980 (Fla. 1978), cert. denied, 435 U.S. 971 (1978).

81. *Moor v. Moor*, 63 S.W. 347, 351-52 (Tex. Civ. App. 1901, writ ref'd) (court may divide personalty located outside Texas in divorce proceeding).

82. *Fall v. Eastin*, 215 U.S. 1, 8 (1909); *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex. Civ. App.—El Paso 1979, no writ); *Kaherl v. Kaherl*, 357 S.W.2d 622, 624 (Tex. Civ. App.—Dallas 1962, no writ). But see *Killpack v. Killpack*, 616 S.W.2d 434, 436 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.) (trial court properly divided community realty located in Iowa).

83. See *Fall v. Eastin*, 215 U.S. 1, 12 (1909).

84. *McElreath v. McElreath*, 162 Tex. 190, 207-08, 345 S.W.2d 722, 733 (1961); accord *Rodgers v. Rodgers*, 611 S.W.2d 175, 176 (Ark. 1981). Conversely, one Texas court refused to entertain a claim that a foreign court did not have jurisdiction over Texas realty once the foreign divorce decree is final. See *Forman v. Forman*, 496 S.W.2d 243, 244-45 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

85. *Fall v. Eastin*, 215 U.S. 1, 13 (1909); *Rozan v. Rozan*, 317 P.2d 11, 15-16 (Cal. 1957); *Hedley v. duPont*, 558 S.W.2d 72, 75 (Tex. Civ. App.—Houston [14th Dist.] 1977), *rev'd and remanded on other grounds*, 570 S.W.2d 384 (1978); accord *Kane v. Kane*, 577 P.2d 172, 175-76 (Wyo. 1978). Such decrees have been honored in other states. See e.g., *Noble v. Noble*, 546 P.2d 358, 361 (Ariz. 1976); *Woodruffe v. DeMola*, 368 A.2d 967, 969 (N.J. Super. Ct.

the court is to award the foreign realty to the title-holding spouse, and award offsetting property within the court's reach to the other spouse.⁸⁶

B. *Tracing and Burden of Proof*

Section 3.63(b)(2) extends the application of section 3.63(b) to property on hand at the time of dissolution which can be traced to property described in section 3.63(b)(1).⁸⁷ The statute does not declare who has the burden to trace. However, a statutory presumption exists that all property on hand at the time of marital dissolution is community property,⁸⁸ and is therefore divisible under section 3.63(a). To overcome this presumption, a spouse must trace such property to its inception of title⁸⁹ and establish that the circumstances surrounding the acquisition make the property a separate, not a community, asset.⁹⁰ If those circumstances reflect an acquisition when the spouse was domiciled in another jurisdiction, they should also reflect whether the property would have been community property had the spouse been domiciled in Texas at the time of acquisition. As a practical matter, and assuming validity of section 3.63(b), the effort of tracing back to an original acquisition while domiciled in another jurisdiction would only be undertaken by a spouse who wished to avoid both section 3.63(a) and section 3.63(b). This may be accomplished by showing: (1) that the

Ch. Div. 1976); *Whitmer v. Whitmer*, 365 A.2d 1316, 1318-19 (Pa. Super. Ct. 1976). See generally Annot., 32 A.L.R.3d 1330 (1970).

86. E.g., *Deger v. Deger*, 526 S.W.2d 272, 274 (Tex. Civ. App.—Waco 1975, no writ); *Simonsen v. Simonsen*, 414 S.W.2d 54, 57 (Tex. Civ. App.—Amarillo 1967, no writ); *Risch v. Risch*, 395 S.W.2d 709, 713 (Tex. Civ. App.—Houston 1965, writ dismissed), cert. denied, 386 U.S. 10 (1967); accord *Martinez v. Martinez*, 573 P.2d 667, 670 (Mont. 1978). California has enacted a statute which expressly authorizes courts to divide out-of-state realty. The court may:

(1) Require the parties to execute such conveyances or take such other actions with respect to the real property situated in the other state as are necessary.

(2) Award to the party who would have been benefited by such conveyances or other actions the money value of the interest in such property that he would have received if such conveyances had been executed or other actions taken.

CAL. CIV. CODE § 4800.5 (West 1970).

87. See TEX. FAM. CODE ANN. § 3.63(b)(2) (Vernon Supp. 1982). The statute does not provide as clear a statement as one might desire. The deletion of the word "and" from section 3.63(b)(2) might make the meaning clearer.

88. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975).

89. See *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975).

90. See *Colden v. Alexander*, 141 Tex. 134, 147-48, 171 S.W.2d 328, 334 (1943).

property in question was not community property under the law of his domicile at the time of acquisition; and (2) that the property in question would not have been community property had the acquiring spouse been domiciled in Texas at the time of acquisition.

C. Conflict of Laws

The interrelation of section 3.63(b) with Texas conflict of laws rules raises interesting questions. Texas conflict of laws rules provide that the rights of a spouse in the property owned by the other spouse at the time of marriage are determined, as to the movables, by the law of the first marital domicile,⁹¹ and as to immovables, by the law of the situs.⁹² Similarly, as to the rights of spouses in property acquired during marriage, the law of marital domicile at the time of acquisition⁹³ controls as to movables,⁹⁴ and the law of the situs controls as to immovable property.⁹⁵ The character of prop-

91. See *Avery v. Avery*, 12 Tex. 54, 56-57 (1854) (under the law of Georgia, the first marital domicile, the husband became the owner of all personal property owned by the wife at the time of marriage; upon removal of the spouses to Texas, the husband continued to be the owner of such property); see also *Tirado v. Tirado*, 357 S.W.2d 468, 471-72 (Tex. Civ. App.—Texarkana 1962, writ dismissed). See generally 3 L. SIMPKINS, TEXAS FAMILY LAW §§ 15.4, 16.2 (Speer's 5th ed. 1976).

92. See 3 L. SIMPKINS, TEXAS FAMILY LAW § 16.2, at 177 (Speer's 5th ed. 1976).

93. See *Gaulding v. Gaulding*, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1974, no writ) (law of husband's domicile, as it existed at the time of acquisition, controlled character of personalty acquired there, regardless of any subsequent changes in the laws of these jurisdictions).

94. See, e.g., *Oliver v. Robertson*, 41 Tex. 422, 425 (1874) (money acquired by joint efforts of spouses while domiciled in Georgia belonged to husband and remained the property of husband after spouses moved to Texas); *Tirado v. Tirado*, 357 S.W.2d 468, 471-72 (Tex. Civ. App.—Texarkana 1962, writ dismissed) (severed oil and gas was movable personal property and its status as separate or community property to be governed by law of domicile of the parties); *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 233 (Tex. Civ. App.—El Paso 1954, writ refused n.r.e.) (since husband's earnings were his separate property under Pennsylvania law, Pennsylvania wife acquired no community interest in property purchased in Texas with those earnings). See generally 3 L. SIMPKINS, TEXAS FAMILY LAW §§ 15.4 at 7, 16.2 at 177 (Speer's 5th ed. 1976).

95. See, e.g., *Commissioner v. Skaggs*, 122 F.2d 721, 723 (5th Cir. 1941) (the right to receive rentals being immovable, rather than movable, rental income from husband's separate realty in California held separate according to law of situs—California—rather than according to law of marital domicile—Texas), cert. denied, 315 U.S. 811 (1942); *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 233-34 (Tex. Civ. App.—El Paso 1954, writ refused n.r.e.) (applied Texas' inception of title rule in holding that Texas realty purchased by Pennsylvania resident was separate property because funds used to acquire it belong exclusively to him under Pennsylvania law); *Bell v. Bell*, 180 S.W.2d 466, 469 (Tex. Civ. App.—El Paso 1944, writ refused w.o.m.) (trial court's finding that realty located in Washington and Tennes-

erty, as either separate or community in nature, is determined by Texas courts in accordance with the foregoing rules.⁹⁶ Therefore, personalty acquired by a spouse while domiciled in Texas will be separate property only if it meets the definition of separate property set out in the Texas Constitution.⁹⁷ Realty, on the other hand, acquired by a spouse while domiciled in Texas will be separate or community, or perhaps some other species of property, in accordance with the law of situs.⁹⁸

If the court looks to Texas conflict of laws rules in determining, under section 3.63(b), whether property acquired by a spouse while domiciled elsewhere would have been community property had the acquiring spouse been domiciled in Texas at the time of acquisition, the law of the spouse's domicile (i.e., hypothetically Texas) will control as to movables, but the law of the situs will control as to immovable property. As a result, the rules used to characterize immovables will be those of another state, and not those of Texas, unless by chance the property lies in Texas. This would seem to defeat the apparent intent of the Texas Legislature to make the divisibility of such property turn on the community property laws of Texas. To avoid this situation, section 3.63(b) should be interpreted as requiring the trial court to determine whether the property in question would have been community property, according to the "local law" of Texas, exclusive of Texas' choice-of-law

see was community property deemed "of no legal effect," since character of such realty is to be determined by the law where the land is situated). See also 3 L. SIMPKINS, TEXAS FAMILY LAW § 15.4, at 7 (Speer's 5th ed. 1976). *Contra* Reeves v. Schulmeier, 303 F.2d 802, 806 (5th Cir. 1962). In *Reeves*, the court indicated that Texas cases hold the law of matrimonial domicile governs the character of Texas realty. *Id.* at 806. The court may have misconstrued the application by Texas courts of the rule that property acquired in an exchange has the same character as the consideration paid. Since the consideration paid was usually movable (i.e. money), the law of the domicile of the acquiring spouse was determinative of the character of the money paid, and, consequently, of the realty acquired. The basic law applied in these cases was the law of the situs (i.e., Texas), particularly the rule that property retains its character as separate or community, through all mutations in form. See *id.* at 806.

96. See *Tirado v. Tirado*, 357 S.W.2d 468, 471 (Tex. Civ. App.—Texarkana 1962, writ *dism'd*). See generally 3 L. SIMPKINS, TEXAS FAMILY LAW §§ 15.4, 16.2 (Speer's 5th ed. 1976).

97. See *Tirado v. Tirado*, 357 S.W.2d 468, 472 (Tex. Civ. App.—Texarkana 1962, writ *dism'd*); TEX. CONST. art. XVI, § 15.

98. See *Commissioner v. Skaggs*, 122 F.2d 721, 723 (5th Cir. 1941), *cert. denied*, 315 U.S. 811 (1942); *Kaherl v. Kaherl*, 357 S.W.2d 622, 624 (Tex. Civ. App.—Dallas 1962, no writ); *Bell v. Bell*, 180 S.W.2d 466, 469 (Tex. Civ. App.—El Paso 1944, writ *ref'd w.o.m.*).

rules.⁹⁹

The true character of property acquired by a spouse while domiciled elsewhere will still be an important matter of proof until the constitutionality of section 3.63(b) is settled. Unless the spouse overcomes the presumption that the property taken from him by the trial court's decree was community property, the trial court's action can be justified on the basis of section 3.63(a). To overcome this presumption, the spouse must show that the property was acquired by him while domiciled in another jurisdiction, and that, under relevant law,¹⁰⁰ the property was his separate property, or at least show that it was owned by him to the exclusion of his spouse. Having established exclusive ownership, he can then argue that the trial court's action violated federal and/or state constitutional principles.

D. Marital and Pre-Marital Agreements

The long-standing rule in Texas is that the rights of spouses under marital and pre-marital agreements are controlled by the laws of this state once the parties become domiciled in Texas, irrespective of the validity of the agreements under the law of marital domicile at the time of contracting.¹⁰¹ Such contracts historically have been declared unenforceable in Texas to the extent that they purported to alter the definition of separate property set out in the Texas Constitution.¹⁰² Since the effective date of the amendment to article XVI, section 15, of the Texas Constitution, spouses and persons about to marry may, by written marital or pre-marital agreement, provide that property on hand or to be acquired, which would have been community absent the agreement, shall instead

99. This is the analysis used in the Restatement (Second) of Conflict of Laws in the sections which relate to marital property conflict of laws questions. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 257, 258 (1971). The term "local law" is defined in the Restatement (Second) as "the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them." *Id.* § 4.

100. Unless the spouse proves the relevant law, it will be presumed that these laws are identical to Texas law. *Gevinson v. Manhattan Constr. Co.*, 449 S.W.2d 458, 465 n.2 (Tex. 1969).

101. *Williams v. Williams*, 569 S.W.2d 867, 870 (Tex. 1978); *Castro v. Illies*, 22 Tex. 479, 498 (1858).

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

be the separate property of one spouse or the other.¹⁰³ It would appear, therefore, that under this amendment the range of marital and pre-marital agreements, contracted in other jurisdictions, which will be honored by Texas courts has been greatly expanded.

When deciding whether an asset acquired by a spouse while domiciled in another jurisdiction would have been community property had the acquiring spouse been domiciled in Texas at the time of acquisition, a trial court should consider the effect of any marital or pre-marital agreement which existed at the time of the acquisition. The agreement would have whatever force Texas law then allowed for a spouse domiciled in this state. Thus, for property acquired prior to the effective date of the amendment, the older, more restrictive law relating to the enforceability of marital and pre-marital agreements would determine the effect of the agreement. In certain instances, a marital or pre-marital agreement which would now be enforceable in Texas may have no effect on a determination under section 3.63(b) where the terms of the agreement violated the public policy of this state as it was understood at the time.

Additionally, section 3.63(b) appears to take no account of the effect of a subsequent agreement by the spouses that an asset acquired by a spouse while domiciled elsewhere would thereafter belong exclusively to the acquiring spouse, either as his separate property or as the sole holder of title to the property.¹⁰⁴ The extent to which such a subsequent agreement restricts the court's power under section 3.63(b) may then have to be determined with reference to the provisions in the Texas Constitution¹⁰⁵ and Family

103. TEX. CONST. art. XVI, § 15.

104. The now-superseded section 307 of the Uniform Marriage and Divorce Act, as amended in 1971, avoided this problem by excluding from its definition of "marital property" that property "excluded by valid agreement of the parties." UNIFORM MARRIAGE & DIVORCE ACT § 307(b)(4) commentary, 9A U.L.A. 144 (1971) (amended 1973). The New York equitable division statute provides: "Nothing [herein] shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision." N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 1979). New York courts, therefore, have held that retroactive application of the new law to agreements valid under prior law is prohibited, *Carner v. Carner*, 444 N.Y.S.2d 715, 717 (App. Div. 1981); *Gedraitis v. Gedraitis*, 439 N.Y.S.2d 987, 980 (Sup. Ct. 1981), although application of the new law to property not covered by the agreement has been approved. See *Carner v. Carner*, 444 N.Y.S.2d 715, 717 (App. Div. 1981).

105. TEX. CONST. art. XVI, § 15.

Code relating to marital and pre-marital agreements,¹⁰⁶ as well as consideration of the language in the *Eggemeyer* decision.¹⁰⁷ In such a situation, the contract clause of the United States Constitution might come into play.¹⁰⁸ Further, application of section 3.63(b) in a manner that would impair contractual rights established by such an agreement in property acquired prior to the effective date of the statute, or prior to the spouses' removal to Texas, could be challenged as violating the prohibition against retroactive laws contained in the Texas Constitution.¹⁰⁹

E. Other Property Rights and Liabilities

Since section 3.63(b) addresses only the power of the court to divide property in a decree of divorce or annulment, it has no effect on the property rights and liabilities of the spouses during marriage. The Texas Family Code still recognizes only two types of property, i.e., separate and community.¹¹⁰ There is not, in Texas, a new category of property called "quasi-community" property. For this reason, section 3.63(b) does not alter the statutory framework, set out in Chapter 5 of the Texas Family Code,¹¹¹ controlling the property rights and liabilities of spouses.

Section 3.63(b) similarly has no effect on the consequences of a dissolution of marriage by the death of a spouse. A change in the intestate succession rules of the probate code¹¹² may be something for future legislatures to consider.

IV. SUMMARY

Section 3.63(b) is a long-needed statement of how Texas courts and family law practitioners should address the property issues which arise in the dissolution of a marriage, by divorce or annulment, between spouses who have acquired property while domi-

106. TEX. FAM. CODE ANN. §§ 5.41 - .46 (Vernon Supp. 1982).

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

108. U.S. CONST. art. X, § 10, cl. 1; see also *Irving Trust Co. v. Day*, 314 U.S. 556, 563 (1942) (ordinary contract clause analysis applied to prenuptial contracts).

109. See TEX. CONST. art. I, § 16.

110. See TEX. FAM. CODE ANN. § 5.01 (Vernon 1975).

111. *Id.* tit. 1, ch. 5.

112. Intestate succession rules pertaining to the passing of community and separate property are set out in Probate Code sections 38 and 45. See TEX. PROB. CODE ANN. §§ 38, 45 (Vernon 1980).

ciled in other jurisdictions. Prior to the adoption of section 3.63(b), the laws of this state relating to the marital property rights of spouses on divorce or annulment dealt only in terms of the concepts of separate and community property that have evolved under our community property system. To the extent that the question arose, Texas courts sometimes attempted to graft property acquired by spouses while domiciled in non-community property jurisdictions onto our community property system by equating the common law concept of title ownership to the Texas concept of separate property. This led to certain assets, such as wages earned during marriage, being classified as one spouse's separate property. This result occurred despite the clear policy of this state that such assets should be available for the trial court to divide, upon divorce or annulment, to achieve a just and right division of the property acquired by the spouses through the collective efforts of their marital unit. In many instances, particularly with regard to retirement benefits, trial courts freely divided such assets, irrespective of their character, to achieve an equitable division of property. With the publication of the *Eggemeyer* opinion,¹¹³ and more particularly, the later-withdrawn opinion in *Campbell*,¹¹⁴ the perhaps ill-considered equating of common law title ownership with separate property assumed significant proportions. Section 3.63(b) has the effect of applying the traditional power of a Texas court, to divide property in a divorce or annulment proceeding, to assets acquired by the spouses while domiciled elsewhere. In doing this, the legislature avoided the injustices that sometimes arose when, upon removal of a marriage from one jurisdiction to another, the safeguards of earlier marital property systems were lost, but the safeguards of the Texas marital property system were not gained.¹¹⁵

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

114. *Campbell v. Campbell*, 23 Tex. Sup. Ct. J. 391 (June 4, 1980); *opinion withdrawn*, 24 Tex. Sup. Ct. J. 84, (Nov. 22, 1980).

115. See *Muns v. Muns*, 567 S.W.2d 563, 566-67 (Tex. Civ. App.—Dallas 1978, no writ). The court in *Muns* speculated as follows:

Suppose the husband and wife have lived in a common-law state until the husband became eligible for retirement, and then they establish a residence for their declining years in the more benign environment of Texas. Difficulties develop here, and the wife seeks a divorce, but she has little earning capacity and no property. Back in the home state a divorce court could have done equity by granting alimony, but no such remedy is available in Texas, where it is assumed that property accumulated during

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marriage belongs to both spouses. If the Texas court cannot reach the husband's separate property, it has no choice but to leave the wife with no means of support.
Id. at 566-67.