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Community Entitled to Reimbursement for Enchanced Value of Separately Owned Corporate Stock.

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MARITAL PROPERTY—Division of Property Upon Divorce—Community Entitled to Reimbursement for Enhanced Value of Separately Owned Corporate Stock

Jensen v. Jensen,
665 S.W.2d 107 (Tex. 1984).

On March 20, 1975, Robert Lee Jensen purchased stock in RLJ Printing Company, Inc. (RLJ).[1] Four months after this acquisition he married Burlene Parks Jensen.[2] During their marriage, Mr. Jensen devoted ninety percent of his time to the company; his managerial skills caused the value of the company's stock to increase substantially.[3] After five years of marriage, the Jensens were granted a divorce.[4] The trial court found the stock and its enhanced value to be Mr. Jensen's separate property and denied Mrs. Jensen any interest in its appreciated value.[5] The Tyler court of appeals reversed, holding that the community estate was entitled to compensation for the enhanced value of the stock.[6] The Texas Supreme Court granted Mr. Jensen's application for writ of error.[7] Held—*Affirmed.*[8] The

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1. *See* Jensen v. Jensen, 665 S.W.2d 107, 108 (Tex. 1984). Mr. Jensen formed RLJ in order to purchase Newspaper Enterprises. *See id.* at 257. After acquiring Newspaper Enterprises, Mr. Jensen purchased 48,455 of RLJ's 100,000 shares for $1.56 a share. *See id.* at 257. He was also trustee of an additional 2000 shares, giving him control over a majority of the company's stock. *See* Jensen v. Jensen, 629 S.W.2d 222, 223 (Tex. App.—Tyler 1982), *aff'd,* 665 S.W.2d 107 (Tex. 1984).

2. *See* Jensen v. Jensen, 665 S.W.2d 107, 108 (Tex. 1984).

3. *See* Jensen v. Jensen, 629 S.W.2d 222, 224 (Tex. App.—Tyler 1982), *aff'd,* 665 S.W.2d 107, 108 (Tex. 1984).

4. *See* Jensen v. Jensen, 665 S.W.2d 107, 108 (Tex. 1984).

5. *See id.* at 108.

6. *See* Jensen v. Jensen, 629 S.W.2d 222, 224-27 (Tex. App.—Tyler 1982), *aff'd,* 665 S.W.2d 107 (Tex. 1984).

7. *See* Jensen v. Jensen, 26 Tex. Sup. Ct. J. 247, 248 (Mar. 2, 1983) (opinion of supreme court granting writ of error).

8. *See* Jensen v. Jensen, 665 S.W.2d 107, 108 (Tex. 1984). On July 6, 1983, the Supreme Court of Texas handed down its opinion on *Jensen v. Jensen,* affirming the decision of the court of appeals. *See* Jensen v. Jensen, 26 Tex. Sup. Ct. J. 480, 481 (July 6, 1983), *withdrawn,* 27 Tex. Sup. Ct. J. 68 (Nov. 9, 1983), *withdrawn,* 665 S.W.2d 107 (Tex. 1984). Justice Kilgarlin, writing for the majority, upheld the court of appeals decision characterizing the enhanced value of Mr. Jensen's separately owned corporate stock as community property. *See id.* at 482. A strong dissent espoused a reimbursement theory as more equitable and more consistent with the Texas Constitution, case law, and statutes. *See id.* at 483. No entitlement to the enhanced value was found, however, because the salary received by Mr. Jensen during the marriage was reasonable. *See id.* at 484. On a motion for rehearing, the opinion of July 6, 1983, was withdrawn. *See* Jensen v. Jensen, 27 Tex. Sup. Ct. J. 68 (Nov. 9, 1983),

community is entitled to reimbursement for the enhanced value of separately owned corporate stock less compensation received by the community for its expenditure of time and labor in achieving that enhancement.[9]

With the community property system there are three distinct property estates: (1) the husband's separate estate, (2) the wife's separate estate, and (3) the community estate.[10] Separate property is that which is possessed before marriage, property acquired by gift, devise, or descent during the marriage, and sums recovered as damages for personal injuries which occur during the marriage.[11] Community property is all property acquired during the marriage which is not separate property.[12] There are eight states which follow the community property system of marital property.[13]

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withdrawn, 665 S.W.2d 107 (Tex. 1984). The opinion substituted reversed the court of appeals decision rendering judgment for Mr. Jensen. *See id.* at 70-71. Justice Wallace, writing for the majority, declared that the reimbursement theory should be applied. *See id.* at 69. Thus, the enhanced value of Mr. Jensen's separately owned stock would remain his separate property subject only to a right of reimbursement for his time, talent, and labor. *See id.* at 70. As Mrs. Jensen had failed to show the salaries paid to Mr. Jensen were unreasonable, she had not proven a right to reimbursement, and, therefore, she had no interest in the enhanced value of the stock. *See id.* at 70. Again, on motion for rehearing, the opinion of the court was withdrawn and a new opinion substituted in which the court altered its second opinion only by its decision to remand on the issue of the reasonableness of Mr. Jensen's salary. *See* Jensen v. Jensen, 665 S.W.2d 107, 110 (Tex. 1984). The evidence presented at trial was found inadequate to determine whether the salary was reasonable. *See id.* at 110.

9. *See* Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984).

10. *See* TEX. CONST. art. XVI, § 15 (defining separate and community property); TEX. FAM. CODE ANN. § 5.01 (Vernon 1975) (delineates marital property as separate or community). *See generally* McKnight, *Husband & Wife, Property Rights and Liabilities,* 13 TEX. TECH L. REV. 735, 736-46 (1982) (commentary on development of marital property as defined in Family Code).

11. *See* TEX. FAM. CODE ANN. § 5.01(a) (Vernon 1975); *see also* Perez v. Perez, 587 S.W.2d 671, 673 (Tex. 1979) (applying statutory definition of marital property). Definitions of separate property in other jurisdictions are in accord. *See, e.g., In re* Torrey's Estate, 95 P.2d 990, 992 (Ariz. 1939) (property owned before marriage and acquired afterward by "gift, devise, or descent" is separate property); McDonald v. Lambert, 85 P.2d 78, 82 (N.M. 1938) (property owned by husband or wife before marriage separate property); Conley v. Moe, 110 P.2d 172, 175 (Wash. 1941) (property acquired before marriage is separate property).

12. *See, e.g.,* Norris v. Vaughan, 152 Tex. 491, 501, 260 S.W.2d 676, 680 (1953) (community labor, talent, and funds expended on production and sale of gas renders gas community property); Smith v. Buss, 135 Tex. 566, 571, 144 S.W.2d 529, 531 (1940) (property acquired by either spouse during marriage is community property); Oppenheimer v. Robinson, 87 Tex. 174, 177, 28 S.W. 95, 96 (1894) (property deeded wife during marriage presumed community property); *see also* TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975). *See generally* Smith, *Characterization of Property,* 1 TEX. BAR ASS'N ADVANCED FAM. L. COURSE B-1, B-8-20 (1982) (discussion on application of statutory definition to characterize marital property as separate or community).

13. *See* Hammonds v. Commissioner, 106 F.2d 420, 423 (10th Cir. 1939) (community property law of Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington drawn from Spanish and French law).

Contrary to the common law property system,[14] community property law allows either spouse to own property which is separate and apart from the marital estate.[15] The Spanish civil law concept of community property has been firmly embedded in Texas constitutional and statutory provisions since Texas was a republic.[16] Consequently, whatever interest either spouse may possess in the community or separate estate is defined by the Texas Constitution[17] and by legislative enactment.[18]

Division of the community estate upon divorce is governed by section 3.63 of the Texas Family Code, which gives the trial court broad discretionary power to divide the community in a fair and equitable manner.[19] Upon divorce, the property of both spouses must be characterized as part

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14. *See* Leake v. Saunders, 126 Tex. 69, 69, 84 S.W.2d 993, 993 (1935) (under common law, identity of wife merged with husband's).

15. *See, e.g.,* Hilley v. Hilley, 161 Tex. 569, 573, 342 S.W.2d 565, 567 (1961) (marital property "either separate or community"); Franklin v. Woods, 598 S.W.2d 946, 948-49 (Tex. Civ. App.—Corpus Christi 1980, no writ) (property purchased while unmarried is separate property of owner spouse after marriage); Taylor v. Hollingsworth, 169 S.W.2d 519, 522 (Tex. Civ. App.—Galveston 1943) (property acquired by gift, devise, or descent during marriage is separate property), *aff'd,* 142 Tex. 158, 176 S.W.2d 733 (1944).

16. *See* Law of Jan. 20, 1840, 1840 Tex. Gen. Laws 3, 2 H. GAMMEL, LAWS OF TEXAS 177 (1838-46) ("An Act to adopt the Common Law of England,—to repeal certain Mexican Laws, and to regulate the Marital Rights of parties"); *see also* Huie, *Commentary on the Community Property Laws of Texas,* 13 TEX. REV. CIV. STAT. ANN. 2, 2-3 (Vernon 1960) (discussion of Spanish origin of Texas law).

17. *See* TEX. CONST. art. XVI, § 15. The constitution states in pertinent part: "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." *Id.*

18. *See* TEX. FAM. CODE ANN. § 5.01 (Vernon 1975). The statute provides as follows:

(a) A spouse's separate property consists of:
  (1) the property owned or claimed by the spouse before marriage;
  (2) the property acquired by the spouse during marriage by gift, devise, or descent; and
  (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.
(b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Id.

19. *See, e.g.,* Bell v. Bell, 513 S.W.2d 20, 22 (Tex. 1974) (division of community property need not be equal but lies within discretion of court); *In re* Marriage of York, 613 S.W.2d 764, 770 (Tex. Civ. App.—Amarillo 1981, no writ) (section 3.63 of Texas Family Code gives court broad discretion in dividing community estate); Daniel v. Daniel, 30 S.W.2d 801, 804 (Tex. Civ. App.—Fort Worth 1930, no writ) (within discretion of court to make partition of personal property which seems just and right); *see also* TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1984); McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law,* 36 SW. L.J. 97, 139-43 (1982) (discussion of discretion exercised in division of property in divorce). Although broad discretion is given the court, such discretion is subject to abuse. *See In re* Marriage of York, 613 S.W.2d 764, 771 (Tex. Civ. App.—

of either the separate or community estate before a division of the community can be effectuated.[20] Although a spouse cannot be divested of his or her separate property, all property possessed by either spouse upon dissolution of the marriage is statutorily presumed to be community property.[21] This presumption may be rebutted, however, by satisfactory evidence proving that the contested property is in fact a part of a spouse's separate estate.[22] Once property has been characterized as either community or separate, the trial court then divides the community estate in a manner it deems equitable, taking into consideration the circumstances of the divorce, the financial condition of both parties, and the rights and needs of any children.[23]

An additional consideration in the characterization of property arises whenever community assets have been utilized for the improvement, benefit, or enhancement of separate property.[24] It is clear that in Texas, absent

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Amarillo 1981, no writ) (failure to characterize certain property as part of community resulted in abuse of discretion).

20. *See* Cooper v. Cooper, 513 S.W.2d 229, 232 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (initial step in division of property is to establish it as community or separate); *see also* Nichols, *Division of Property on Divorce,* 1 TEX. BAR. ASS'N ADVANCED FAM. L. COURSE E, E-3 (1982) (outline of court's duty in regard to division of property on divorce).

21. *See* Purser v. Purser, 604 S.W.2d 411, 413 (Tex. Civ. App.—Texarkana 1980, no writ) (failure of husband to produce evidence that funds used to purchase property were separate resulted in presumption of community); *see also* TEX. FAM. CODE ANN. § 5.02 (Vernon 1975). The statute reads in pertinent part: "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property." *Id.*

22. *See, e.g.,* Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. 1965) (statute forms rebuttable presumption in favor of community property; contrary must be satisfactorily proved); Wilson v. Wilson, 145 Tex. 607, 610, 201 S.W.2d 226, 227 (1947) (law imposes rebuttable presumption; must prove otherwise by clear evidence); Schreiner v. Schreiner, 502 S.W.2d 840, 847 (Tex. Civ. App.—San Antonio 1973, writ dism'd) (statute creates rebuttable presumption which places burden of proving contrary on one claiming property to be separate). For examples of what constitutes separate property, see, e.g., Smith v. Smith, 473 S.W.2d 299, 302 (Tex. Civ. App.—Texarkana 1971), *writ ref'd n.r.e. per curiam,* 478 S.W.2d 81 (Tex. 1972) (recovery for personal injuries of husband and wife is separate property); Hays v. Marble, 213 S.W.2d 329, 333-34 (Tex. Civ. App.—Amarillo 1948, writ dism'd) (land inherited from father and mother separate property); Steele v. Caldwell, 158 S.W.2d 867, 869 (Tex. Civ. App.—Eastland 1942, no writ) (land acquired before marriage is separate property).

23. *See* Cooper v. Cooper, 513 S.W.2d 229, 233-34 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (factors considered in division of property: spouse's earning capacity, business opportunity, educational background, physical condition, possible need for future support); *see also* TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp. 1984).

24. *See, e.g.,* Dakan v. Dakan, 125 Tex. 305, 320, 83 S.W.2d 620, 627 (1935) (court characterizes improvements made to separate property by community estate); Stringfellow v. Sorrells, 82 Tex. 277, 278, 18 S.W. 689, 689 (1891) (court considers increased value of separately owned mules fed and cared for by community estate); Schmidt v. Huppman, 3 Tex. 112, 116, 11 S.W. 175, 176 (1889) (court characterizes profits from separate property used to

a valid agreement to the contrary, profits or income derived from separate property will be characterized as community property.[25] This is based on the rationale that, although the profits are derived from the separate estate, the income or profits would not have been forthcoming without the aid of one or both spouses.[26] Profits derived from separate property which are due to the industry and skill of either spouse are, therefore, to be treated as community property.[27] Reimbursement is applied, however, where community funds have created merely a growth in the corpus of the separate estate.[28] The community is denied any property interest in the increase because separation of the increase from the corpus itself would destroy the integrity of the spouse's separate estate.[29] The community is instead entitled to the equitable remedy of reimbursement so that it may recover the expenses it has incurred from the separate estate.[30] The same is also true when community funds are utilized by the separate estate to make improvements;[31] the separate estate is allowed to keep the improvements sub-

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improve community estate); *see also* White v. Hugh Lynch & Co., 26 Tex. 195, 195-96 (1862) (lumber from wife's mill cut by wife's slaves is community property).

25. *See, e.g.,* White v. Hugh Lynch & Co., 26 Tex. 195, 196 (1862) (lumber cut from wife's mill is community property); Mortenson v. Trammell, 604 S.W.2d 269, 274-75 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (income from savings account and certificates of deposit acquired by gift is community property); Craxton v. Ryan, 3 Willson 439, 439 (Tex. Ct. App. 1888) (bricks from soil of wife's separate estate community property).

26. *See* De Blane v. Hugh Lynch & Co., 23 Tex. 25, 29 (1859). In *De Blane,* the court relied on the fact that the husband acted as trustee for the wife's separate estate, giving rise to the presumption that the husband's industry and skill must have been employed in the management and production of the cotton in question. *See id.* at 29.

27. *See, e.g.,* Dakan v. Dakan, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935) (community entitled to be reimbursed for community funds expended on behalf of separate estate of husband); Furrh v. Winston, 66 Tex. 521, 524, 1 S.W. 527, 529 (1886) (community entitled to reimbursement for costs made on behalf of separate estate); Bond v. Hill, 37 Tex. 626, 627-28 (1873) (husband entitled to reimbursement for funds expended on wife's separate property).

28. *See* Stringfellow v. Sorrells, 82 Tex. 277, 278-79, 18 S.W. 689, 689 (1891) (court denied creditor's claim that increased value of separately owned mules was community property).

29. *See id.* at 278-79, 18 S.W. at 689.

30. *See* Furrh v. Winston, 66 Tex. 521, 524, 1 S.W. 527, 529 (1886) (buildings erected on separate property by community estate entitle community to equitable right of reimbursement).

31. *See id.* at 524, 1 S.W. at 529. Since the community has no interest in separately owned realty, the buildings will vest in the separate estate; the separate estate, however, will be required to pay the community estate for the cost of the buildings. *See id.* at 524, 1 S.W. at 529. The right to reimbursement is an equitable remedy; therefore, application of the rule "lies within the discretion of the trial court." *See* Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1982).

ject only to a right to reimbursement.[32]

A distinct issue arises when the time, talent, and labor of one or both spouses have been expended on separate property and result in both profits and the appreciation of the separate estate.[33] Unlike community funds, the time, talent, and labor of the community prior to *Vallone* have not been considered community expenses.[34] Historically, it has been unclear whether the community should be compensated by applying the right of reimbursement or by characterizing the enhanced value of the separate estate as community property.[35] In an early line of Texas cases, the courts characterized everything acquired by community efforts as community property.[36] In this respect, Texas law parallels the Spanish civil law,[37] which provides that the time, talent, and labor of either spouse are wholly owned by the community estate.[38] Using this rationale, courts had little difficulty in determining that an increase in the separate estate which was attributable to the industry and skill of one or both spouses was in fact community property, therefore treating the problem as one of title charac-

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32. *See* Dakan v. Dakan, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935) (separate estate of husband must reimburse community for expense of improvements to separate property).

33. *See, e.g.,* Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1982) (court considered enhanced value of separately owned corporation and time of community utilized by separate estate); Norris v. Vaughan, 152 Tex. 491, 501, 260 S.W.2d 676, 680 (1953) (court examined community time involved in acquiring gas wells purchased with separate funds of husband); Bell v. Bell, 504 S.W.2d 610, 611-12 (Tex. Civ. App.—Beaumont) (court considers business conducted by husband through corporations and enhanced value of stock), *rev'd,* 513 S.W.2d 20 (Tex. 1974).

34. *See* Hale v. Hale, 557 S.W.2d 614, 615 (Tex. Civ. App.—Texarkana 1977, no writ) (time, talent, and labor not community expense), *overruled,* Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982).

35. *See* Norris v. Vaughan, 152 Tex. 491, 497-98, 260 S.W.2d 676, 680 (1953) (utilization of community time and effort impressed community character on separate property); *In re* Marriage of York, 613 S.W.2d 764, 770 (Tex. Civ. App.—Amarillo 1981, no writ) (enhanced value of separately owned tire company community property due to community time expended).

36. *See, e.g.,* White v. Hugh Lynch & Co., 26 Tex. 195, 196 (1862) (lumber produced from wife's separately owned mill community property); De Blane v. Hugh Lynch & Co., 23 Tex. 25, 29 (1859) (cotton grown and harvested from wife's separately owned land is community property); Craxton v. Ryan, 3 Willson 439, 439 (Tex. Ct. App. 1888) (bricks manufactured from soil of wife's separate property is community property).

37. *See* Graham v. Franco, 488 S.W.2d 390, 392 (Tex. 1972) (Texas courts apply test similar to test used under Spanish civil law).

38. *See, e.g., id.* at 392 ("property is community which is acquired by the work, efforts or labor of the spouses"); Norris v. Vaughan, 152 Tex. 491, 498, 260 S.W.2d 676, 680 (1953) (community time, talent, and labor expended on separate estate may impress community character upon it); *In re* Marriage of York, 613 S.W.2d 764, 770 (Tex. Civ. App.—Amarillo 1981, no writ) ("if the separate property of one spouse is *increased* due to time, talent and industry of either spouse . . . then the entire increase acquires a community character").

terization rather than reimbursement.[39] Each spouse is granted a reasonable amount of time to maintain and preserve his or her separate estate,[40] but any time expended beyond this is considered community time.[41]

In *Hale v. Hale,*[42] the Texarkana court of civil appeals expressly rejected the view that the industry and skill of either spouse devoted to his or her separate estate was a cost to the community.[43] The Texas Supreme Court, in *Vallone v. Vallone,*[44] however, recently disapproved of the *Hale* decision and declared that the right to reimbursement also arises whenever community time, talent, and labor have been used to improve or enhance separate property.[45] After *Vallone,* it would seem that the time, talent, and labor of either spouse would be considered expenses to the community if they were utilized to improve the separate estate, therefore changing the focus from that of title characterization to reimbursement.[46]

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39. *See* Norris v. Vaughan, 152 Tex. 491, 498, 260 S.W.2d 676, 680 (1953). In *Norris,* the Texas Supreme Court found that the industry and skill of either spouse may impress a community character upon separate property; this suggests that Texas courts were then concerned with the character of the enhanced value of separate property produced by community time. *See id.* at 497-98, 260 S.W.2d at 680.

40. *See* Vallone v. Vallone, 644 S.W.2d 455, 458 (Tex. 1982) (spouse may devote reasonable amount of time to preservation of separate estate); Norris v. Vaughan, 152 Tex. 491, 499, 260 S.W.2d 676, 681 (1953) (time of husband devoted to separate property found necessary for preservation of separate estate).

41. *See* Norris v. Vaughan, 152 Tex. 491, 500, 260 S.W.2d 676, 681 (1953) (community time expended on gas wells purchased with separate funds beyond what was necessary for preservation renders gas produced community property).

42. 557 S.W.2d 614 (Tex. Civ. App.—Texarkana 1977, no writ), *overruled,* Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982).

43. *See id.* at 615. The husband in *Hale* claimed a right to reimbursement for the industry and skill he contributed to improving his wife's separately owned house. *See id.* at 615. The wife had spent her own separate funds on the materials needed to make the additions and improvements to her house, but the husband, a construction laborer, alleged that his time and talents in construction were utilized by the separate estate. *See id.* at 615. The *Hale* court held that only when community funds were expended for improvements to the separate estate could the community assert a right to reimbursement. *See id.* at 615.

44. 644 S.W.2d 455 (Tex. 1982).

45. *See id.* at 459. "To the extent that *Hale v. Hale* . . . held that community time, talent and labor may under no circumstances give rise to an equitable right of reimbursement in the community's favor, it is hereby disapproved." *See id.* at 459. The court noted that several other jurisdictions employ some form of reimbursement. *See id.* at 459 n.1.

46. *See id.* at 459. The *Vallone* court stated that the right to reimbursement arises when separate property benefits from community labor; it is not an interest equitable or otherwise in the property itself, nor a debt which may be enforced, but is instead an equitable right which may be asserted upon divorce, annulment, or death of the community partner. *See id.* at 458-59. The court then turned away from a previous line of cases, which characterized the enhanced value of separate property as community property, and instead viewed the time, talent, and labor of the community as a cost to the community estate for which it must be reimbursed. *See id.* at 459. *See generally* Comment, *Closely Held Corporation in the*

In *Jensen v. Jensen,*[47] the Texas Supreme Court considered the issue of whether the community estate was entitled to compensation for the enhanced value of separately owned corporate stock.[48] Justice Wallace, writing for the court, noted that there are two approaches to compensating the community estate: (1) the "reimbursement" theory, and (2) the "community ownership" theory.[49] The court concluded that the "reimbursement" theory is the more equitable of the two because it allows the community estate to be reimbursed for its time while preserving the separate estate of the owner spouse.[50] The *Jensen* court also observed that this theory is consistent with the Texas Constitution, statutes, and case law.[51] Finding there was insufficient evidence to sustain the trial court's determination that the salaries and dividends received by Mr. Jensen were reasonable, the court remanded the case to the trial court to make a proper decision based on adequate evidence.[52] The *Jensen* court declared that, should a right to reimbursement be shown to exist, the salaries received should be subtracted from the value of time, talent, and labor expended by the owner spouse.[53] It was further determined that no lien should attach to Mr. Jensen's separately owned stock, but that a money judgment should be awarded instead.[54]

Community property law favors a right to reimbursement over the characterization of the enhanced value of a separately owned business as community property because the enhancement is in the nature of an improvement to the separate estate.[55] The enhancement can be viewed

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Wake of Vallone: Enhancement of Stock Value by Community Time, Talent and Labor, 35 BAYLOR L. REV. 47 (1983) (general discussion of *Vallone).*

47. 665 S.W.2d 107 (Tex. 1984).

48. *See id.* at 109.

49. *See id.* at 109.

50. *See id.* at 109.

51. *See id.* at 109.

52. *See id.* at 110.

53. *See id.* at 110.

54. *See id.* at 110-11. The concurring opinion of Justice Robertson clarifies a procedural point. *See id.* at 110 (Robertson, J., concurring). He states simply that *Jensen* represents a return to the liberal construction of pleadings in divorce suits. *See id.* at 110-11 (Robertson, J., concurring). Although Mrs. Jensen did not specifically plead reimbursement, the cause was remanded to find if, based on the reimbursement theory, compensation was owed to the community. *See id.* at 110-11 (Robertson, J., concurring). Thus, the departure in *Vallone* from the broad construction of pleadings in family law cases was ended with the court's decision in *Jensen. See id.* at 110-11 (Robertson, J., concurring).

55. *See* Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1982). The *Vallone* court held that a right to be reimbursed accrues to the community estate whenever the industry and skill of a community partner are used for the improvement or benefit of the separate estate. *See id.* at 459.

simply as an increase in the corpus of the estate itself.[56] The time and effort contributed by Mr. Jensen to his separate property is not unlike the instance in which community funds are used to make improvements to separately owned realty.[57] Rather than spending community funds to benefit separate realty, however, the community, through Mr. Jensen, has contributed its time, talent, and labor to the husband's separate estate, resulting in a substantial increase in the value of his property.[58] As in cases where community funds are spent to benefit a separate estate,[59] the holding in *Jensen* requires Mr. Jensen's separate estate to reimburse the community for its contribution.[60] Therefore, the time, talent, and labor of either spouse can be considered an expenditure of the community made on behalf of the separate estate.[61]

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56. *See* Stringfellow v. Sorrells, 82 Tex. 277, 278, 18 S.W. 689, 689 (1891). In *Stringfellow,* a judgment creditor of the husband levied on two mules which were the separate property of the wife. *See id.* at 277, 18 S.W. at 689. The creditor claimed that the mules were community property because the community had fed them and the husband had cared for them during the marriage. *See id.* at 278, 18 S.W. at 689. The court held they were not community property although they had grown and increased in value due to the community's feed and care. *See id.* at 278-79, 18 S.W. at 689. The court stated that to hold otherwise would destroy the "corpus of the wife's estate." *See id.* at 278, 18 S.W. at 689.

57. *See* Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984); *see also* Burton v. Bell, 380 S.W.2d 561, 565 (Tex. 1964) (children of deceased husband claim right to reimbursement for community funds expended on improvements to widow's separate estate); Lindsay v. Clayman, 151 Tex. 593, 600, 254 S.W.2d 777, 781 (1952) (husband claims right to reimbursement for community funds spent in order to make installment payments on wife's separate property); Dakan v. Dakan, 125 Tex. 305, 308-10, 83 S.W.2d 620, 622-23 (1935) (wife claims right to reimbursement for improvements made on deceased husband's land).

58. *See* Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1982). In *Vallone,* the Texas Supreme Court for the first time held that the time, talent, and labor of the community gives rise to a right of reimbursement. *See id.* at 459. Previously, such a claim had been rejected by the Texarkana court of civil appeals. *See* Hale v. Hale, 557 S.W.2d 614, 615 (Tex. Civ. App.—Texarkana 1977, no writ), *overruled,* Vallone v. Vallone 644 S.W.2d 455 (Tex. 1982). The *Vallone* court stated that "[a] right of reimbursement arises when the funds *or assets* of one estate are used to benefit and enhance another estate without itself receiving some benefit." *See* Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1982) (emphasis added).

59. *See* Dakan v. Dakan, 125 Tex. 305, 320, 83 S.W.2d 620, 628 (1935) (separate estate of owner spouse must pay when community funds are spent to improve separately owned land).

60. *See* Jensen v. Jensen, 665 S.W.2d 107, 110 (Tex. 1984); Furrh v. Winston, 66 Tex. 521, 524, 1 S.W. 527, 529 (1886). In *Furrh,* it was alleged that buildings erected by the community on the separate estate of one spouse constituted community property. *See id.* at 524, 1 S.W. at 529. The court held that the improvements could not be divided from the separate estate. *See id.* at 524, 1 S.W. at 529. Because the buildings and land were not divisible interests, the improvements would vest in the separate estate and the community would be entitled to reimbursement for the costs it had incurred. *See id.* at 224, 1 S.W. at 229.

61. *See* Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1982) (right to reimbursement arises when community assets are used to benefit separate estate).

Additionally, because the enhancement of separately owned corporate stock can be viewed simply as an increase in the corpus of the separate estate, the result in *Jensen* is consistent with cases which hold that profits or rents from separate property are community property.[62] Since the enhancement is merely a change in, and not a product of, the separate estate, it would be difficult to sever the increase which has occurred during the marriage from Mr. Jensen's initial purchase of RLJ stock.[63] To characterize the enhancement as community property would tend to impair the corpus of the stock.[64] By employing the "reimbursement" theory, however, the *Jensen* court manages to preserve the integrity of the separate estate while allowing the community to recover the benefits it has contributed to the increase.[65]

When applying the right of reimbursement to a time, talent, and labor demand, the basis for recovery is the value of the community partner's services.[66] Logically, in determining whether the community has been adequately compensated, a court will consider the salaries, bonuses, dividends, and other fringe benefits which the owner spouse has received from the separately owned business.[67] The right to reimbursement is particularly applicable to the situation in *Jensen,* in light of Mrs. Jensen's argu-

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62. *See* Stringfellow v. Sorrells, 82 Tex. 277, 278, 18 S.W. 689, 689 (1891) (mules remained separate property of wife although increase in their value was due to community feed and care; increase was merely growth of mules themselves). For cases dealing with profits and rents, see Gifford v. Gabbard, 305 S.W.2d 668, 671 (Tex. Civ. App.—El Paso 1957, no writ) (profits from separately owned business held to be community property); Simmons v. Clampitt Paper Co. 223 S.W.2d 792, 794 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.) (rents from lease of separately owned property held to be community property).

63. *See* Rice v. Rice, 21 Tex. 58, 66 (1858). In a case involving improvements made to separately owned land, the court stated: "They are fixtures, attached to the soil, and cannot in the nature of things be divisible in specie, where one of the joint owners has no interest in the land upon which they have been erected." *See id.* at 66.

64. *See* Stringfellow v. Sorrells, 82 Tex. 277, 278, 18 S.W. 689, 689 (1891). In *Stringfellow,* the court stated that the offspring of separately owned livestock had been recognized as community property, but a mere increase in the size or value of livestock was not community property. *See id.* at 278, 18 S.W. at 689. "It would tend to entirely destroy the corpus of the wife's estate, consisting of live personal property, to declare that an augmentation in weight or value should be deemed an 'increase' of the property itself so as to constitute a part of the community to that extent." *Id.* at 278-79, 18 S.W. at 689.

65. *See* Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984). Writing for the majority, Justice Wallace states that the right to reimbursement "more nearly affords justice to both the community and separate estates." *See id.* at 109.

66. *See id.* at 109 (right to reimbursement requires that community estate be compensated for value of either spouse's industry and skill); *see also* Trawick v. Trawick, 671 S.W.2d 105, 108-09 (Tex. App.—El Paso 1984, no writ) (applying reimbursement theory from *Jensen);* Katson v. Katson, 89 P.2d 524, 525 (N.M. 1939) (right to reimbursement allocated from reasonable value of spouse's services to community).

67. *See* Speer v. Quinlan, 525 P.2d 314, 322-23 (Idaho 1974) (community entitled to

ment that the salaries and other benefits received by the community were unreasonable and inadequate when compared to the amount of time her husband devoted to his separately owned business.[68] Mrs. Jensen's claim to the enhanced value of the stock revolved around the community time spent in developing the separately owned corporation.[69] The most logical method of compensating a person for his or her time is by paying a salary and providing other benefits which his or her time, talent, and labor deserve.[70] Thus, courts have been inclined to look at the salary and other benefits which a non-owner employee would have been paid to fill the position which the owner spouse occupied.[71] Where the actual salaries and benefits received are less than what a non-owner employee would have received, the spouse's separate estate should be required to pay the difference to *reimburse* the community estate.[72]

As salaries received by either spouse during the marriage are community property,[73] the salaries and benefits which RLJ had paid to Mr. Jen-

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difference between salaries and other benefits received from separately owned business and what court determines is reasonable recompense for husband's efforts).

68. *See* Jensen v. Jensen, 665 S.W.2d 107, 108-09 (Tex. 1984). On appeal, Mrs. Jensen contested the finding of the trial court that the salaries and other benefits received by the community were adequate and reasonable. *See id.* at 108-09.

69. *See id.* at 108-09; *see also* Katson v. Katson, 89 P.2d 524, 526 (N.M. 1939). In *Katson,* the court declared that if a third party had been employed by the husband to run his separately owned corporation, the entire proceeds of the business could have been retained by the separate estate. *See id.* at 526. Therefore, unless the community estate has contributed to the separately owned business, it has no interest at all in any increase in its value. *See id.* at 526.

70. *See* Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984); *see also* Speer v. Quinlan, 525 P.2d 314, 323 (Idaho 1974) (evidence of salaries and benefits which non-owner employee would receive in a position comparable to that of owner spouse); Katson v. Katson, 89 P.2d 524, 526 (N.M. 1939) (wages paid for services similar to those rendered by owner spouse may be considered as evidence).

71. *See, e.g.,* Tassi v. Tassi, 325 P.2d 872, 878 (Cal. Dist. Ct. App. 1958) (value of spouse's services is community's interest in separately owned business); Speer v. Quinlan, 525 P.2d 314, 323 (Idaho 1974) (value of services performed by spouse is measure of community compensation); Katson v. Katson, 89 P.2d 524, 526 (N.M. 1939) (court held value of spouse's services is measure of compensation to community estate).

72. *See* Speer v. Quinlan, 525 P.2d 314, 323 (Idaho 1974). In *Speer,* the Idaho Supreme Court stated:

> [if] the community has been deprived of adequate compensation for its services, the community would be entitled to a judgment against the owner spouse equivalent to the difference between the income actually received by the community in the form of compensation from the business, and the income which the community would have received had the owner spouse been justly compensated.

Id. at 323.

73. *See* Bantuelle v. Bantuelle, 195 S.W.2d 686, 689 (Tex. Civ. App.—Texarkana 1946, no writ) (rents, profits, earnings, and other income derived from separately owned business are community property); TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975) (defining commu-

sen during the marriage would appear to have at least partially compensated the community for its time.[74] Under the "reimbursement" theory, the salaries, dividends, and bonuses paid by a separately owned business are in fact taken into consideration by a court when determining what compensation is owed to the community estate.[75] In essence, the salaries and other benefits received by the community are deemed to be at least partial payment for the time, talent, and labor of the owner spouse.[76] In contrast, courts which employ a title characterization theory would characterize the enhanced value of the separately owned stock as community property.[77] Under the facts of *Jensen,* not only would the separate estate have compensated the community for Mr. Jensen's time through the salaries, dividends, and bonuses it had paid, but it would also have been required to surrender the enhanced value of the separate stock.[78] Thus, under title characterization, in paying out salaries, dividends, bonuses, and other fringe benefits which the community receives during the marriage,[79] and in relinquishing to the community the enhancement which has accrued during that period, the separate estate is required to pay the community twice for the benefit of the owner spouse's time.[80] The right to

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nity property); *see also* Katson v. Katson, 89 P.2d 524, 526 (N.M. 1939) (spouses' salaries are owned by community).

74. *See* Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984); *see also* Speer v. Quinlan, 525 P.2d 314, 323 (Idaho 1974) (reasonable compensation for husband's services offset by salary and other benefits received).

75. *See* Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984). "The right to reimbursement is only for the value of the time, toil and effort expended to enhance the separate estate for which the community did not receive adequate compensation." *Id.* at 109.

76. *See In re* Herbert's Estate, 14 P.2d 6, 8 (Wash. 1932) (salary paid owner spouse, which under circumstances was adequate compensation, is measure of community interest in spouse's time and effort); *see also* Trawick v. Trawick, 671 S.W.2d 105, 108-09 (Tex. App.—El Paso 1984, no writ) (application of "reimbursement" theory in Texas; salary, life insurance premiums, death benefits, and use of company car considered as partial compensation of community).

77. *See In re* Marriage of York, 613 S.W.2d 764, 770 (Tex. Civ. App.—Amarillo 1981, no writ) (community entitled to that part of enhanced value of company attributable to owner spouse's industry and skill).

78. *See* Jensen v. Jensen, 665 S.W.2d 107, 108 (Tex. 1984) (separate property remains separate subject only to right of reimbursement). *Compare* Bell v. Bell, 504 S.W.2d 610, 612 (Tex. Civ. App.—Beaumont) (wife entitled to appreciated value of corporate assets even though already compensated by salaries of husband), *rev'd,* 513 S.W.2d 20 (Tex. 1974) *with* Katson v. Katson 89 P.2d 524, 526 (N.M. 1939) (community entitled only to reasonable value of spouse's services).

79. *See* Katson v. Katson, 89 P.2d 524, 526 (N.M. 1939). The New Mexico Supreme Court stated "that the community owns the earning power of the husband, and that when it is used in the conduct of his separate business, the portion of the earnings attributable to his personal activities and talent is community property." *Id.* at 526.

80. *See In re* Marriage of York, 613 S.W.2d 764, 770 (Tex. Civ. App.—Amarillo 1981,

reimbursement avoids this problem of double compensation by allowing the separate estate to keep the enhanced value of the stock, subject only to the community's right to be reimbursed for the time, talent, and labor not compensated by the salaries and other benefits it has already received.[81]

Prior to *Jensen,* six of the community property states applied variations of the "reimbursement" theory when dealing with time, talent, and labor claims made by the community.[82] Thus, there is considerable persuasive authority for the majority's application of the right to reimbursement in *Jensen.*[83] It was not intended that the owner of separate property should engage a manager to direct his separately owned business in order to preserve its separate character; "separate property should have the direction of the owner."[84] As in other states adopting the "reimbursement" theory, Texas preserves the valuable right of personal management of one's separate estate while adequately compensating the community for its contribution.[85]

The increased value of Mr. Jensen's stock which has occurred during the

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no writ). The court stated that "if the separate property of one spouse is *increased* due to the time, talent and industry of either spouse, beyond that required to preserve such property, then the entire increase acquires a community character." *Id.* at 770.

81. *See* Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984) (community's interest in enhanced value of separate stock is right of reimbursement).

82. *See* Vallone v. Vallone, 644 S.W.2d 455, 459 n.1 (Tex. 1982). Footnote one of the *Vallone* opinion lists the six states which apply the right to reimbursement rule: Arizona, California, Idaho, Nevada, New Mexico, and Washington. *See id.* at 459 n.1.

83. *See, e.g.,* Speer v. Quinlan, 525 P.2d 314, 323 (Idaho 1974) (applied right to reimbursement where trial court awarded wife interest in husband's separately owned stock); Katson v. Katson, 89 P.2d 524, 525-28 (N.M. 1939) (applied right to reimbursement where wife claimed interest in husband's separately owned stock); Hamlin v. Merlino, 272 P.2d 125, 126-29 (Wash. 1954) (applied right to reimbursement where deceased wife's administrator claimed community had interest in husband's separately owned corporation). *But see* Mauzy v. Legislative Restricting Bd., 471 S.W.2d 570, 573 (Tex. 1971). "Decisions of courts of other jurisdictions, even if based upon identical facts, are no more than persuasive, and they are persuasive only to the extent that their reasoning is regarded as logical." *Id.* at 573.

84. *See* Katson v. Katson, 89 P.2d 524, 526 (N.M. 1939). In a case similar to *Jensen,* the New Mexico Supreme Court considered whether the community had an interest in the enhanced value of the owner spouse's separately owned corporation. *See id.* at 525. The court held that while the salaries earned by either spouse are community property, the owner spouse need not employ a manager so that he might retain his separate property. *See id.* at 526. Being a man of considerable experience in the printing and publishing business, Mr. Jensen was in a better position than most to manage and supervise his separately owned publishing business. *See* Jensen v. Jensen, 629 S.W.2d 222, 226 (Tex. App.—Tyler 1982), *aff'd,* 665 S.W.2d 107, 108 (Tex. 1984). Mr. Jensen had been an accountant at the Times Mirror Company and risen to the position of president. *See id.* at 226. He also served on the board of several corporations and banks. *See id.* at 226.

85. *See* Jensen v. Jensen, 665 S.W.2d 107, 108 (Tex. 1984); *see also* Katson v. Katson 89 P.2d 524, 526 (N.J. 1939) (right of reimbursement protects separate estate and allows owner to manage without impressing community character on separate property).

marriage is in the nature of an improvement to the separate estate created by community assets. It is a mere increase in the value of the corpus itself and not something which can be severed from the separate estate. Since the enhancement is both a community improvement and an increase in the corpus of the separately owned stock, the right to reimbursement is the best approach to employ when compensating the community for its time, talent, and labor. The enhancement cannot be severed because it is part of the stock itself, and the efforts of the community can be reimbursed much as if community funds had been spent. It appears to be the most equitable theory of compensation because it compensates the community for its industry and skill yet preserves the integrity of the separate estate. The right to reimbursement correctly bases compensation on the value of a spouse's services, thus avoiding double compensation which occurs when the increase is characterized as community property. As a result, both the separate and community estates are justly treated and the interests of both preserved by the "reimbursement" theory.

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