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ACQUIRING SEPARATE PROPERTY ON CREDIT: A REVIEW AND PROPOSED REVISION OF TEXAS MARITAL PROPERTY DOCTRINE

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I. INTRODUCTION

The character of property acquired on credit is one of the most vexing but, until recently, least important questions in Texas marital property law. The apparent black letter rule is that anything acquired by either spouse on credit during marriage is community property, unless the creditor agrees at the outset to look only to separate property for repayment.[1] Put in words more familiar to lenders, all property acquired on credit during marriage is community property, unless that property is acquired by a separate-property-secured non-recourse loan.

The general rule governing credit acquisitions makes sense. It follows naturally from a core principle of Texas law, now codified, that everything owned by a married person is presumed community.[2] When that basic presumption is combined with the "incep-

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1. *See* Cockerham v. Cockerham, 527 S.W.2d 162, 171 (Tex. 1975) (explaining that debts incurred during the marriage are community property).

2. *See, e.g.*, TEX. FAM. CODE ANN. § 3.003(a) (Vernon 1998) (stating that "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property"); Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225, 1235 (1995) (noting the presumption that property acquired on credit is community property). McKnight stated:

> It is a corollary of the community presumption that property acquired on credit or with money borrowed during marriage is presumed to be community property unless a spouse can prove that the seller of the property bought on credit or the lender of the money used to make the purchase looked solely to the separate credit of the buying or borrowing spouse.

Id.; *see also* Marion Fallwell, Comment, *Agreements That Property Bought on Credit During Marriage Will Be Separate*, 15 BAYLOR L. REV. 66, 66 (1963) (describing the presumption, that property bought on credit by a married person is community, as "basic to Texas community property law"). *See generally* ALOYSIUS A. LEOPOLD, 39 TEXAS PRACTICE:

tion of title" doctrine—the rule that the status of marital property is fixed at the moment legally enforceable rights first attach—the reasoning is not difficult to follow.[3] In a credit transaction, the borrower (or buyer) acquires some legal right to the loan proceeds (or property bought on credit) at the very instant the credit agreement is signed. At that moment, everyone might expect that payments will be made from one spouse's separate property. Those expectations may even come to pass. But no one can predict the future. If there is any chance at the time title "incepts" that community property might ever be at risk, the community property presumption is not displaced.[4]

The apparent exception to the general rule makes less sense. The notion that proceeds of a separate-property-secured non-recourse loan also become separate property has been criticized by one court as "lacking a strong conceptual basis."[5] Making things worse, Texas credit acquisition decisions are, in the words of leading scholars, "confusing and inconsistent."[6] An astute federal judge who tackled the issue some thirty years ago agreed, concluding that "[n]o resolution by this [c]ourt can reconcile existing con-

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MARITAL PROPERTY AND HOMESTEADS §§ 18.1-.2, at 57-60 (1993) (describing the community property presumption and its applications).

3. *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Bennett, 133 Tex. 450, 128 S.W.2d 791, 795 (1939) (stating that "[t]he status of property as separate or community is fixed as of the time of the inception of the title"); Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937) (concluding that borrowed money became community property even though the loan was paid from the wife's separate property in part because "[t]he title to the land had . . . been acquired, and its status was fixed at the time of its acquisition" (quoting Goddard v. Reagan, 8 Tex. Civ. App. 272, 28 S.W. 352, 353 (Tex. Civ. App.—Galveston 1894, no writ))).

4. *See* Heidenheimer Bros. v. McKeen, 63 Tex. 229, 230 (1885) (making the point forcefully in an early decision dealing with a credit transaction). The old Texas Commission of Appeals stated, in an opinion adopted by the Texas Supreme Court, that:

> [T]he *status* of the property is to be determined at the time when the loan is secured. It will not do to say, because perchance the separate property of the husband, or the wife, as the case may be, which has been used as security, may have to be resorted to for the purpose of paying the debt in whole or in part, that therefore the money secured by the loan, and the merchandise purchased with it, constitutes a portion of the separate property of the marital partner whose property had been used for security.

Id.

5. Ray v. United States, 385 F. Supp. 372, 380 (S.D. Tex. 1974) (referring to William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1 (1962)), *aff'd*, 538 F.2d 1228 (5th Cir. 1976) (adopting the opinion of the lower court).

6. JOSEPH W. MCKNIGHT & WILLIAM A. REPPY, JR., TEXAS MATRIMONIAL PROPERTY LAW 88 n.1 (1983).

ceptual inconsistencies found in the cases."[7] Nothing has happened since to make things any better.[8]

Fortunately, neither theoretical uncertainty nor confused case law has caused much trouble to date. Few institutional lenders would willingly make a non-recourse, separate-property-secured loan to an individual, especially if they suspect the loan might embroil them in a family squabble down the road.[9] Accordingly, the vast majority of credit transactions entered into by married Texans put some community property at risk, rendering any property acquired by use of that credit community property.

That situation, however, has changed. In November 1997, Texas voters approved a constitutional amendment to permit general

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7. *Ray*, 385 F. Supp. at 380.

8. *See* Richard L. Young, *Community Property Classification of Credit Acquisitions in California: Law without Logic?*, 17 CAL. W. L. REV. 173, 243-45 (1981) (reviewing Texas cases dealing "with the issue of credit acquisitions"). In fairness to Texas courts, it should be noted that Young, a California legal writer who surveyed other community property jurisdictions' rules governing credit acquisitions, concluded that Texas and Washington state cases constituted "notable exceptions" to the generally deplorable state of legal doctrine. *Id.* at 226.

9. *See id.* at 252-53 (surveying nine lenders and discovering that no lender made secured or unsecured loans "primarily on the strength of existing separate property of the borrowing spouse(s)" in "more than five percent of the [loans]"). Following Young's survey, a student writer conducted a similar survey, the answers to which suggested that "a married borrower must almost inevitably implicate his community assets in order to qualify for a loan from a lending institution." Catherine Perlman, Comment, *A Reappraisal of California's Intent of the Lender Rule*, 37 UCLA L. REV. 389, 408 (1989); *see also* S. David Rosenson & Timothy J. Paris, *"Grinius and Bear It": An Analysis of the Characterization of Loan Proceeds Made During Marriage*, 21 BEVERLY HILLS B. ASS'N J. 46, 49 (1986) (stating that "[i]t would be a rare situation indeed in today's commercial dealings that any lender would testify that it looked *solely* to the separate property of the borrowing spouse").

One relatively common situation that might, depending on the documentation of the particular transaction, fit the definition of a separate-property-secured non-recourse loan is a pawn, assuming separate personal property (a wedding ring, perhaps) is pledged as security. *See, e.g.*, TEX. FIN. CODE ANN. § 371.003(6) (Vernon 1998) (stating that a "pawnbroker" is a "person engaged in the business of: (A) lending money on the security of pledged goods; or (B) purchasing goods on condition that the goods may be redeemed or repurchased by the seller for a fixed price within a fixed period"); Juhan v. State, 86 Tex. Crim. 63, 216 S.W. 873, 875 (1918) (stating that a "pawnbroker's occupation is lending money upon personal property pledged"); *EZCORP Announces Credit Services Product in 177 Texas Locations*, PR NEWSWIRE, July 14, 2005, http://sev.prnewswire.com/banking-financial-services/20050714/DATH05114072005-1.html (stating that "EZCORP meets the short-term cash needs of the cash and credit constrained consumer by offering convenient, non-recourse loans collateralized by tangible personal property, commonly known as pawn loans") (on file with the *St. Mary's Law Journal*).

home equity lending.[10] As one of several consumer safeguards, the Texas Constitution now requires that home equity loans be non-recourse, secured only by the homestead.[11] If government estimates prove true, pent-up demand for such loans ultimately will result in more than $10 billion in additional Texas home equity lending,[12] spread across some fifteen percent of home-owning

10. *See* TEX. CONST. art. XVI, § 50 (including the amended language which took effect January 1, 1998); Tex. H.R.J. Res. 31, 75th Leg., R.S., 1997 Tex. Gen. Laws 6739 (constitutional amendment resolution) (authorizing a vote on the language of the amendment). *See generally, e.g.*, Julia Patterson Forester, *Home Equity Loans in Texas: Maintaining the Texas Tradition of Homestead Protection*, 55 SMU L. REV. 157 (2002) (discussing the background and provisions of the constitutional amendment); Charles C. Boettcher, Comment, *Taking Texas Home Equity for a Walk, but Keeping It on a Short Leash*, 30 TEX. TECH L. REV. 197 (1999) (providing an overview of the constitutional amendment). Before 1997, for a variety of historical reasons, Texas was the only state that did not permit general home equity lending. *See generally* James W. Paulsen, *The Home Equity Controversy in Context*, 26 ST. MARY'S L.J. 307 (1995) (providing an historical overview of home equity lending in Texas).

11. *See* TEX. CONST. art. XVI, § 50(a)(6)(A), (C) (explaining that credit secured by a voluntary lien on a homestead must be created with each owner); *see also* 2 HUGH M. RAY & ROBIN RUSSELL, TEXAS PRACTICE GUIDE: CREDITORS RIGHTS § 11.11, at 11-7 (2005) (stating that a "valid deed of trust lien for non-recourse debt may be fixed on a homestead if the creditor complies with the loan procedures and documentation mandated for a home equity loan or reverse mortgage under the Texas Constitution," and adding, "[n]onrecourse means that only the debtor's homestead is available to satisfy the debt"). The apparent reason for requiring that home equity lending be non-recourse was the idea that the "home stands alone," that the lender must be put to an election: "either take a loan against everything but the homestead, or take a loan against the homestead and nothing else." Charles C. Boettcher, Comment, *Taking Texas Home Equity for a Walk, but Keeping It on a Short Leash*, 30 TEX. TECH L. REV. 197, 249-50 (1999).

12. *See* CAROLE KEETON STRAYHORN, TEX. COMPTROLLER FOR PUB. ACCOUNTS, SPECIAL REPORT: HOME EQUITY LENDING GAPS IN TEXAS 2 (Mar. 2003), http://www.window.state.tx.us/specialrpt/homeeqty03 (showing that a report by the Texas Comptroller of Public Accounts estimated that about $12.7 billion in existing loans must be replaced with home equity lines of credit (HELOCs) if Texans decide to utilize these financing options at the same rate as consumers in other parts of the country) (on file with the *St. Mary's Law Journal*); *see also* Charles C. Boettcher, Comment, *Taking Texas Home Equity for a Walk, but Keeping It on a Short Leash*, 30 TEX. TECH L. REV. 197, 225 (1999) (stating that "[a]ccording to some analysts, the Texas market could represent as much as $10 billion to $20 billion in annual originations—about [5%] of the home equity loan volume in the United States"). In 2003, Texas voters approved an additional constitutional amendment that authorizes HELOCs. *See generally* TEX. CONST. art. XVI, § 50(a)(6)(F) (mentioning HELOC); Tex. S.J. Res. 42, 78th Leg., R.S., 2003 Tex. Gen. Laws 6219 ("[P]roposing a constitutional amendment authorizing a home equity line of credit, providing for administrative interpretation of home equity lending law, and otherwise relating to the making, refinancing, repayment, and enforcement of home equity loans.").

households.[13] Further liberalization of Texas home equity lending rules, such as occurred by voter approval of another constitutional amendment in November 2005,[14] will only accentuate these trends. In consequence, the arcane legal doctrine surrounding credit acquisition of separate property will take on great importance in every Texas divorce in which a married couple's home is separately owned, and in which property has been acquired through a home equity loan. It is only a matter of time, and not much time at that, before divorce and probate courts will encounter real-world examples of this formerly academic question.

An example may help illustrate the problem. Suppose Harry, a married man, gets a hot stock tip. He and Wanda don't have much cash, but they do have a friendly banker. Harry borrows $10,000 on a signature loan and uses the proceeds to buy stock. The tip pays off, and a few months later, the stock shares are worth $1,000,000. Harry sells and uses part of the money to pay off the loan. The remaining $990,000 or so is community property. If Harry and Wanda divorce, the court can divide the money between them as the court deems "just and right."[15]

Now change the facts just a little. When Harry sits down with his banker, the banker explains that Harry can get a much better interest rate with a home equity loan. Harry had bought the house just before he met Wanda, but after ten years' worth of mortgage payments during marriage, there is more than enough equity to cover

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13. *See* CAROLE KEETON STRAYHORN, TEX. COMPTROLLER FOR PUB. ACCOUNTS, SPECIAL REPORT: HOME EQUITY LENDING GAPS IN TEXAS 1 (Mar. 2003), http://www.window.state.tx.us.specialrpt/homeeqty03 (reporting that in 1997, before general home equity lending was authorized by constitutional amendment, only about 2.5% of Texas homeowners had home equity loans, "substantially less than the 14.5[%] for all U.S. homeowners outside of Texas") (on file with the *St. Mary's Law Journal*). By 2001, that number had risen to 6.4%, which was actually above the national average for standard home equity loans that year (about 5.7%). *Id.* In 2001, 8.4% of American homeowners also had HELOCs. *Id.* Assuming Texas home equity loan rates increase proportionately now that HELOCs are also available in Texas, a 15% figure would not seem implausible. *See* Jerry Patterson, *Home Equity Reform in Texas*, 26 ST. MARY'S L.J. 323, 334 (1994) (reporting the results of a study that indicated 12% of Texans could be expected to take out home equity loans if such loans were generally available).

14. *See* TEX. CONST. art. XVI, § 50(p), (v) (listing the requirements for advances made on a reverse mortgage); Tex. S.J. Res. 7, 79th Leg., C.S., 2005 Tex. Sess. Law Serv. 7 (Vernon) (authorizing a vote on the constitutional amendment permitting line-of-credit advances under a reverse mortgage).

15. TEX. FAM. CODE ANN. § 7.001 (Vernon 1998).

the loan. Harry agrees and signs the note. The rest of the story is the same, right up until the divorce. This time, instead of a "just and right" share of $990,000, Wanda gets nothing. Because the stock was bought with the proceeds of a home equity loan, and because the home is Harry's separate property, the increased stock value is Harry's separate property.[16] It would, therefore, be unconstitutional for the divorce judge to give Wanda even one penny of that money.[17]

One might reasonably wonder what bedrock legal principle or important public policy justifies such radically different results on such a trivial variation in facts. This Article suggests there is none. Rather, the separate credit exception to the credit acquisition rule is a useless relic of a bygone legal age that should be repudiated before it begins to cause serious mischief.

Part II of this Article reviews the case law, briefly tracing the development of the current Texas rule and chronicling some of the more interesting deviations from that rule. Part III lays out varying problems with the separate credit exception to the credit acquisition rule. Finally, Part IV proposes a simple alternative rule, that *all* property acquired on credit during marriage is community property, subject to appropriate reimbursement rights. Elimination of the separate-property-secured non-recourse exception to the credit acquisition rule is consistent with Texas Supreme Court decisions, accords with basic principles of Texas community property law, and yields equitable results.

II. THE DEVELOPMENT AND STATUS OF THE CREDIT ACQUISITION RULE

A. *The Origins of the Modern Texas Credit Acquisition Rule*

Gleich v. Bongio[18] is generally considered the leading Texas case on the characterization of property acquired on credit during mar-

16. *See* ALOYSIUS A. LEOPOLD, 38 TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 5.9, at 144-46 (1993) (discussing the treatment of capital increases in separate property stock shares).

17. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 141-42 (Tex. 1977) (holding, in part on constitutional grounds, that the trial court's discretion in dividing property at divorce "does not extend to a taking of the fee to the separate property of the one and its donation to the other").

18. 128 Tex. 606, 99 S.W.2d 881 (1937).

riage.[19] That is unfortunate, because the facts are not easily described. This 1937 post-divorce partition action[20] determined ownership of a number of Houston city lots acquired by brothers Felix and Sam Bongio during Felix's marriage to Bertha. Bertha had remarried by the time the case was appealed, hence the "Gleich" in the case name.[21]

Felix and Sam bought six more-or-less contiguous lots from a Houston widow for a total purchase price of $12,000 ($2000 per lot). The brothers paid $5000 cash, money inherited from their mother.[22] They signed promissory notes for the remaining $7000.[23]

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19. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881 (1937); *see also* Ray v. United States, 538 F.2d 1228, 1230 (5th Cir. 1976) (citing *Gleich v. Bongio* as sole authority for the proposition that "the critical element in determining the status of property purchased on credit is the agreement of the creditor and the purchasing spouse that the proceeds of the loan are to be the debtor's separate property and that the creditor will look solely to the purchasing spouse's separate property for satisfaction of the indebtedness"); Holloway v. Holloway, 671 S.W.2d 51, 57 (Tex. App.—Dallas 1983, writ dism'd w.o.j.) (stating that "[d]espite some judicial expression to the contrary, the law was settled in *Gleich*"); William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 14 (1962) (disapproving the result, but nonetheless conceding that "[w]hat may fairly be termed a new note was sounded in *Gleich*"); Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225, 1235 n.77 (1995) (citing *Gleich* as principal authority for the credit acquisition rule); Marion Fallwell, Comment, *Agreements That Property Bought on Credit During Marriage Will Be Separate*, 15 BAYLOR L. REV. 66, 71 (1963) (referring to *Gleich* as "still the leading case in Texas for the proposition that property can be bought on credit").

A student article written shortly after *Gleich*, and generally critical of that decision, nonetheless conceded that the ruling on the credit acquisition issue was an actual "necessary" decision (or holding), though perhaps a holding that could be limited to part-cash, part-credit purchases, or acquisition of separate property by a husband. *See* Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37, 41 n.21 (1942) (arguing that the holding should be limited).

20. Speaking more technically, the opinion was written by then-Commissioner Hickman of the Texas Commission of Appeals, Section A, before the Texas Supreme Court expanded to its current nine members, but after all opinions of the two Commission panels were automatically adopted by the Texas Supreme Court. Accordingly, it has the precedential weight of a Texas Supreme Court decision and is cited as such. *See* TEXAS RULES OF FORM 28 (Tex. Law Review Ass'n et al. eds., 10th ed. 2003) (explaining the precedential evolution of the Texas courts).

21. *See Gleich*, 99 S.W.2d at 882 (briefly explaining the marital status of Bertha Bongio Gleich).

22. *See* Bongio v. Gleich, 71 S.W.2d 291, 291-93 (Tex. Civ. App.—Galveston 1934) (explaining the facts of the case in more detail than the later decision), *rev'd*, 99 S.W.2d 881 (Tex. 1937).

23. *Id.* at 292. Rather than draw up and sign a single promissory note to cover the whole transaction, or five promissory notes (one for each of the five parcels of land conveyed subject to debt), the deal was structured with *six* promissory notes—each in the face

About eight months later, the Bongio brothers sold three of the lots, making more than enough money on the deal to pay off the purchase money debt.[24]

One aspect of the deal made analysis more difficult. When the Bongio brothers originally bought the six lots, the deal was structured so that one lot (referred to by the courts as lot number three) was bought for $2000 cash and conveyed to the brothers by separate deed.[25] Because Felix Bongio acquired his half interest in lot number three with $1000 of his separate property inheritance, and no credit issues were involved, the court should not have seriously disputed the separate property status of lot number three.[26]

As to the two remaining lots (lot numbers one and two), the issue was more complex. These lots had been conveyed to the Bongio brothers by a single deed, grouped together with the three lots that were later sold for a considerable profit. At $2000 per lot, the original purchase price for all five lots was $10,000. The Bongio brothers paid $3000 cash from their respective inheritances; for the remainder, they signed a $7000 note secured by a vendor's lien on all five lots.[27]

The trial court apparently considered that portion of the lots acquired on the strength of Felix Bongio's credit to be community property, though its ruling was flawed by the court's failure to con-

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amount of $1166.66—due one, two, three, four, five, and six years from the date of purchase. *Id.*

24. *Id.* at 292-93. Felix and Sam bought the land on December 27, 1927, and sold three of the parcels, paying off the loan on or about August 7, 1928. *Id.*

25. *Id.* at 293. The reason the Gleich brothers structured the sale this way is not explained in either the Court of Civil Appeals's or Commission of Appeals's decisions. One possibility is that the brothers intended to keep lot number three and build on it, while selling some or all of the remaining lots for a profit. *Id.* After paying off the debt on three of the lots with proceeds from the sale of the other three, the brothers got a new loan to build on the three remaining lots. *Id.* There is some suggestion in the Commission of Appeals's decision that at least some of the improvements were on lot number three. *See Gleich*, 99 S.W.2d at 885 (discussing the possible use of funds for improvements on lot number three).

26. Oddly enough, the trial court did rule—despite these facts—that the community had an interest in lot number three. *See Bongio*, 71 S.W.2d at 291 (detailing the trial court's decision). The trial court either overlooked or disregarded the fact that the Bongio brothers received lot number three free and clear, through a deed separate from that conveying the other five lots. The Commission of Appeals spent little time on this point, commenting that it was "obvious" that the former Mrs. Bongio had no interest in this lot and that she "practically concede[d] error in this particular." *Gleich*, 99 S.W.2d at 883.

27. *Gleich*, 99 S.W.2d at 883.

sider the deal as two separate transactions.[28] The court of civil appeals likewise ignored any distinction between the one lot purchased for cash and the five lots purchased as a part-cash, part-credit transaction. However, the intermediate court held all properties to be separately owned, stating that "[n]ot a dollar of the money paid by Felix Bongio for his interest in the lots ever belonged to or became part of the community estate of himself and [Bertha]."[29]

The Texas Commission of Appeals, in an opinion written by Commissioner John Hickman and adopted by the Texas Supreme Court, ruled that the wife had a community property interest in that portion of the two lots acquired by virtue of her husband's debt to the vendor.[30] Much of the opinion was devoted to proving the unexceptional proposition that property could be acquired in shares by both the separate and community estates.[31] As to the property acquired by use of the husband's credit (seventy percent of five lots), the Commission began by stating the general rule that "property acquired on the credit of the community is community property."[32] The court then set out a possible exception in two sentences:

> The mere intention of the husband and wife cannot convert property purchased with an obligation binding upon the community into the separate estate of either spouse. To accomplish that purpose the vendor must have agreed with the vendee to look only to his or her separate estate for the satisfaction of the deferred payments.[33]

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28. The trial court held that Bertha Bongio Gleich had a 7/48 interest in the three unsold lots. *See id.* (describing the trial court decree). This fraction would be consistent with a determination that the former Mrs. Bongio owned an undivided half-interest in one-half of seven-twelfths of all three lots (the latter fraction being the ratio of the Bongio brothers' total cash payments to the credit portion of the combined transactions).

29. *Bongio*, 71 S.W.2d at 293.

30. *Gleich*, 99 S.W.2d at 884. Specifically, the Commission of Appeals ruled that 50% of the $7000 vendor's lien on the $10,000 five-lot purchase was the husband's responsibility, and of that, 50%—or 7/40 of the two remaining lots' value—was the wife's fractional interest. *Id.* The Commission spoke of the $3500 credit as "consideration . . . furnished by the community of Felix and Bertha Bongio." *Id.*

31. *See id.* at 883-84 (discussing the characterization of community property). This rule of law finds expression in cases as early as *Love v. Robertson*, 7 Tex. 6 (1851).

32. *Id.* at 883.

33. *Id.* at 884.

The Texas Commission of Appeals's decision in *Gleich v. Bongio* went to some pains to rebut the notion that the character of property acquired on credit should be determined simply by the intent of husband and wife. Quoting an earlier decision, Commissioner Hickman explained—with italics for emphasis—that a woman's separate ownership of land acquired partly on credit "would have been established by proof . . . that it was agreed at the time *by the parties to the deed* that the land should be her separate property and that the balance of the purchase money should be paid out of her separate funds."[34]

Some two decades later, the Texas Supreme Court revisited the issue. In *Broussard v. Tian*,[35] the ex-wife appealed a ruling that a parcel of land bought from the Federal Land Bank during marriage was her ex-husband's separate property.[36] The husband paid $480 cash and signed a vendor's lien note for $1600.[37] He paid off the note with his separate property.[38] Both the trial court and court of appeals ruled that the land was the husband's separate property.[39]

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34. *Id.* (quoting Foster v. Christensen, 67 S.W.2d 246, 249 (Tex. Comm'n App. 1934, holding approved)).

The *Gleich* court's quotation from *Foster v. Christensen* leaves out language a modern court would consider significant. Immediately after stating that a wife could acquire separate property by credit only on a showing that "it was agreed at the time by the parties to the deed that the land should be her separate property and that the balance of the purchase money should be paid out of her separate funds," the *Foster* court continued, in a sentence omitted from *Gleich*: "The effect of such proof would not be altered by the fact that the husband joined in the promise to pay the balance of the purchase money." *Foster*, 67 S.W.2d at 249. As the credit acquisition rule is understood today, such a promise would make all the difference in the world because potential personal liability on the part of either or both spouses would render property acquired on credit the property of the community.

In fairness to the *Gleich* court, however, it was not the first time Panel A of the Texas Commission of Appeals had dropped this sentence from the *Foster* ruling. Two years earlier, Commissioner Critz had done the same thing in *Solether v. Trinity Fire Insurance Co.*, 124 Tex. 363, 78 S.W.2d 180, 182 (1935). The *Solether* opinion was adopted by the Texas Supreme Court, and Commissioner Critz had since been elevated to a position on the Texas Supreme Court. *See Gleich*, 99 S.W.2d at 884. Accordingly, Commissioner Hickman may have felt justified in dropping the extra sentence, as the *Solether* court already had done.

35. 156 Tex. 371, 295 S.W.2d 405 (1956).

36. Broussard v. Tian, 156 Tex. 371, 295 S.W.2d 405, 405 (1956).

37. *Id.*

38. *Id.* at 406.

39. *Id.* at 405.

The Texas Supreme Court, however, reversed and rendered judgment for the wife.[40]

The question for the jury was whether the lender "agreed and understood . . . that the $1,600.00 note . . . would be paid out of the separate property of [the husband]."[41] The husband signed the note, and the note contained no recitals referring to the intended community or separate status of the land or the source of loan repayment.[42] However, the husband testified (over objection) to conversations tending to prove the lender expected the husband to pay the loan with his separate property oil revenues.[43] The conversations, coupled with the fact that the husband followed through on his representations, and in fact did make all loan payments from his separate property, convinced the Waco Court of Civil Appeals that the land should be his separate property.[44]

The Texas Supreme Court avoided the question of whether testimony about conversations with the loan officer on expected sources of repayment was admissible.[45] Instead, the court ruled

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40. *Id.* at 408.

41. Broussard v. Tian, 290 S.W.2d 372, 373-74 (Tex. Civ. App.—Waco 1956), *rev'd*, 295 S.W.2d 405 (Tex. 1956).

42. *See Broussard*, 295 S.W.2d at 406 (explaining the details of the note). The Texas Supreme Court was explicit on this point:

> [A]s appears to be conceded—and necessarily so—by the respondents-defendant, the vendor's lien note being executed during the marriage by the husband, who is the community manager, and there being nothing in the note or related instruments to the contrary, the note is by presumption and in legal effect a community obligation, unless somehow lawfully shown to be otherwise.

Id.

43. *See Broussard*, 290 S.W.2d at 377 (explaining the circumstances and oral testimony relating to the negotiations between the husband and the lender). The admissibility of this evidence certainly is subject to reasonable question. The Waco Court of Civil Appeals concluded that the husband's testimony regarding oral statements made during loan negotiations "did not in anywise vary the terms of the contract that he made with the bank." *Id.*

44. *See id.* (concluding the land was the husband's separate property). The Waco court stated that the question of whether the loan officer had the authority to bind the bank to the sort of understanding described by the husband "passes out of the case because the bank accepted the benefits of their negotiations and proceeded to close the trade," and the husband "proceeded to carry out the details of his trade with the bank just as he promised the agents negotiating for the bank." *Id.* While the Texas Supreme Court did not explicitly rule on this point, the court did comment: "The fact that the cash consideration and part of the note were later paid out of money accruing from the [separate property] oil properties might well have been due to reasons other than an obligation so to pay them." *Broussard*, 295 S.W.2d at 407.

45. *Broussard*, 295 S.W.2d at 406.

that, even if a court did consider the statements, they did not establish an enforceable commitment on the part of the lender to look only to the husband's separate property for repayment.[46] The court's language is worth quoting at some length:

> Possibly the proof does amount to an "understanding" in the sense that both parties considered the existence of the [separate property] oil properties in question as a factor favorable to due discharge of the note. But *it does not reflect a contract* that it was to be paid out of these properties in particular, still less out of the separate property of [the husband] generally.
>
> . . . .
>
> The fact that at the time of the purchase the spouses had been living apart for a considerable period does suggest a motive for [the husband] to avoid a community obligation; but the possibility or even probability of a general purpose to do business as a single man does not, under the circumstances, afford *any proof of a contract between him and the bank* to this effect.[47]

As the italicized language makes clear, the Texas Supreme Court's ruling in *Broussard v. Tian* maintains that any understanding between borrower and lender that only separate property is liable for loan repayment must rise to the level of an enforceable contract for the separate credit exception to the general credit acquisition rule to apply.[48]

At this point, one biographical detail bears mention. While *Gleich* and *Broussard* are separated by more than two decades in time, there is more than just philosophical continuity between the two opinions. The author of the *Gleich* decision was John Hickman.[49] Two decades later *Broussard* was written by Justice W. St.

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46. *Id.*

47. *Id.* at 407 (emphasis added).

48. *Id.* (hinging the court's holding on whether a contract between the borrower and the lender existed); *accord* Dorfman v. Dorfman, 457 S.W.2d 91, 95 (Tex. Civ. App.—Waco 1970, no writ) (citing *Broussard* for the proposition that "[t]he portion purchased on a credit or with borrowed funds becomes community unless there is an express agreement on the part of the vendor or lender to look solely to the separate estate of the purchaser for satisfaction of the indebtedness").

49. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 881 (1937). Chief Justice Hickman began his 34-year appellate judge career first as an associate justice and then as the chief justice of the Eastland Court of Civil Appeals. John Edward Hickman—Biography, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/HH/fhi1.html (last visited Jan. 12, 2006) (on file with the *St. Mary's Law Journal*). In 1935, he was appointed to Section A of the Commission of Appeals, during which time he wrote *Gleich*

John Garwood.[50] Garwood was joined in the unanimous opinion, however, by Justice John Hickman who, by then, had ascended to the position of Chief Justice of the Texas Supreme Court.

In any event, twenty years or so after *Broussard*, in *Cockerham v. Cockerham*,[51] the Texas Supreme Court provided a one-sentence summary of the credit acquisition rule, synthesized from *Gleich* and *Broussard*.[52] "It is well established that debts contracted during marriage are presumed to be on the credit of the community and thus are joint community obligations, unless it is shown the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction."[53] That sentence has become a standard opening litany for courts dealing with community property aspects of credit acquisition, and a fair statement of current doctrine.[54]

Finally, when considering the credit acquisition rule, the reader should be aware that the development of the modern rule is not quite as neat and tidy as this discussion might make it seem. At least one string of arguably correct authority developed in apparent ignorance of *Gleich*,[55] another ran parallel to *Broussard* for a

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v. Bongio. *Id.* When the Texas Supreme Court expanded from three members to nine in 1945, by absorption of the two sections of the Commission of Appeals, Hickman automatically became an associate justice of the Texas Supreme Court. *Id.* In 1948, he was appointed chief justice and thereafter was twice elected to the position. *Id.*

50. *Broussard*, 295 S.W.2d at 405.

51. 527 S.W.2d 162 (Tex. 1975).

52. *See* Cockerham v. Cockerham, 527 S.W.2d 162, 171 (Tex. 1975) (categorizing debts acquired during marriage).

53. *Id.*

54. *See, e.g.*, Sprick v. Sprick, 25 S.W.3d 7, 13 (Tex. App.—El Paso 1999, pet. denied) (referring to the "well established" rule from *Cockerham* and its progeny); Humphrey v. Taylor, 673 S.W.2d 954, 956 (Tex. App.—Tyler 1984, no writ) (recognizing the long-standing rule in Texas); Brazosport Bank of Tex. v. Robertson, 616 S.W.2d 363, 366 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (repeating the sentence from *Cockerham* in explaining the law in Texas); Mortenson v. Trammell, 604 S.W.2d 269, 275 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (noting the general rule in Texas stemming from *Cockerham*); *see also* Oliver S. Heard, Jr., Richard A. Streiber & Richard R. Orsinger, *Characterization of Marital Property*, 39 BAYLOR L. REV. 909, 920 (1987) (citing *Cockerham* and explaining the Texas law).

55. *See* Phillips v. Vitemb, 235 F.2d 11, 15-16 (5th Cir. 1956) (considering, contrary to *Gleich*, the intent of the spouses when analyzing the property). The *Phillips* decision by the fabled Judge John R. Brown concerned an attempt to keep some property out of the husband's bankruptcy estate by claiming it was the wife's separate property, acquired on credit. Rejecting the argument, Judge Brown summarized the law as follows:

> [T]here is no showing that [the husband] knew of, or participated in, any of these transactions. Indeed, that fact, highlighting a seeming paradox, is of dominant significance, for unless the conveyance clearly and affirmatively reflects (as this one does not) that it is to be property of the separate estate so that, by the contract between vendor and purchaser or otherwise, the separate estate is alone obligated for the deferred purchase price, the total nonparticipation of the husband in the transaction makes the wife's agreement to pay the deferred price a community debt and the property, to the extent it is procured thereby, community property.

Id. at 16.

It is a little difficult to interpret Judge Brown's statement. The Fifth Circuit's initial and final emphasis in *Phillips* on the husband's nonparticipation suggests, contrary to *Gleich*, that the spouses' intent plays a role. *See* Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937) (stating that "[t]he mere intention of the husband and wife cannot convert property purchased with an obligation binding upon the community into the separate estate of either spouse"). Most likely, though, the court was recognizing that under the right circumstances, the husband's joinder in the instrument could make the transaction a gift. This surmise gains support from the fact that the second cited authority for the Fifth Circuit's holding, *Hodge v. Ellis*, 154 Tex. 341, 277 S.W.2d 900 (1955), specifically references gift theory. *See Gleich*, 99 S.W.2d at 904-05 (repeatedly referencing the possibility of an intended gift when the husband is a party to the conveyance).

The core of the Fifth Circuit's statement in *Phillips*, that to create separate property the conveyance must clearly reflect "by the contract between the vendor and purchaser or otherwise, the separate estate is alone obligated for the . . . purchase price," *Phillips*, 235 F.2d at 16, is very close to *Gleich*'s formulation, though the "or otherwise" proviso appears contrary to *Broussard*'s emphasis on the actual contract. *See* Broussard v. Tian, 156 Tex. 371, 295 S.W.2d 405, 407 (1956) (stating that the facts should reflect a contract).

The Fifth Circuit surely can be forgiven for not taking account of *Broussard*, because it issued *Phillips* a little more than four months before the Texas Supreme Court issued *Broussard*. *Compare Phillips*, 235 F.2d at 11 (showing an issuance date of June 30, 1956), *with Broussard*, 295 S.W.2d at 405 (showing an issuance date of November 7, 1956). What is not so easy to understand is the Fifth Circuit's failure to refer to *Gleich*.

The answer to that question may lie in the fact that the Fifth Circuit apparently placed primary reliance on a 1946 Amarillo Court of Civil Appeals opinion, *Hudspeth v. Hudspeth*. *See Phillips*, 245 F.2d at 16 n.8 (placing Hudspeth v. Hudspeth, 198 S.W.2d 768 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.) before Texas Supreme Court authority, in the authority footnote). The *Hudspeth* court, in turn, relied on three cases—all issued before *Gleich*'s announcement of the modern rule. *See Hudspeth*, 198 S.W.2d at 771-72 (citing Heidenheimer Bros. v. McKeen, 63 Tex. 229 (1885); Kearse v. Kearse, 262 S.W. 561 (Tex. Civ. App.—Dallas 1924), *aff'd*, 276 S.W. 690 (Tex. Comm'n App. 1925, judgm't adopted); and Harrison v. Mansur-Tibbets Implement Co., 41 S.W. 842 (Tex. Civ. App.—Dallas 1897, no writ)).

Harrison seems to have been decided under some sort of "delayed mutation" analysis, discussed briefly later in this Article. *See Harrison*, 41 S.W. at 631 (noting several Texas Supreme Court cases that hold, "where the consideration for land purchased is in part paid out of the separate means of the wife, and the balance to be paid at some future date, the wife acquires an interest in the land to the extent of the cash paid," but adding that those holdings recognize that if the deferred payments are made out of her separate means, [the wife] acquires a title to all of the land; but, if the deferred payments should be paid out of property other than that of her separate means, to that extent it would be community

couple of decades,[56] and a third—mentioned later in this Article—

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property); *see also infra* notes 238-42 and accompanying text (discussing delayed mutation analysis).

The other cases cited by *Hudspeth* are more interesting. *Kearse* was decided a year before *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925), and over a decade before *Gleich*. Nonetheless, the court correctly anticipated—though on statutory grounds, not constitutional—*Arnold*'s reasoning. *Compare Kearse*, 262 S.W.2d at 564 (citing the statutory definition and *Heidenheimer* for the conclusion that "[p]roperty purchased by the wife entirely on credit is not acquired by either gift, devise or descent, and therefore its status is that of community property"), *with Arnold*, 273 S.W. at 801 ("If the method be by gift, devise or descent to the wife, then the Constitution makes the property belong to the wife's separate estate," but "[i]f the method of acquiring during marriage be different, then the property falls without the class of separate estate of the wife, as fixed by the Constitution.").

As mentioned, *Kearse*, like *Hudspeth*, also cited *Heidenheimer Bros. v. McKeen*. *See Kearse*, 262 S.W.2d at 564 (citing Heidenheimer Bros. v. McKeen, 63 Tex. 229 (1885)). *Heidenheimer Bros.*, which reasoned to much the same conclusion as *Kearse* some thirty years earlier, is treated at some length in Part III.A. of this Article. *See infra* notes 209-17 and accompanying text (discussing *Heidenheimer Bros.*). For present purposes, however, it is sufficient to note that *Heidenheimer*'s reasoning process—or at least the constitutionalized version of that reasoning set out in *Arnold v. Leonard*—figured to some extent into *Gleich*. Accordingly, while the line of authority leading to the Fifth Circuit's *Phillips* decision developed in apparent ignorance of *Gleich*, it does share some significant common ancestry.

The *Kearse-Hudspeth-Phillips* line seems to have died out by merger into the mainstream of post-*Gleich* jurisprudence. *See, e.g.*, Ray v. United States, 385 F. Supp. 372, 377 (S.D. Tex. 1974) (citing *Carter* in close proximity to *Gleich* and *Broussard*), *aff'd*, 538 F.2d 1228 (5th Cir. 1976) (adopting the lower court's opinion); Mortenson v. Trammell, 604 S.W.2d 269, 275-76 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (citing *Carter v. Grabeal* in close proximity to *Gleich*, *Broussard* and *Cockerham*); O'Benar v. O'Benar, 410 S.W.2d 214, 218 (Tex. Civ. App.—Dallas 1966, writ dism'd w.o.j.) (citing *Carter* in close proximity to *Broussard*); Carter v. Grabeal, 341 S.W.2d 458, 460 (Tex. Civ. App.—Amarillo 1960, no writ) (citing *Phillips* and *Hudspeth* in close proximity to *Gleich*).

56. Six months after the Texas Supreme Court issued *Broussard*, the Texarkana Court of Civil Appeals finalized its opinion in *Goodloe v. Williams*. *Compare* Goodloe v. Williams, 302 S.W.2d 235, 235 (Tex. Civ. App.—Texarkana 1957, writ ref'd) (showing rehearing overruled May 9, 1957), *with Broussard*, 295 S.W.2d at 405 (showing an issuance date of November 7, 1956). The *Goodloe* opinion received a "writ refused" designation from the Texas Supreme Court, elevating its precedential weight to the equivalent of a Texas Supreme Court opinion. *See, e.g.*, TEXAS RULES OF FORM 93 app. A (Tex. Law Review Ass'n et al. eds., 10th ed. 2003) (stating that "[s]uch cases have equal precedential value with the Texas Supreme Court's own opinions").

The "writ refused" designation was perhaps unfortunate because *Goodloe* lacked something in the way of theoretical precision. *Goodloe*'s discussion of the credit acquisition question began with an extended quotation from *Gleich*, italicizing for emphasis the last sentence of *Gleich*'s quotation from *Foster v. Christensen*, to wit: "To accomplish that purpose [the creation of separate property by a credit purchase] the vendor must have agreed with the vendee to look only to his or her separate estate for the satisfaction of the deferred payments." *Goodloe*, 302 S.W.2d at 237 (quoting Gleich v. Bongio, 128 Tex. 606, 99

S.W.2d 881, 884 (1937) (quoting Foster v. Christensen, 67 S.W.2d 246, 249 (Tex. Comm'n App. 1934, holding approved))).

From that beginning, the *Goodloe* court stated: "The two vendor lien notes were in form joint promises to pay their face amount, signed by both [husband and wife], and secured by a lien on the land. As such they were an obligation of the community estate." *Id.* Such language is consistent with *Gleich* and with *Broussard*'s just-issued clarification that proof must rise to the level of "a contract between [the spouse] and the bank" to look only to separate property for repayment. *Broussard*, 295 S.W.2d at 407. However, the *Goodloe* court then added: "Lacking this indispensable proof that the vendors[ ] . . . agreed with the vendee[ ] . . . that the land should be her separate property and that the balance of the purchase money should be paid out of her separate funds, there is no evidence that shows the 20 acres was [the wife's] separate property." *Goodloe,* 302 S.W.2d at 238.

If one reads *Goodloe* quickly, or focuses entirely on the last sentence, it is easy to get the impression that an enforceable agreement with the lender is only one factor—albeit an important factor—to be considered alongside such things as deed recitals, possible spousal agreements and the actual source of loan repayment. And indeed, some subsequent decisions may have interpreted *Goodloe* that way. *See, e.g.*, Welder v. Welder, 794 S.W.2d 420, 428 (Tex. App.—Corpus Christi 1990, no writ) (citing *Goodloe*, among other cases, for the proposition that "the intention of the lender to look solely to the property of one spouse is an evidentiary factor of prime importance in showing . . . that the spouses intended to hold the property as one spouse's separate property, especially where there is no other evidence of such an agreement"); Beeler v. Beeler, 363 S.W.2d 305, 307-08 (Tex. Civ. App.—Beaumont 1962, writ dism'd w.o.j.) (citing *Goodloe* for the proposition that "in order for deferred payments upon the purchase of real estate during marriage to create separate property . . . it must have been agreed at the time of the purchase between the parties to the deed that the land was to be the separate property of one [spouse]" and that this spouse should make the deferred payments "out of that spouse's separate funds"); *see also* Tripp v. Burleson, No. 13-97-809-CV, 1999 Tex. App. LEXIS 5989, at *15 (Tex. App.—Corpus Christi Aug. 12, 1999, no pet.) (not designated for publication) (reconfirming the language in *Welder*).

This is not, however, a good reading of *Goodloe*, particularly when one considers the unambiguous language in *Broussard* just mentioned, as well as the *Goodloe* court's pointed reference to *Gleich*. When the *Goodloe* court referred to "this indispensable proof," the reference was to the vendor lien notes signed by both spouses. *Goodloe*, 302 S.W.2d at 237-38. It therefore seems that evidence of spousal agreements (unless contained in signed loan documents) or subsequent payments (under any circumstances) could not serve to dispense with the "indispensable proof" offered by the contract itself. Most courts citing *Goodloe* seem to have interpreted the decision in this way. *See, e.g.*, Ray v. United States, 385 F. Supp. 372, 377 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976) (citing *Goodloe*, among other cases, for the proposition that "when one spouse acquires property on credit with the creditor agreeing to look solely to the separate property of that spouse for compensation in the event of default, the spouse serving as the source of credit is considered the owner"); Holloway v. Holloway, 671 S.W.2d 51, 57 (Tex. App.—Dallas 1983, writ dism'd w.o.j.) (citing *Goodloe*, and other cases, for the proposition that separate property cannot be acquired on credit "unless there is an express agreement on the part of the vendor or lender to look solely to the separate estate of the purchasing spouse for satisfaction of the indebtedness"); Harrington v. Harrington, 451 S.W.2d 797, 799 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) (citing *Goodloe*, among other cases, for the conclusion that "[p]roperty purchased during the marriage on credit is community property unless an agreement exists that the separate estate of one of the vendees only shall be

erroneously keyed off some loose language in *Cockerham*. While detailed discussion would add little to this Article, the recognition that such legal tributaries, eddies and backwaters actually exist may help one understand how the occasional lower court can still manage to miss the mainstream of Texas credit acquisition jurisprudence.

B. *Real World Applications of the Separate Credit Exception*

Case law examples of situations in which a spouse actually acquires separate property through credit transactions are rare. Examples in which the courts have correctly applied the credit acquisition rule as stated by the Texas Supreme Court are even rarer. Two arguably correct examples of the rule in operation are the federal district court decision in *Ray v. United States*,[57] and the Dallas Court of Appeals's ruling in *Holloway v. Holloway*.[58] Together, they illustrate just how unusual the circumstances of a credit transaction must be to render loan proceeds separate property. Additionally, they foreshadow problems with the doctrine.

1. *Ray*: Exploiting an Estate Tax Loophole

In *Ray*, doctors diagnosed Mr. Ray, the husband, with terminal cancer.[59] To minimize his looming estate tax, Mr. Ray borrowed $1 million to buy $1.3 million face value U.S. Treasury "flower

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looked to by the vendor for satisfaction of the credit extended"); Dillard v. Dillard, 341 S.W.2d 668, 671 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.) (citing *Goodloe* and cases cited therein, including *Gleich* but not *Broussard*, for the conclusion that "property purchased during marriage by either spouse on credit is community property unless an agreement exists that the separate estate of the vendee only shall be looked to by the vendor for satisfaction of the credit extended").

In any event, while *Goodloe*'s timing and "writ refused" designation initially led to some decisions that cited *Goodloe* and *Gleich*, but not *Broussard*, the *Goodloe* branch seems to have drifted back into the *Gleich-Broussard* mainstream. *See, e.g.*, *Ray*, 385 F. Supp. at 377 (citing *Gleich*, *Broussard*, and *Goodloe*, among others); *Welder*, 794 S.W.2d at 428 (relying on various authority including *Gleich*, *Broussard*, and *Goodloe*); *Holloway*, 671 S.W.2d at 57 (citing *Gleich*, *Broussard*, and *Goodloe*); *Harrington*, 451 S.W.2d at 799 (citing *Dillard* and *Goodloe*, but not *Broussard*); *Beeler*, 363 S.W.2d at 307-08 (citing *Goodloe* and *Gleich*, but not *Broussard*); *Dillard*, 341 S.W.2d at 671 (citing *Goodloe* and cases cited therein, including *Gleich*, but not *Broussard*).

57. 385 F. Supp. 372 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976).

58. 671 S.W.2d 51 (Tex. App.—Dallas 1983, writ dism'd w.o.j.).

59. Ray v. United States, 385 F. Supp. 372, 375 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976).

bonds."[60] Flower bonds were long-term low-interest government securities that were not redeemable before maturity, except on the bond owner's death.[61] The most attractive feature of these bonds, which no longer are available,[62] was that they could be bought at a discount shortly before death, then used at face value to pay estate taxes.[63]

The IRS challenged the deal.[64] The government argued, in part, that the purchased bonds constituted community property.[65] That would mean only half of the bonds would be included in Mr. Ray's estate, and therefore, only half of the bonds could be redeemed for use in minimizing tax burdens.[66] The federal district court ruled in favor of the Rays, finding that Mr. Ray's loan had been secured solely with his separate property, and that the loan proceeds used to purchase the flower bond thus were his separate property.[67] The Fifth Circuit affirmed the ruling per curiam, complimenting and adopting U.S. District Judge Carl Bue Jr.'s "excellent opinion."[68]

For the most part, the district court's opinion in *Ray* simply relied on *Gleich*, *Broussard*, and several intermediate appellate decisions establishing that separate property could be acquired on credit if the lender agreed to look solely to the borrowing spouse's

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60. *Id.* The term "flower bonds" is a colloquialism, apparently based on the connection between flowers and funerals, or the macabre but accurate description that "[w]hen you were pushing up daisies, flower bonds bloomed." Marilyn Cohen, *Death Puts: Capital Markets*, FORBES, Mar. 8, 1999, at 146, *available at* 1999 WLNR 5225039.

61. *See, e.g.*, Weld v. United States, 31 Fed. Cl. 81, 82-83 (1994) (providing citations and general information on flower bonds), *aff'd*, 55 F.3d 623 (Fed. Cir. 1995); DAVID WESTFALL, ESTATE PLANNING LAW AND TAXATION § 11.03[3], at 11-28 to -32 (1984) (explaining payment of estate tax with flower bonds); *Points to Remember*, 29 TAX LAW. 615, 618 (1976) (discussing the relevance of flower bonds within the context of estate planning). In addition, the *Weld* decision gives an excellent example of how to work the basic math of flower bonds. *See Weld*, 31 Fed. Cl. at 83 (providing a mathematical illustration of the bond discount).

62. *See* Ray v. United States, 538 F.2d 1228, 1229 n.1 (5th Cir. 1976) (noting the decline of flower bonds). As the Fifth Circuit put it in the *Ray* appeal, "The blooms are off the bonds. Once a hardy perennial, flower bonds are now virtually extinct." *Id.*

63. *See id.* at 1229 (explaining the estate tax purpose of the bonds).

64. *Id.*

65. *Id.*

66. *Id.* at 1229 n.2.

67. Ray v. United States, 385 F. Supp. 372, 380 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976).

68. *See Ray*, 538 F.2d at 1230 (adopting Judge Bue's opinion).

separate property.[69] The evidence establishing such an agreement in Mr. Ray's case was formidable—as might be expected from a loan agreement drafted with the assistance of an attorney[70]—in what the Fifth Circuit described as an "ingenious if not entirely ingenuous" effort to avoid estate tax.[71] Proceeding from the assumption that "[u]nder Texas law, the key to determining the character of the funds . . . is the agreement between the creditor and the borrower,"[72] the district court quoted the loan agreement's actual words:

> Bank acknowledges that the proceeds of the loan evidenced by this note are and shall be the separate property of Robert H. Ray and hereby agrees that this indebtedness shall be paid out of his separate funds and that only his separate property (including the Government bonds purchased with the proceeds of this loan) shall be liable for the payment of this indebtedness.[73]

The security agreement pledging the flower bonds as collateral contained similar unambiguous language.[74] The district court properly deemed these provisions "very explicit recitation[s]" that the bank would look only to Mr. Ray's separate property for the satisfaction of the debt.[75]

The federal government's unsuccessful argument in *Ray* is perhaps the most comprehensive set of objections to the separate-property-secured non-recourse exception yet made. Briefly put, the government argued that: (1) separate property could not be acquired in this manner without violating the Texas Constitution; (2) the status of the loan proceeds should be determined by the source of funds from which the borrower spouse actually expected to repay the loan; (3) the exception required at least some initial payment from separate property; and (4) the bonds should have

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69. *See Ray*, 385 F. Supp. at 377 (relying on various decisions that established the law in Texas).

70. *See id.* at 375 (stating that the loan agreement was solicited "[o]n the advice of decedent's attorney and with the consent of decedent's wife").

71. *Ray*, 538 F.2d at 1230.

72. *Ray*, 385 F. Supp. at 381.

73. *Id.* at 375.

74. *Id.* at 376. The agreement stated in part: "Notwithstanding anything herein to the contrary, Bank agrees that the Liabilities [defined as the $1 million promissory note] shall be paid out of the separate funds of Robert H. Ray and that only his separate property (including the Collateral) shall be liable for payment of the Liabilities." *Id.*

75. *Id.* at 379.

been treated as community property because the "loan" was a sham transaction to avoid taxes.[76]

The government's first, and core, argument was that allowing the decedent to acquire separate property by creatively structuring a loan transaction violated the Texas Constitution and case law.[77] This Article will later revisit this argument because the author believes the argument was correct and should prevail if properly presented to a Texas court.[78] In synopsis, the tax authorities argued that the Texas Constitution defines the accepted methods for acquiring separate property: essentially, "[a]ll property . . . of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent,"[79] as well as property created by premarital or spousal agreement,[80] and (by judicial gloss on the Texas Constitution) property purchased with separate funds.[81] The government argued that because "credit acquisition" is not a line item on this constitutionally derived list, the court must characterize it as community property.

Judge Bue's rejoinder to the government's argument, as set out in the *Ray* opinion and embellished here, makes some sense, at least on the surface.[82] The Texas Supreme Court has endorsed the

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76. *See id.* at 378-81 (presenting the government's general arguments).

77. *Ray*, 385 F. Supp. at 378.

78. *See infra* text accompanying notes 193-97 (discussing the constitutional issues with the separate credit exception).

79. TEX. CONST. art. XVI, § 15.

80. *See id.* (stating that separate property may be acquired through a premarital or spousal agreement). Though not originally part of the Texas constitutional scheme, separate property created by spousal agreement was sanctioned by a 1948 amendment and refined by further amendments in 1980, 1987, and 1999. *See generally* JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED §§ 4.003, 4.102-.103 (Aug. 2005 ed.) (stating that the parties can transfer or exchange community property to separate property at any time through premarital or spousal agreements); Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 276 (1997) ("[S]ection 15 authorize[s] the creation of separate property in four new ways: (1) premarital partitions, (2) spousal partitions of future community property, (3) spousal income agreements, and (4) spousal donations.").

81. *See* Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565, 567 (1961) (stating that "[p]roperty purchased with separate funds" is an exception to the general rule that "[i]f acquired before marriage by any method, or after marriage by gift, devise or descent, [property] is separate; otherwise it is community").

82. *See Ray*, 385 F. Supp. at 379 (explaining that the government's first argument fails because "[n]either [*Hilley* nor the Texas Constitution] considers the manner in which a court must determine the ownership of property acquired by virtue of a credit transac-

rule that property purchased with separate funds becomes separate property.[83] Strictly speaking, however, the rule is not found in the Texas Constitution. Equally important, the Texas Supreme Court is committed to the inception of title rule—the requirement that for acquisitions made over time, separate or community status must be determined at the time legally enforceable rights first attach.[84] Therefore, the court reasoned, "[T]he rule of *Gleich v. Bongio* supports application of [the inception of title] principle by requiring that property purchased on credit be determined at the time of acquisition by looking to the type of property that will be subjected to forfeiture in the event of a default."[85]

The government's remaining arguments in *Ray* deserve less attention. The second argument suggested that a court should classify property as either separate or community based on "the source of the funds from which the purchasing spouse expects to repay the loan."[86] This argument, however, depended on questionable case authority and ignored a main point made in *Broussard v. Tian*.[87] The claim that the "separate credit" exception also required a separate property down payment was correctly rejected as not "supported by the more modern case law or the underlying concept of the separate credit principle."[88] The court also rejected the argu-

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tion"). One major problem with Judge Bue's argument, as set out below, is that while Texas's inception of title doctrine would require some rule that permits the determination of separate or community property status at the "inception" of the loan, nothing says the rule must hinge on the property that would be subjected to foreclosure in the event of default. A rule that simply says "all property acquired on credit during marriage is community property" would satisfy inception of title requirements just as well.

83. *See Hilley*, 342 S.W.2d at 567 (stating that "property purchased with separate funds is separate").

84. *See supra* note 3 (discussing the inception of title rule).

85. *Ray*, 385 F. Supp. at 379.

86. Ray v. United States, 385 F. Supp. 372, 379 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976).

87. *See, e.g., id.* (distinguishing Edsall v. Edsall, 240 S.W.2d 424 (Tex. Civ. App.—Eastland 1951, no writ) and explaining the government's misplaced reliance on it); Broussard v. Tian, 156 Tex. 371, 295 S.W.2d 405, 407 (1956) (emphasizing the importance of contractual obligations, not subjective expectations). The *Ray* court explained: "In *Edsall*, there was no agreement between the vendor and the purchaser to look only to the separate property of the purchaser for repayment of the purchase money debt. The legal principle recognized in *Gleich* actually was not before the court in *Edsall*." *Ray*, 385 F. Supp. at 379. The *Edsall* decision is discussed at greater length later in this Article. *See infra* notes 135-51 and accompanying text (discussing the role of spousal intent).

88. *Ray*, 385 F. Supp. at 379.

ment that the use of flower bonds was merely a tax dodge, though conceding that "the line between legitimate tax minimization and illegitimate tax avoidance is not always easily discerned."[89]

2. *Holloway*: Acquiring a $60 Million Separate Property Company

The second court decision that has arguably applied the "separate credit" test correctly to find separate property had far different, and far more disturbing, facts. In *Holloway v. Holloway*,[90] the marriage ended in divorce, not death.[91] The husband, a lawyer and oil entrepreneur, secured a $10,000 bank loan during the marriage using some $40,000 in separately owned securities as collateral. He used $3000 of the loan proceeds as initial capitalization for a wholly owned pipeline company, which at the time of divorce was valued at $60 million.[92] Unlike the circumstances presented in *Ray*, Mr. Holloway's spouse may not have known of, consented to, or benefited from the transaction.[93]

Mr. Holloway made one of the same arguments the government had used without success in *Ray*, namely, that "his intention to repay the loan out of his separate property establish[ed] the proceeds of [the] loan as his separate property."[94] He even relied on the same dubious case authority as did the tax authorities in *Ray*.[95] The result, at least as to this argument, was the same. Just as the *Ray* court rejected the notion that the loan proceeds must be con-

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89. *Id.* at 381.

90. 671 S.W.2d 51 (Tex. App.—Dallas 1983, writ dism'd w.o.j.).

91. Holloway v. Holloway, 671 S.W.2d 51, 55 (Tex. App.—Dallas 1983, writ dism'd w.o.j.).

92. *Id.* at 55-58.

93. *Compare Ray*, 385 F. Supp. at 375 (establishing that the decedent's wife knew of, consented to, and was an intended beneficiary of the transaction), *with Holloway*, 671 S.W.2d at 59 (presenting a less clear opinion regarding the possible lack of knowledge of Mr. Holloway's wife). However, one may fairly infer from the *Holloway* court's discussion of the wife's fraud and constructive trust claim that no substantial evidence of consent existed. *See Holloway,* 671 S.W.2d at 59 (detailing the court's understanding of the wife's claim).

94. *Holloway*, 671 S.W.2d at 56.

95. *Compare id.* (citing *Edsall* as a basis for Mr. Holloway's argument that an intention to repay a loan with separate property would establish the loan proceeds as separate property), *with Ray*, 385 F. Supp. at 379 (discussing *Edsall* as well). This Article discusses the *Edsall* decision at some length in Part II.A. *See infra* notes 135-51 and accompanying text (discussing *Edsall*).

sidered community property because Mr. Ray had no realistic expectation he could repay the loan from his minimal separate property, so the *Holloway* court rejected Mr. Holloway's claim that the proceeds should be considered separate property because he did expect to repay the loan from separate funds.[96]

Nonetheless, Mr. Holloway won. The Dallas Court of Appeals concluded that there was evidence to establish the separate property status of the loan proceeds under the correct test: whether there existed "an agreement by the bank to look only to his separate property for repayment."[97] Notwithstanding, reasonable minds might differ on exactly what sort of deal the bank had worked out with Mr. Holloway. For example, professors Reppy and Samuel observe that "Texas bankers may be shocked to learn that a recital in the loan instrument that proceeds will be the borrower spouse's separate property constitutes the agreement by the lender to waive the right to recover from any community property in the event of default."[98] Other commentators believe that the court inferred an "implied agreement" from the fact that loan proceeds were deposited into an account designated as Mr. Holloway's separate property.[99] The *Holloway* court itself said there was "no direct testimony of an express agreement," yet ruled in Mr. Holloway's favor.[100]

To this writer, the evidence seems a bit stronger than that. Mr. Holloway signed both the promissory note and security agreement, but the signature lines read "Pat S. Holloway, Separate Property."[101] An affidavit, which Mr. Holloway said he presented to the

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96. *Compare Ray*, 385 F. Supp. at 379 (asserting that "the source of the debt incurred has no materiality insofar as the separate or community character . . . is concerned"), *with Holloway*, 671 S.W.2d at 56 ("We do not agree that the unilateral intention of the borrowing spouse is sufficient to establish the separate character of borrowed funds.").

97. *Holloway*, 671 S.W.2d at 56-57.

98. WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 8-4 (3d ed. 1991).

99. *See* Oliver S. Heard, Jr., Richard A. Streiber, Richard R. Orsinger, *Characterization of Marital Property*, 39 BAYLOR L. REV. 909, 920 n.75 (1987) (discussing the "implied agreement" between the creditor and the debtor). The writer would not necessarily agree with these commentators' precise conclusion. While the opinion states that Mr. Holloway testified that "he opened the 'Pat S. Holloway, Separate Property' account with the proceeds," the opinion does not suggest the bank agreed beforehand to deposit the funds into this account. *Holloway*, 671 S.W.2d at 57.

100. *Holloway*, 671 S.W.2d at 57.

101. *Id.*

bank when the bank made the loan, listed the collateral as separate property.[102] The affidavit also apparently stated that the loan was one for which "the community estate shall not be liable."[103] The opinion does not indicate one way or another whether anything in the note or security agreement bore on the non-recourse question. Nor does any bank officer seem to have testified, which might be what the Dallas Court of Appeals was getting at when it noted the absence of "direct testimony" of an "express" agreement.[104]

In short, it is not completely clear just what led the court of appeals to its conclusion. However, the evidence is at least arguably consistent with some actual intent on the bank's part to make a non-recourse loan. The bottom line is that the bank appeared willing to structure the deal any way Mr. Holloway wanted, and that by doing so the husband managed to acquire $60 million in separate property during marriage.[105]

C. *Real World Misapplications of the Separate Credit Exception*

Ray and *Holloway* are the best, and may well be the only, modern case examples of credit acquisition of separate property—at least, those examples that correctly apply the rules set out by the Texas Supreme Court in *Gleich*, *Broussard*, and *Cockerham*. A fair number of other decisions have arrived at the same result as *Ray* and *Holloway*, but through misunderstanding, misapplication, or even genuine ignorance of Texas Supreme Court authority.

While this Article makes no serious effort to comprehensively catalogue these cases or dissect every analytical error, a brief examination of a few decisions may shed some light on common sources of this widespread confusion. The cases defy easy categorization, but most interpretive errors fall into two categories: (1) relaxation of the Texas Supreme Court's requirement of an enforceable agreement with the lender; and (2) a recurring urge to find some role for the intentions of one or both spouses.

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102. *Id.*

103. *Id.*

104. *Id.* The opinion noted that Mr. Holloway did testify to these issues. *Id.*

105. *Holloway*, 671 S.W.2d at 57-58 (discussing both the structure of the deal and the vast level of appreciation of the stock acquired).

1. Imaginative Variations on the "Lender's Agreement" Theme

Texas courts generally agree that property acquired on credit during marriage is community unless the lender agreed to look solely to the separate estate of the contracting spouse for satisfaction. However, some courts have—to borrow a phrase from earlier commentators—"taken a liberal view" of what constitutes such an agreement.[106] *Holloway*, just discussed, may be one such case.[107] *Brazosport Bank of Texas v. Robertson*[108] is a much clearer example of such "liberality," or lack of adherence to the Texas Supreme Court's directives.[109]

The Robertsons were having marital difficulties.[110] Mrs. Robertson wanted to buy a Lincoln Mark IV on credit; Mr. Robertson did not.[111] Mr. Robertson apparently was so opposed to the idea that he went to the bank with his wife, refused to co-sign the note, and made a point of telling the bank officer directly that he "wanted no part" of the car purchase.[112] When Mrs. Robertson informed the bank she had "substantial income" of her own, Brazosport Bank made the loan to Mrs. Robertson alone and she took title to the Mark IV in her own name.[113]

As one might expect, the Robertsons divorced. Shortly thereafter, loan payments stopped. The bank sued both Robertsons. The trial court found that the car note was a "community debt" but that the bank, by its "action[s] and conduct, agreed to look only to the separate properties of [Mrs.] Robertson for the payment of the debt."[114] Accordingly, the bank could not recover from Mr. Robertson. Houston's Fourteenth Court of Appeals affirmed, holding that "the Bank, by loaning the money to Mrs. Robertson despite Mr. Robertson's objections and his refusal to sign, in effect agreed

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106. *See* Oliver S. Heard, Jr., Richard A. Streiber, & Richard R. Orsinger, *Characterization of Marital Property*, 39 BAYLOR L. REV. 909, 920 (1987) (considering what exactly constitutes proof of an agreement in various courts of appeal).

107. *See id.* at n.75 (referencing the implied agreement in *Holloway*).

108. 616 S.W.2d 363 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

109. *See* Brazosport Bank of Tex. v. Robertson, 616 S.W.2d 363, 366-67 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (arriving at several interesting conclusions).

110. *Id.* at 364.

111. *Id.*

112. *Id.* at 364, 366.

113. *Id.* at 365-66.

114. *Brazosport Bank*, 616 S.W.2d at 365.

with Mrs. Robertson to look to her alone for satisfaction of the note."[115] The court added: "In our view *Broussard* does not prevent us from holding a creditor, by its actions and conduct under these circumstances has agreed with the borrowing spouse to look only to that spouse's separate properties to satisfy the debt."[116]

Brazosport Bank of Texas v. Robertson is a thoroughly confused and wrongly reasoned opinion. The basic problem is that the *Brazosport Bank* court failed to distinguish between liability of *persons* and liability of *property*. The court correctly stated that Brazosport Bank was looking to Mrs. Robertson, not Mr. Robertson, to pay off the loan.[117] However, this is not an agreement "in effect," as the court so oddly put it.[118] It is an agreement *in fact*. Only Mrs. Robertson signed the note; therefore, absent unusual circumstances not suggested here, only Mrs. Robertson was personally liable in the event of default.[119]

The Fourteenth Court of Appeals's second conclusion, that the bank had "agreed with the borrowing spouse to look only to that spouse's separate property to satisfy the debt,"[120] is plainly wrong.[121] While only the wife may have been personally liable on the car note, the Texas Family Code provides that some community property ordinarily is at risk to satisfy any debt personally incurred by one spouse.[122] Moreover, the opinion says the couple argued, the wife "kept telling [her husband] she was working and she

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115. *Id.*

116. *Id.* at 367.

117. *Id.* at 365.

118. *See supra* text accompanying notes 46-48 (discussing the Texas Supreme Court's ruling in *Broussard* regarding an enforceable contract).

119. *See* TEX. BUS. & COM. CODE ANN. § 3.401(a) (Vernon 2003) (stating that "a person is not liable on an instrument unless the person signed the instrument").

120. *Brazosport Bank*, 616 S.W.2d at 367.

121. *See* Joseph W. McKnight, *Family Law: Husband and Wife*, 41 Sw. L.J. 1, 14 (1987) (discussing the misconstruction of the Family Code by various courts). Professor McKnight, a principal drafter of the Texas Family Code, lists *Brazosport Bank* as one of "a number of appellate decisions [that] indicate misconceptions about the general principles controlling a spouse's personal liability." *Id.* at n.131.

122. *See* TEX. FAM. CODE ANN. § 3.202(c) (Vernon 1998) (stating that "community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by the spouse before or during marriage"). Professors Reppy and Samuel make much the same point, describing *Brazosport Bank* as one of "[a] handful of Texas cases [that] find borrowed money to be separate where the lender intends to collect only from the separate property of the borrower spouse and *the community property he or she manages*." WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY

IN THE UNITED STATES 8-3 n.1 (3d ed. 1991) (predicting that "the Texas Supreme Court would disapprove this line of authority").

Professors Reppy and Samuel mention *Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ), as another example of the "handful" of decisions that constitute the questionable "line of authority." *Id.* The *Wierzchula* opinion certainly does contain some troubling language. The court's primary holding was that because the husband signed the earnest money contract for the home while single, the property was separate under Texas inception of title doctrine. *Wierzchula*, 623 S.W.2d at 731-32. The court should have stopped there, but the opinion goes on in a possible attempt to craft an alternative holding. According to *Wierzchula*, a "second presumption" of community property status arose when a spouse signed a promissory note during marriage. *Id.* at 732. That sort of reasoning, never fleshed out by the *Wierzchula* court, is exactly what inception of title doctrine was designed to avoid.

To make things worse, the *Wierzchula* court then cited *Gleich* for the conclusion that separate property could be acquired on credit on proof that "the lender agreed to look only to the separate property of one spouse for the security for the debt," but added: "The agreement between the borrower and the creditor is *one of the primary indicators* of the character of the loan to be made." *Id.* (emphasis added). *Gleich*, of course, suggests that the lender's agreement is the only thing that counts, not just a "primary indicator." Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937). *Wierzchula* then goes on to list the fact that the husband applied for the loan and received a loan commitment while a single man, and that only he signed the promissory note, apparently as some sort of secondary indicator that the bank was "looking only to [the husband] to meet the obligations contained in the note." *Wierzchula*, 623 S.W.2d at 732. While all these statements may be true, the fact remains that once the husband signed the note, he assumed personal liability for repayment. In consequence, he put both his separate property and some community property—his sole management and the joint management community, to be precise—at risk. *See* TEX. FAM. CODE ANN. § 3.202(a), (c) (Vernon 1998) (defining the rules for treatment of separate property).

Professors Reppy and Samuel also criticize *Glover v. Henry*, 749 S.W.2d 502 (Tex. App.—Eastland 1988, no writ), on the ground that it stretches the lender's agreement idea too far. *See* WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 8-4 (3d ed. 1991) (expressing concern regarding the *Glover* decision). In *Glover*, the husband's father had left him a fractional interest in a piece of real estate. *Glover*, 749 S.W.2d at 503. The husband bought out his mother and siblings' shares by signing a promissory note for most of the purchase price. *Id.* The deed recited that the cash down payment was the husband's separate property, and that the land was conveyed as separate property. *Id.* The promissory note itself was not offered into evidence. *Id.*

The *Glover* court stated the correct rule of law, that "property purchased on credit during marriage . . . is community property unless there is an express agreement on the part of the lender to look solely to the separate estate of the purchasing spouse for satisfaction of the indebtedness." *Id.* (citation omitted). However, the court then proceeded—on nothing more than the facts just stated—to affirm a jury finding that there was an agreement to look solely to the husband's separate estate for repayment. *Id.* at 503-04.

While the decision in *Glover* certainly is not consistent with *Gleich*, two observations about *Glover* may help put the Eastland court's ruling in context. First, after stating the correct legal rule and before stating the incorrect conclusion, the court observed: "This case involves an intrafamily conveyance." *Id.* at 503. The court might just as well have added, "and a fight between children of different marriages." *See id.* (describing the dispute over the ownership of the property in question as being between children from differ-

would make the car payments," and Brazosport Bank knew she had "substantial income."[123] The court evidently forgot that income from one spouse's job during marriage is community property, not separate property.[124] In short, any way one looks at it, the Fourteenth Court of Appeals's reasoning does not hold up.

Nonetheless, the *Brazosport Bank* court actually may have stumbled through to the right result. Mr. Robertson did not sign the promissory note, and there is no suggestion that he had otherwise made himself personally liable for Mrs. Robertson's car loan. Accordingly, leaving marital property considerations to the side, the bank simply had no legal right to sue the husband as an individual, either before or after the divorce.[125]

Another strained interpretation of a supposed lender's agreement can be found in *Mortenson v. Trammell*,[126] a 1980 Corpus Christi decision. *Mortenson* was a will contest in which one dispute involved ownership of a note receivable.[127] Mrs. Trammell bor-

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ent marriages). Thus, the court may have applied a more relaxed standard because no creditor rights were involved. Alternatively, the court may have assumed that because grantors and grantee were all part of the same immediate family, no one would ever have seriously contemplated litigation against the husband or collection from the community estate.

Second, procedural considerations go a long way toward explaining *Glover*'s questionable outcome. Both the trial court and court of appeals decided the case under what courts today would consider the wrong burden of proof. The jury charge in *Glover* asked the jury to determine "from a preponderance of the evidence" whether the facts showed that the promissory note's holder "agreed to look solely to the separate property of [the husband] for payment." *Id.* Generally, such a charge would be fine. However, when making a determination that any particular asset is separate property, both the historical and modern standard is "clear and convincing evidence" or the equivalent. *See, e.g.*, TEX. FAM. CODE ANN. § 3.003 (Vernon 1998) (setting out the "clear and convincing" standard); Love v. Robertson, 7 Tex. 6, 11 (1851) (articulating a "clear and conclusive" standard). In sum, the jury was asked the right question. The fact that the Court of Civil Appeals let the decision stand may be nothing more than an artifact of a lenient standard of review.

123. *Brazosport Bank*, 616 S.W.2d at 366.

124. *Accord* Joseph W. McKnight, *Family Law: Husband and Wife*, 36 Sw. L.J. 97, 116 (1982) (stating that "[i]n spite of the court's holding in [*Brazosport Bank of Tex. v.*] *Robertson* that the seller looked to the buyer's separate property for payment, the facts suggest that the seller actually looked to the wife's earnings").

125. *Cf.* Stewart Title Co. v. Huddleston, 598 S.W.2d 321, 323-24 (Tex. Civ. App.—San Antonio 1980), *writ ref'd n.r.e.*, 608 S.W.2d 611 (Tex. 1980) (per curiam) (holding that a creditor of one spouse must first secure a judgment against the owner of the property before seizing property in satisfaction of a marital debt incurred by the other).

126. 604 S.W.2d 269 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

127. Mortenson v. Trammell, 604 S.W.2d 269, 275 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

rowed money from the Rio Building & Loan Association to make a loan to her daughter and son-in-law.[128] She used a separate property certificate of deposit as collateral. The Corpus Christi appeals court properly cited the rule that the presumption of community credit "can be overcome by presenting clear and satisfactory evidence that the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction."[129] So far, so good. Unfortunately, the remainder of the court's reasoning is a non sequitur:

> The creditor . . . obviously intended to seek satisfaction of the debt from Mrs. Trammell alone by requiring her certificate of deposit as collateral. If a default on the loan occurred, the Bank would have looked to Mrs. Trammell for repayment of the debt. Additionally, there is no indication that this debt was purchased on community credit because Mrs. Trammell took out the loan in her name and gave her separate property as collateral.[130]

To reiterate, according to the Texas Supreme Court, the basic test for determining whether one spouse has acquired separate property on credit during marriage is not whether only that spouse is liable for repayment, but whether "the creditor agreed to look solely *to the separate estate* of the contracting spouse for satisfaction."[131] By operation of law, if either spouse is found personally liable on a contract, including a loan agreement like that at issue in *Mortenson v. Trammell*, that spouse's sole management community property, joint management community property *and* the spouse's separate property is at risk.[132] There being no proof that Mrs. Trammell's loan was non-recourse as to her—such as the language in the *Ray* loan documents[133]—the court should have concluded that the loan proceeds were community property.

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128. *Id.*

129. *Id.*

130. *Id.* at 276.

131. Cockerham v. Cockerham, 527 S.W.2d 162, 171 (Tex. 1975) (emphasis added).

132. *See* TEX. FAM. CODE ANN. § 3.202(c) (Vernon 1998) (explaining that sole or joint management community property and separate property are each subject to either spouse's contractual liabilities occurring before or after marriage).

133. *See supra* note 74 (quoting the security agreement in *Ray*).

2. Uninformed Efforts to Resurrect Spousal Intent

A substantial number of post-*Gleich v. Bongio* decisions continue to find a role for spousal intent and expectations, despite *Gleich*'s decisive rejection of the approach.[134] A prime example is *Edsall v. Edsall.*[135] If a prize were to be awarded for the single most mischievous misstatement of credit acquisition law in the last half-century or so, this 1951 Eastland "no writ" decision would make any short list. In *Edsall*, the court announced that if a married man who bought some real estate on credit "had the intention at the time he borrowed such purchase price and bought such tract to repay same with his separate funds, then such [land] became his separate property."[136]

This emphasis on the spouse's intent was no slip of the pen. The court stated elsewhere in the opinion that "[t]he status of money borrowed during the marriage relationship is determined by the intention to re-pay out of the separate funds of the husband or wife or from their community fund."[137] Authority cited by the *Edsall* court consisted of a 1913 Galveston Court of Civil Appeals decision,[138] an entry in the first edition of *Texas Jurisprudence*, published just about two decades before *Edsall* issued,[139] and an ambiguous reference to one of the cases leading up to *Gleich v. Bongio*[140]—but not *Gleich v. Bongio* itself.

The erroneous *Edsall* opinion has had remarkable staying power (though oddly, not in Eastland).[141] *Edsall* has been cited in several court decisions over the years, though sometimes (as in *Ray*[142] and

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134. *See supra* text accompanying notes 18-34 (discussing the *Gleich* case).

135. 240 S.W.2d 424 (Tex. Civ. App.—Eastland 1951, no writ).

136. Edsall v. Edsall, 240 S.W.2d 424, 427 (Tex. Civ. App.—Eastland 1951, no writ).

137. *Id.* at 426.

138. *See id.* (citing Blair v. Teel, 152 S.W. 878 (Tex. Civ. App.—Galveston 1913, writ ref'd)).

139. *See id.* (citing 23 TEX. JUR. *Husband and Wife* § 104, at 127 (1932)).

140. *See id.* (citing Foster v. Christensen, 67 S.W.2d 246 (Tex. Comm'n App. 1934, holding approved)).

141. *See* Glover v. Henry, 749 S.W.2d 502, 504 (Tex. Civ. App.—Eastland 1988, no writ) (reaching a holding more or less directly contrary to *Edsall* without mentioning the earlier decision).

142. *See supra* note 87 and accompanying text (reviewing the *Ray* court's discussion of *Edsall*).

Holloway[143]) only in order to reject its reasoning. An otherwise impressive article by a California-based scholar erroneously identified *Edsall* as the "first pertinent case in Texas to deal with the issue of credit acquisitions,"[144] though the writer did not seem overly fond of the *Edsall* decision.[145] Even today, students who rely on the most popular study guide for the Texas bar exam will find *Edsall* elevated to coequal status with the Texas Supreme Court's contrary pronouncements in *Gleich* and *Broussard*,[146] accompanied by a dubious comment that tries to explain why *Edsall*'s "result is sound."[147]

The simplest explanation for *Edsall*'s aberrant language has already been suggested. The Eastland court simply misstated the law, perhaps because of sloppy research or inadequate legal ency-

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143. *See supra* note 95 and accompanying text (comparing Holloway v. Holloway, 671 S.W.2d 51, 56 (Tex. App.—Dallas 1983, writ dism'd w.o.j.), with the federal case Ray v. United States, 385 F. Supp. 379 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976)).

144. Richard L. Young, *Community Property Classification of Credit Acquisitions in California: Law without Logic*, 17 CAL. W. L. REV. 173, 243 (1981). In fairness to Professor Young, he did state that "an exhaustive search for and survey of all cases involving credit acquisitions during marriage in all community property jurisdictions was not attempted." *Id.* at 226. Young followed this comment, however, with twenty-five solid pages of discussion of out-of-state law. *See id.* at 226-51 (illustrating the various approaches taken on the issue of credit transactions during marriage in several community property states).

145. *See id.* at 244 (explaining that instead of *Edsall*'s focus on "the non-binding expectations of the creditor or debtor at the time the obligation arises," it would be more realistic to examine "the legal exposure of the spouses and their property" (emphasis omitted)).

146. *See* BARBRI, BAR REVIEW: TEXAS COMMUNITY PROPERTY 3-4 (2005).

147. *Id.* at 4. The bar study guide opines that the *Edsall* result is sound "because of the nearly contemporaneous nature of the transaction." *Id.* As explained, because the loan was made on February 28 and paid in full by a March 7 land sale, the "distinctive feature" of *Edsall* is that "H *intended to pay cash* for the purchase as soon as he sold other assets." *Id.*

This "distinction" is doubtful. In *Gleich v. Bongio*, the promissory notes had maturity dates varying from one to six years. *See* Bongio v. Gleich, 71 S.W.2d 291, 292 (Tex. Civ. App.—Galveston 1934) (discussing the facts of the case in more detail than the later decision), *rev'd*, 99 S.W.2d 881 (Tex. 1937). Yet these notes were paid off in a matter of eight months or so when the Bongio brothers "flipped" some of the properties for a substantial profit. *Id.* Surely the Bongio brothers would have paid the notes off even sooner if they could have found a willing buyer for some of the parcels more quickly. As a general matter, consideration of future intent, which is inherently mutable, is inconsistent with the doctrine of inception of title, which depends on facts which fix the status of property at the time of its acquisition. *See supra* note 3 (discussing the community property presumption combined with the inception of title doctrine).

clopedia updates. In fact, *Blair v. Teel*,[148] the 1913 case referenced in *Edsall*, does not even seem to address the same subject.[149] The encyclopedia entry predates by a few years both *Gleich v. Bongio* and the principal cases relied upon by the Commission of Appeals in its decision in *Gleich*.[150] Furthermore, while the relevant volume of *Texas Jurisprudence* had been supplemented since the original volume was issued, the supplementation was seriously deficient.[151]

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148. 152 S.W. 878 (Tex. Civ. App.—Galveston 1913, writ ref'd).

149. *See* Blair v. Teel, 152 S.W. 878, 879 (Tex. Civ. App.—Galveston 1913, writ ref'd) (involving the contract liability of a woman who signed a note, the proceeds of which purportedly were to benefit her separate property). The nature of the loan proceeds does not appear to have been at issue in *Blair*. *Id.* In fairness to the *Edsall* court, though, a respected early commentator on Texas marital property rights read *Blair v. Teel* in a similar way, summarizing the case thus: "[U]nder disabling statutes, where the wife contracted to borrow money to redeem her separate property from a sale, the agreement was held binding, and of necessity the fund borrowed under such circumstances would belong separately to her." O. SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 430 (3d ed. 1929). Speer generally was an advocate of women's rights, and judging from his treatise seems to have opposed the "modern" (i.e., post-*Gleich v. Bongio*) credit acquisition rule. It is altogether possible that Speer just missed some long-gone aspect of coverture or statute law that would help place *Blair* in context.

150. *See* 23 TEX. JUR. *Husband and Wife* § 104, at 127 (1932) (supporting the *Edsall* court's conclusion). "Either the husband or the wife or the community can own an estate and therefore may acquire it by borrowing, or by purchase on credit. In the case of borrowed money the intention of the parties is of controlling importance." *Id.*

151. *Cf.* 5 TEX. JUR. TEN-YEAR SUPPLEMENT 1937-1947 *Husband and Wife* § 104, at 605 (1948) (citing *Gleich* for the propositions that "[m]oney borrowed on community obligation and property acquired on credit of community constitute community property," and that "[w]here property is purchased partly with separate funds and partly on credit of community, the community estate acquires a part interest in the nature of a tenancy in common, each estate owning an interest in the proportion that it supplies consideration" (emphasis omitted)). Essentially, the supplement cited *Gleich* for two propositions not central to the holding and failed to cite the decision for the point on which it was reversed, that the intent of the lender is what matters. As a result, the *Edsall* court's reliance on *Texas Jurisprudence* would explain its failure to properly take the *Gleich* decision into account.

The erratic nature of the supplementation of *Texas Jurisprudence* is also illustrated by the 1959 pocket part. The big news between the 1948 ten-year supplement and the 1959 pocket part, so far as credit acquisition of property is concerned, certainly was the Texas Supreme Court's decision in *Broussard v. Tian*. *See supra* text accompanying notes 35-48 (reviewing Broussard v. Tian, 290 S.W.2d 372 (Tex. Civ. App.—Waco 1956), *rev'd*, 295 S.W.2d 405 (Tex. 1956)). The pocket part missed that development. *See* TEX. JUR. TEN-YEAR SUPPLEMENT 1937-1947 *Husband and Wife* § 104, at 229-30 (Supp. 1959) (providing the 1959 pocket part for volume 5 of the ten-year supplement). This supplement, however, did view the Eastland Court of Civil Appeals's "no writ" decision in *Edsall* as entitled to two squibs, possibly because the *Edsall* court had itself cited *Texas Jurisprudence*. *See id.* (citing the *Edsall* decision for various propositions).

Moreover, there is no clear evidence on the face of the *Edsall* opinion that the Eastland court even checked the supplement.

The *Edsall* decision by the Eastland Court of Appeals does not stand alone. The Corpus Christi Court of Appeals has generated a fair bit of confusion on the question of spousal intent as well. In the 1990 case of *Welder v. Welder*,[152] the court correctly disapproved a jury instruction that read in relevant part: "If the spouse evidenced a clear intention to repay the credit with his separate funds at the time of extension of credit, the credit and the proceeds from the credit is separate property."[153] Unfortunately, the Corpus Christi court's explanation of why the jury charge was defective demonstrates significant misunderstanding of the credit acquisition rule. Instead of simply relying on *Gleich* and *Broussard*, possibly adding a reference to *Cockerham*'s one-sentence summary of the rule, the *Welder* court led off its discussion with references to two pre-*Gleich* Texas Supreme Court decisions.[154] *Welder* then summarized the analysis by quoting a 1919 Court of Civil Appeals decision, as follows:

> [I]f the wife borrow[ed] money for the benefit of her separate property, intending to repay it out of her separate estate, and both she and her husband intend that the borrowed fund shall belong separately to the wife, such will be its status, though the husband has signed the note and pledged his separate property to secure the loan.[155]

To make matters worse, the Corpus Christi court added a "see also" citation to the erroneous *Edsall* decision.[156]

The summary of pre-*Gleich* Texas Supreme Court authority just quoted may or may not be accurate. However, this 1919 snapshot of the law simply does not square with more recent statements from the Texas Supreme Court. *Gleich* emphatically rejected any role for the intent of the spouses, and both *Broussard* and *Cockerham* unambiguously require an agreement on the part of the

152. 794 S.W.2d 420 (Tex. App.—Corpus Christi 1990, no writ).

153. Welder v. Welder, 794 S.W.2d 420, 427 (Tex. App.—Corpus Christi 1990, no writ).

154. *See id.* (citing McClintic v. Midland Grocery & Dry Goods Co., 106 Tex. 32, 154 S.W. 1157 (1913), and Sparks v. Taylor, 99 Tex. 411, 90 S.W. 485 (1906)).

155. *Id.* (quoting Armstrong v. Turbeville, 216 S.W. 1101, 1105 (Tex. Civ. App.—El Paso 1919, writ dism'd)).

156. *Id.*

lender to look only to separate property for repayment as a prerequisite to acquisition of separate property on credit.[157] However, the *Welder* court reduced *Gleich* and *Broussard* to string-cite status and did not mention *Cockerham* at all.[158] The *Welder* court summed up all post-1919 legal developments in a single misleading sentence:

> These cases suggest that the intention of the lender to look solely to the property of one spouse is an evidentiary factor of prime importance in showing by clear and convincing evidence that the spouses intended to hold the property as one spouse's separate property, especially where there is no other evidence of such an agreement.[159]

One might reasonably wonder whether the Corpus Christi panel even read most of the authorities it tried to summarize in *Welder*. In addition to missing the point of *Gleich* and *Broussard*, the *Welder* court passed over perfectly clear statements from the Beaumont,[160] Dallas,[161] and even the Eastland court,[162] as well as a "writ refused" Texarkana decision.[163]

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157. *See supra* text accompanying notes 52-54 (explaining the credit acquisition rule).

158. *See Welder*, 794 S.W.2d at 428 (listing the *Gleich* and *Broussard* cases in a string cite while leaving out the *Cockerham* opinion).

159. *Id.*

160. *See* Beeler v. Beeler, 363 S.W.2d 305, 307 (Tex. Civ. App.—Beaumont 1962, writ dism'd) (identifying and applying the test the *Gleich* court developed). The Corpus Christi court's misreading of *Beeler* is particularly perplexing. The *Beeler* opinion discusses *Sparks v. Taylor*, 99 Tex. 411, 90 S.W. 485 (1906), on which the *Welder* panel relied in some detail, concluding that the continued authority of *Sparks* was doubtful in light of later decisions such as *Gleich*; *Solether v. Trinity Fire Insurance Co.*, 124 Tex. 363, 78 S.W.2d 180 (1935); and *Goodloe v. Williams*, 302 S.W.2d 235 (Tex. Civ. App.—Texarkana 1957, writ ref'd). *See Beeler*, 363 S.W.2d at 307-08 (discussing the law of the several cases).

161. *See* Holloway v. Holloway, 671 S.W.2d 51, 57 (Tex. App.—Dallas 1983, writ dism'd) (stating that "the intention of the spouses *cannot control* the separate or community character of property purchased on credit . . . such property is community unless there is an express agreement on the part of the vendor or lender to look solely to the separate estate of the purchasing spouse" (emphasis added)); *see also* Goodridge v. Goodridge, 591 S.W.2d 571, 574 (Tex. Civ. App.—Dallas 1979, writ dism'd) (stating that "community credit was used, because there was no agreement by the lender to look solely to separate funds or property of [the husband] for repayment").

162. *See* Glover v. Henry, 749 S.W.2d 502, 503 (Tex. App.—Eastland 1988, no writ) (stating that "[t]he intention of the spouses does not control the separate or community character of property purchased on credit during marriage"). The court nearly quotes the *Holloway* language in noting that "[s]uch property is community property unless there is an express agreement on the part of the lender to look solely to the separate estate of the purchasing spouse for satisfaction of the indebtedness." *Id.*

163. *See* Goodloe v. Williams, 302 S.W.2d 235, 237 (Tex. Civ. App.—Texarkana 1957, writ ref'd) (acknowledging that "[t]he mere intention of the husband and wife cannot con-

For a while, it looked like the Corpus Christi court might have been extricating itself from the hole it had dug in *Welder*. Professor Joseph McKnight, the dean of Texas marital property scholars, welcomed the Corpus Christi Court of Appeals's 1994 decision in *Jones v. Jones*[164] as one that "avoided an erroneous implication of its errant opinion in *Welder*."[165] Professor McKnight's observation was essentially correct, though perhaps a bit too charitable to Corpus Christi.[166] Unfortunately, in a then-uncitable 1999 opinion, Corpus Christi reverted to its erroneous *Welder* analysis, and lifted two long paragraphs pretty much verbatim from *Welder*.[167] The Corpus Christi court consequently followed the flawed "spouses' intent" analysis through to a clearly erroneous result.[168]

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vert property purchased with an obligation binding upon the community into the separate estate of either spouse," and if they intended to do so, "*the vendor must have agreed with vendee to look only to his or her separate estate for the satisfaction of the deferred payments*" (emphasis added by the *Goodloe* court) (quoting Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937))).

164. 890 S.W.2d 471 (Tex. App.—Corpus Christi 1994, writ denied).

165. Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225, 1236 (1995); *see* Jones v. Jones, 890 S.W.2d 471, 476 (Tex. App.—Corpus Christi 1994, writ denied) (finding that a promissory note used to purchase securities was community property). The issue in *Jones* was whether three treasury notes purchased with the proceeds of a bank loan were separate or community property. *Id.* at 475. The court concluded that the treasury notes were community property because "there [was] no indication on the loan application or on the note that Mbank would limit itself to satisfying the debt by only the collateral or only the separate property of Mr. Jones." *Id.* at 476. The Corpus Christi court even stated the credit acquisition rule correctly: "[P]roperty purchased on credit during a marriage is community property unless there exists an express agreement on the part of the lender to look solely to the separate estate of the purchasing spouse for satisfaction of the indebtedness." *Id.* (citing *Glover*, 749 S.W.2d at 503).

166. *Cf. Jones*, 890 S.W.2d at 475-76 (quoting, without citation, Welder v. Welder, 794 S.W.2d 420, 428 (Tex. App.—Corpus Christi 1990, no writ), in erroneous dicta that "the intention of the lender to look solely to the property of one spouse is an evidentiary factor of prime importance in showing by clear and convincing evidence that the spouses intended to hold the property as one spouse's separate property, especially where there is no evidence of such an agreement").

167. *See* Tripp v. Burleson, No. 13-97-809-CV, 1999 Tex. App. LEXIS 5989, at *15-16 (Tex. App.—Corpus Christi Aug. 12, 1999, no pet.) (not designated for publication) (following closely the language from *Welder*). Until 2003, the *Tripp* decision was not citable under the Texas Rules of Appellate Procedure because it was not designated for publication. *See* TEX. R. APP. P. 47.7 (changing the rules in 2002 to permit citation to opinions ordered not published, which were previously uncitable).

168. *See Tripp*, 1999 Tex. App. LEXIS 5989, at *19-20 (holding that any property purchased on credit that was expressly secured by one spouse is community property if the loan was being repaid with community funds). In *Tripp*, the issue was ownership of Karen Tripp's stock as a shareholder in the Arnold, White & Durkee law firm. *Id.* at *14. Tripp

Additionally, before leaving this sampling of judicial efforts to re-create some role for spousal intent, some misleading statements from the Austin Court of Appeals's decision in *Nesmith v. Berger*[169] bear brief mention.[170] Not only is the opinion's author—Justice Bea Ann Smith—somewhat of an expert on marital property issues,[171] the reasoning is distinctly different from *Edsall* or *Welder.*

Nesmith involved a complicated fight between a divorcing couple over ownership of their residence.[172] The wife noted that part of

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borrowed the money from First Interstate Bank to buy into the firm. *Id.* The Corpus Christi court stated:

> The evidence showed that when Karen borrowed the $44,000 to buy the stock the lender agreed to look solely to her separate property for repayment. Although the lender's intention to look solely to the property of one spouse is an evidentiary factor in determining the status of marital property, we must consider other important factors unique to this case. In 1995 and 1996 Karen made two $8,000 payments on the $44,000 loan. She borrowed the $16,000 from Wachovia Bank. There is some evidence to show she used community funds to make payments on the Wachovia loans. The evidence does not show Karen intended to use separate funds to retire the $44,000 loan or that [Karen's husband] intended the $44,000 to belong separately to Karen. We hold Karen has failed to show by clear and convincing evidence that the 220 shares of stock are her separate property.

Id. at *19-20.

Judged by the standards announced by the Texas Supreme Court in *Gleich* and *Broussard*, the Corpus Christi court erred. Once the court found that "the lender agreed to look solely to [Karen's] separate property for repayment," the analysis should have ended. The criterion for establishing the loan proceeds as Karen's separate property was satisfied. Moreover, under Texas's inception of title doctrine, circumstances surrounding payments made in 1995 and 1996 cannot change the nature of property acquired in 1994. *See* Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328, 334 (1943) ("The character of property, whether separate or community, is fixed at the very time of acquisition."). As a result, the payments could have justified only potential reimbursement rights. *See* Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 885 (1937) (noting that "[t]he improvement of separate property with community funds does not change the status of property, but may create equities in favor of the community").

169. 64 S.W.3d 110 (Tex. App.—Austin 2001, pet. denied).

170. Nesmith v. Berger, 64 S.W.3d 110 (Tex. App.—Austin 2001, pet. denied).

171. *See generally* Bea Ann Smith, *Why the Community Property System Fails Divorced Women and Children*, 7 TEX. J. WOMEN & L. 135 (1998) (detailing the historical unfairness of Texas marital property laws to married women); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990) (criticizing the unfairness of Texas community property doctrine to married women).

172. *See* Nesmith v. Berger, 64 S.W.3d 110, 112-13 (Tex. App.—Austin 2001, pet. denied) (explaining the complications of the fight over the residence). As the Austin Court of Appeals put it, to determine ownership of the couple's home:

> [T]he trial court was required to review a premarital "agreement to agree," a postnuptial agreement, the real estate documents surrounding the purchase of the home as [the husband's] separate property, a second deed from [the husband] conveying the

the house was bought on credit and that the creditor had not agreed to look solely to the separate estate in the event of default.[173] As a result, she argued that a postnuptial agreement to change the character of the property was invalid because, under the language in *Gleich*, the "mere intention of the husband and wife cannot convert property purchased with an obligation binding upon the community into the separate estate of either spouse."[174]

In *Nesmith*, Justice Smith acknowledged that, as she put it, the promissory note lacked *Gleich*'s "magic words" to the effect that "the creditor agreed to look solely to [the husband's] separate property for satisfaction."[175] However, this did not settle the issue. Rather, the absence of such magic words (which could, less disparagingly, be called "an enforceable contract") simply raised a fact issue that justified examination of "the totality of the circumstances in which the debt arose to determine the character of the debt."[176] The opinion added, citing a pre-*Gleich* ruling: "Evidence showing, for example, that the down payment was paid with separate funds, and the parties agreed that the property would remain separate property and the balance of the debt was to be paid from separate funds is sufficient to overcome the presumption of community debt."[177] The most important of these "circumstances" in *Nesmith* appears to have been that the wife signed the promissory note with the statement that her signature was "pro forma for the reason that the property . . . is the sole and separate property" of her husband.[178]

One simple and correct response to the wife's argument is that the law has changed since 1937. *Gleich*'s statement that "[t]he mere intention of the husband and wife cannot convert property purchased with an obligation binding upon the community into the

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property to both [husband and wife] in undivided interests, and an executed "buy-in" agreement with a subsequent addendum attempting to define the parties' joint ownership interests in the residence following the second deed.

Id.

173. *Id.* at 116.

174. *Id.* at 116-17.

175. *Id.* at 117.

176. *Id.*

177. *Nesmith*, 64 S.W.3d at 117 (citing Foster v. Christensen, 67 S.W.2d 246, 249 (Tex. Comm'n App. 1934, holding approved)).

178. *See id.* (focusing on the recitation in the note).

separate estate of either spouse" was correct in 1937.[179] However, the Texas voters amended the Texas Constitution in 1948, and thereafter, to permit spouses to convert community property to separate property by agreement.[180] That seems to be exactly what the *Nesmith* spouses were trying to do. Another simple way to answer the wife's argument would have been to observe that when the wife signed a deed "pro forma" containing a statement that the property was conveyed to her husband as his separate property, it constituted a "significant recital" binding on her in the absence of fraud, duress or mistake.[181]

Unfortunately, the Austin Court of Appeals overlooked both of these simple answers.[182] While the court ultimately reached the right result, it did so by throwing together a seemingly random series of questionable comments. For example, take *Foster v. Christensen*,[183] the opinion that the *Nesmith* court relied on for the proposition that the spouses' intent can matter in a credit purchase.[184] Not only does *Foster* predate *Gleich*, but *Gleich* directly contradicts the particular sentence relied on by the Austin court[185] and (probably for that very reason) was excised from the part of the *Foster* opinion quoted in *Gleich*.[186] The *Nesmith* court also misquoted an Eastland opinion for the proposition that a fact question arises when the loan documents fail to express any lender agreement to seek payment solely from separate property.[187]

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179. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937).

180. *See infra* Part III.B.2. (discussing constitutional amendments permitting spouses to recharacterize property by written agreement).

181. *See infra* note 250 (discussing the "significant recital" rule in detail).

182. *See Nesmith*, 64 S.W.3d at 116-18 (failing to make either of these arguments).

183. 67 S.W.2d 246 (Tex. Comm'n App. 1934, holding approved)).

184. Foster v. Christensen, 67 S.W.2d 246, 249 (Tex. Comm'n App. 1934, holding approved); *see Nesmith*, 64 S.W.3d at 117 (citing *Foster*).

185. *See Gleich*, 99 S.W.2d at 884 (stating that "[t]he mere intention of the husband and the wife cannot convert property purchased with an obligation binding upon the community into the separate estate of either spouse").

186. *See supra* note 34 (discussing the omission of this sentence from the *Gleich* opinion).

187. *See Nesmith*, 64 S.W.3d at 117 (stating that "[a] question of fact is raised as to the character of the property when the documentary evidence fails to reflect an express agreement by the lender to look only to the purchasing spouse's separate estate for payment"). As authority, the *Nesmith* court cited *Glover v. Henry*, 749 S.W.2d 502 (Tex. App.—Eastland 1988, no writ). *Id.*

The *Nesmith* court's summary of *Glover* actually is an exact but unacknowledged quotation, omitting one crucial phrase. *Glover* actually states—with the phrase omitted in *Ne-*

A final problem with *Nesmith*'s reasoning is a little more difficult to explain. The "totality of the circumstances" and "community debt" language found in *Nesmith* comes from *Cockerham v. Cockerham*,[188] a decision commonly cited for the general credit acquisition rule and its exception.[189] However, the Austin Court of Appeals seems to have misread *Cockerham*. The "totality of the circumstances" language was not used in connection with characterizing property acquired on credit, but to determine whether the husband would be held personally liable for his wife's debts—a

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smith italicized for emphasis here—that "[a] question of fact is raised as to the character of the property when *a deed to a spouse recites that the property is conveyed on credit as separate property and* the documentary evidence fails to reflect an express agreement by the lender to look only to the purchasing spouse's separate estate for payment." *Glover*, 749 S.W.2d at 503.

Admittedly, *Glover* could have been more carefully written. Nonetheless, the sole authority cited by *Glover* for this conclusion—*Hodge v. Ellis*, 154 Tex. 341, 277 S.W.2d 900, 904 (1955)—makes it clear that the concept under consideration was the Texas significant recital rule applicable to all instruments of title, not some variation on the credit acquisition rule. Furthermore, language in *Glover* immediately following the snippet that is inaccurately quoted by the *Nesmith* court does not support the conclusion that, in the absence of significant recitals, a fact question would be raised. The *Glover* decision notes:

> The intention of the spouses does not control the separate or community character of property purchased on credit during marriage. . . . Such property is community property unless there is an express agreement on the part of the lender to look solely to the separate estate of the purchasing spouse for satisfaction of the indebtedness.

Glover, 749 S.W.2d at 503 (citations omitted).

The bottom line is that the Austin Court of Appeals probably reached the right result in *Nesmith*. The wife's pro forma joinder in a deed acknowledging that the property was to be her husband's "sole and separate property" would be binding as a "significant recital" in the absence of fraud, accident or mistake. *See infra* note 250 (providing examples of cases involving the parol evidence rule). That result would obtain, however, not because the deed lacked *Gleich*'s magic words, thereby opening the door for other evidence of intent, but because the deed did contain other "magic words"—explicit recitals of separate property ownership, coupled with the wife's signature.

188. Cockerham v. Cockerham, 527 S.W.2d 162, 165, 171 (Tex. 1975).

189. S*ee supra* notes 51-53 and accompanying text (reviewing *Cockerham* and the credit acquisition rule).

very different question.[190] Furthermore, *Cockerham*'s authority is doubtful even on that far different issue.[191]

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190. *See Cockerham*, 527 S.W.2d at 171 (determining "whether a debt is only that of the contracting party or if it is instead that of both the husband and wife"). In *Cockerham*, as a result of marital problems, the wife moved into town to open a dress shop while the husband stayed on the dairy farm. *Id.* at 164, 171. The wife incurred various business debts and subsequently went bankrupt. *Id.* at 171. The bankruptcy trustee, on behalf of the wife's creditors, was trying to establish that the husband was personally liable for the wife's dress shop debts, thus subjecting all community property (as well as the husband's separate property) to seizure for payment. *Id.*

The Texas Supreme Court initially observed, in a part of the opinion that often is quoted on credit acquisition questions, that "debts contracted during marriage are presumed to be on the credit of the community and thus are joint community obligations, unless it is shown the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction." *Id.* (citing Broussard v. Tian, 156 Tex. 371, 295 S.W.2d 405 (1956)). After observing that there was no evidence the wife's creditors agreed to limit their recovery solely to the wife's separate estate, the Texas Supreme Court commented: "Though this would establish the community character of the debts, the fact that the debts are community liabilities would not, without more, necessarily lead to the conclusion they were joint liabilities." *Id.*

It is only in regard to determining the husband's personal liability for his wife's debts that the Texas Supreme Court stated, "it is necessary to examine the totality of the circumstances" surrounding the debt. *Id.* The fact that the debt was determined to be a community obligation—determined purely by the "lender intent" test—simply became "one aspect of the circumstances to be considered in determining whether the debts are joint." *Id.* Thus, the *Nesmith* court's citation of *Cockerham* for the proposition that "[w]e must look to the totality of the circumstances in which the debt arose to determine the character of the debt," *Nesmith*, 64 S.W.3d at 117, gets things entirely backwards. According to *Cockerham*, the character of the debt simply is one circumstance, which totaled together with other circumstances, will determine whether one or both spouses are personally liable. Those "other circumstances" included the fact that the husband advanced his wife the original capital for the dress shop, permitted his wife to write checks for her business on his personal account, and took income tax deductions for her business losses. *See Cockerham*, 527 S.W.2d at 172 (analyzing factors that support the conclusion that the business debts were the liability of both spouses).

191. *See Cockerham*, 527 S.W.2d at 174 (Reavley, J., joined by Greenhill, C.J. & Walker, J., dissenting) (questioning whether the circumstances detailed in the preceding footnote warranted a finding of joint liability). The three-judge dissent noted, with respect to the joint return, "[t]his is what spouses do in joint returns." *Id.* In 1987, the Texas Legislature amended the Family Code to specifically provide that "[a] spouse does not act as an agent for the other spouse solely because of the marriage relationship." TEX. FAM. CODE ANN. § 3.201(c) (Vernon 1998). That statute is widely regarded as a legislative reaction to, and repudiation of, *Cockerham*'s reasoning. *See, e.g.*, Patel v. Kuciemba, 82 S.W.3d 589, 595 (Tex. App.—Corpus Christi 2002, pet. denied) (distinguishing *Cockerham* as having been decided before enactment of section 3.201); Nelson v. Citizens Bank & Trust Co., 881 S.W.2d 128, 131 (Tex. App.—Houston [1st Dist.] 1994, no writ) (noting that *Cockerham* was decided before enactment of section 3.201's predecessor); JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED § 3.201 cmt. at 89 (Aug. 2005 ed.) (stating that "[t]his statute is specifically intended to clarify the misleading and

III. A Critique of the Separate Credit Exception

As stated at the beginning of this Article, the general rule that property acquired on credit during marriage is community property is a good one.[192] The same cannot be said about the sole exception to that rule. The notion that a spouse could acquire separate property through credit transactions if a creditor agreed to look only to that spouse's separate property for repayment might have had some practical appeal when it first developed, during an age before women achieved legal equality, and before Texas spouses gained the right to alter the nature of their marital property by agreement. Today, the separate credit exception serves no good purpose. Moreover, it runs counter to basic community property doctrine, as well as modern interpretations of the Texas Constitution.

A. *The Exception Is Unconstitutional*

The most fundamental problem with the separate credit exception is that its application to a real world situation would be unconstitutional. The Texas Constitution says "[a]ll property . . . 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."[193] In a landmark 1925 decision, *Arnold v. Leonard*,[194] the Texas Supreme Court set out what is often referred to as the "rule of implied exclusion."[195] In the *Arnold* court's view,

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confusing discussion in *Cockerham*"); Joseph W. McKnight, Commentary, *Title I. Husband and Wife*, 21 TEX. TECH L. REV. 911, 1048 & n.490 (1990) (stating that "[t]he need for specific legislation to clarify existing principles of personal liability was demonstrated by a series of decisions which departed from these principles in greater or lesser degrees," (citation omitted) and providing a pinpoint cite to the portion of *Cockerham* just discussed).

192. *See supra* text accompanying notes 2-3 (discussing the community property assumption).

193. TEX. CONST. art. XVI, § 15.

194. 114 Tex. 535, 273 S.W. 799 (1925).

195. Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799, 802 (1925); *see also, e.g.*, Cameron v. Cameron, 641 S.W.2d 210, 226 (Tex. 1982) (McGee, J., concurring) (explaining the implied exclusion reasoning of *Arnold*); Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 147 (Tex. 1977) (Steakley, J., dissenting) (recognizing the implied exclusion rationale of *Arnold*). It is difficult to overstate the effect of *Arnold v. Leonard* on the landscape of Texas marital property doctrine. *See* Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71, 71 (1993) (stating that "[r]eform of Texas family property law has been significantly restrained by the conclusion of the Supreme Court of Texas in 1925 that the marital property system is con-

the list set out in the Texas Constitution is exclusive.[196] As a logical corollary, "if property was acquired during marriage by any other means than gift, devise, or descent, it was and is necessarily community."[197]

The Texas Supreme Court's decision to adopt the modern version of the credit acquisition rule in *Gleich v. Bongio*—and in particular, the court's decision to reject prior case law emphasizing the spouses' intentions—was greatly influenced by *Arnold v. Leonard*'s then-recent constitutional pronouncements. Three years after *Arnold*, the Commission of Appeals cited to it in ruling that husband and wife did not have the power to convert community property to separate property by agreement.[198] In *Gleich*, the same Commission of Appeals panel simply extended this earlier holding to the credit acquisition question, though without citing *Arnold* directly.[199]

The theoretical soundness of *Arnold v. Leonard*'s implied exclusion test is certainly debatable. The rule cannot easily explain Texas mutation doctrine, the notion that separate property can change form during marriage without changing its separate character.[200] Nor, if the Texas Constitution is read literally, could the im-

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stitutionally defined" and that "[w]ithout the decision of 1925, . . . the system could have developed very differently").

196. *Arnold*, 273 S.W. at 802.

197. Graham v. Franco, 488 S.W.2d 390, 392 (Tex. 1972).

198. *See* Brokaw v. Collett, 1 S.W.2d 1090, 1091-92 (Tex. Comm'n App. 1928, judgm't adopted) (asserting that neither the husband nor the wife had the power to contract in advance and change the status of community property).

199. *See* Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937) (quoting *Brokaw*, 1 S.W.2d at 1091).

200. *See* Norris v. Vaughan, 152 Tex. 491, 260 S.W.2d 676, 679 (1953) (stating that "so long as separate property can be definitely traced and identified it remains separate property regardless of the fact that the separate property may undergo 'mutations and changes'").

Love v. Robertson is an early example of mutation doctrine. *See* Love v. Robertson, 7 Tex. 6, 9 (1851) (discussing the issue resolved). In this will contest case, the Texas Supreme Court held that a slave purchased with funds received in relation to a separate property inheritance would also be considered separate property, despite the fact that the slave was bought during marriage. *Id.* at 6. This seems to have represented a change in the law. *See* Scott v. Maynard, Dallam 548, 550-51 (Tex. 1843) (summarizing a Louisiana case as holding that, under Spanish law, "everything purchased during the marriage fell into the common stock of gains . . . whether the purchases were made with the money or capital of the community, or with that of either of the married parties," and holding, "[f]rom an examination of the above authorities, we are justified in concluding that under the Spanish laws property acquired during marriage by purchase, whether the acquisition be made in the

plied exclusion test explain how any married man could acquire separate property before 1980[201] or how before 1865 the children of separately owned slaves could remain separate property.[202] Nor would the decision, issued by a court that was "[e]vidently troubled by the speed and extent of reform of married women's property

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joint names of husband and wife or of either of them separately, must be considered as common property").

An example can easily demonstrate the problem with fitting mutation doctrine into the constitutional "implied exclusion" test. Assume a man inherits $10,000 from his mother before he marries. After marriage, he uses the money to buy a bass boat. The $10,000 is separate property both because it is an inheritance and because the husband owned it before marriage. Yet the husband neither owned the bass boat before marriage, nor acquired it thereafter by gift, devise or descent. Applying *Arnold v. Leonard*'s rule strictly, the boat would be community property. *See Arnold,* 273 S.W. at 802 (discussing that the wife's property acquired during marriage becomes community property unless by gift, devise or descent).

The Texas Supreme Court was clearly aware of this problem. *Arnold v. Leonard* tried to finesse the theoretical difficulty by stating: "It is evident that everything relating to land that has been recognized by the Supreme Court as becoming separate property of the wife is embraced within the constitutional definition of her separate property, *if we bear in mind that property remains separate through all mutations and changes.*" *Id.* at 802-03 (emphasis added). However, as the *Scott v. Maynard* decision referenced above illustrates, the proposition that separate property may change form during marriage without changing its separate character is far from self-evident.

201. *See* Cameron v. Cameron, 641 S.W.2d 210, 226 (Tex. 1982) (McGee, J., concurring) (describing how before the constitution was amended in 1980 to use gender-neutral language, the Texas Constitution spoke only of "the wife's" separate property). Accordingly, Justice McGee argued in *Cameron* that "[u]nder a strict reading of *Arnold v. Leonard*, all property owned by the husband before marriage and acquired thereafter during marriage is necessarily *community*." *Id.*

202. As with the question of mutations, the *Arnold v. Leonard* court was fully aware that the fact that the children of separately owned slaves were themselves considered separate property posed a problem for the constitutional implied exclusion test. *See Arnold*, 273 S.W. at 802 (citing Cartwright v. Cartwright, 18 Tex. 626, 636 (1857), which noted that the application of this principle would have increased the wife's separate estate through the progeny of her female slaves). The *Arnold* court tried to explain this historical anomaly by claiming that the *Cartwright* decision "was based on a principle of the law of slavery in the United States which forbade the inhumanity of separating a young child from the child's mother." *Id.* There are, however, at least two problems with this idea. First, Justice Oran Roberts explained the exception for slave children not on the ground of humanity, but "on account of their permanent and valuable character." Howard v. York, 20 Tex. 670, 672 (1858). Second, it is hard to imagine any "humanitarian exception" to the Texas Constitution, particularly a constitution that, at the time *Cartwright* and *Howard* were decided, formally enshrined the fundamentally inhumane institution of human slavery. *See* TEX. CONST. of 1845, art. VIII (mandating that "[t]he Legislature shall have no power to pass laws for the emancipation of slaves"). All in all, the property status of slave children is simply inconsistent with rigid implied exclusion analysis. If the supposedly exclusive list permits an unstated humanitarian exception, it might admit other implicit exceptions as well. And if that were the case, it would not be much of a test at all.

rights,"[203] be considered a model of right-minded judicial thinking today. Nonetheless, the implied exclusion test seems to be the current preferred method for distinguishing between separate and community property.[204]

Applying *Arnold*'s implied exclusion test to a separate credit situation, it seems obvious (notwithstanding inconsistent dicta in *Gleich v. Bongio* and other cases) that anything acquired by virtue of a separate-property-secured non-recourse loan must be community property.[205] Consider the hypothetical offered at the beginning of this Article. Harry gets a home equity loan on his separate property house. He uses the loan money to buy stock, which increases greatly in value. He sells some of the stock to pay off the loan. Harry begins with a separate property house, and ends up with both his separate property house *and* a substantial block of stock shares. Under *Arnold*, one need only ask: Did Harry acquire the stock by gift or inheritance? If the answer is "no," as it must be, the stock is community property.

As just explained, the *Gleich v. Bongio* court implicitly recognized that under *Arnold v. Leonard*'s implied exclusion test, an agreement between husband and wife could not create separate property.[206] Unfortunately, in leaving the door open for a separate credit exception, the court missed an equally obvious point: If an agreement between husband and wife to create separate property violates the Texas Constitution, then an agreement between a lend-

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203. Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71, 84 (1993).

204. *See, e.g.*, *Cameron*, 641 S.W.2d at 213 (applying the *Arnold* test); Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977) (upholding the decision in *Arnold* stating that separate property should always be separate and should not be changed by the legislature); *see also* TEX. FAM. CODE ANN. §§ 3.001-.002 (Vernon 1998) (more or less codifying the implied exclusion rule, though omitting mutations and separate property created by agreement).

205. *Accord* William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 24 (1962) (observing that if "these cases [culminating in *Gleich v. Bongio*] are to be accepted, this line of authority has added a new dimension to the constitutional and statutory definitions of separate property," and explaining further that "[l]ogically applied, these cases require that . . . to the methods of acquiring separate ownership . . . another must be added—acquisition 'in exchange for a separate obligation,' the property so acquired being separately owned whether it is paid for with separate funds or not").

206. *See supra* text accompanying note 199 (citing the *Gleich* court's extension of *Arnold*'s holding).

ing institution and either the husband or the wife is likewise unconstitutional.[207]

The failure of the *Gleich v. Bongio* court to take the implied exclusion problem into account becomes even more puzzling when one considers the fact that an 1885 decision cited in *Gleich* for a different point focused on that very issue.[208] In *Heidenheimer Bros. v. McKeen*,[209] the McKeens claimed that merchandise on which the husband's creditors sought to foreclose was actually the wife's separate property.[210] The couple's argument followed right along the lines of the modern separate credit exception. The McKeens explained that they acquired the merchandise with loan proceeds, and that the wife's separate property had been used as security.[211] Therefore, the McKeens argued, the loan money and the merchandise bought with that money were the wife's separate property.[212] The "old" Texas Commission of Appeals,[213] in an opinion adopted by the Texas Supreme Court with full precedential value, rejected that argument.[214] The court's reasoning is worth quoting at some length:

> It should be observed that this merchandise was not acquired by Mrs. McKeen by either gift, devise or descent, nor by the exchange

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207. Observation of this inconsistency is not original to this writer. *Cf.* Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37, 41 n.19 (1942) (referencing *Brokaw*'s comment on agreements to set aside property rights, and adding, "[i]t would seem that this same reasoning would be applicable even if the *vendor* agreed with the spouses, as the *Gleich* case would seem to require").

208. *See* Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937) (citing Heidenheimer Bros. v. McKeen, 63 Tex. 229 (1885), for the proposition that the status of property paid for over time "was fixed at the time of its acquisition").

209. 63 Tex. 229 (1885).

210. Heidenheimer Bros. v. McKeen, 63 Tex. 229, 230 (1885).

211. *Id.*

212. *Id.*

213. *See generally* Jim Paulsen & James Hambleton, *A Pocket Part of* Posey's*: A Daring Exposé of* Posey's Unreported Cases, 53 TEX. B.J. 806 (1990) (describing the short career of the "old" Commission of Appeals).

214. *See Heidenheimer Bros.*, 63 Tex. at 230 (rejecting the argument as well as indicating that the Texas Supreme Court adopted the opinion on Feb. 13, 1885). It is of value to note that opinions by the Texas Commission of Appeals that were adopted by the Texas Supreme Court are in essence Texas Supreme Court opinions and hence carry the binding effects and precedential value that accompany such a designation. *See* Jim Paulsen & James Hambleton, *A Pocket Part of* Posey's*: A Daring Exposé of* Posey's Unreported Cases, 53 TEX. B.J. 806, 807 (1990) (explaining the procedure of the Supreme Court's approval of the Commission of Appeals's decisions).

> of property thus acquired, nor by money derived through the sale of property thus acquired.
>
> Counsel claim that as the merchandise was purchased with money which was borrowed upon the faith of her separate property as security, that therefore the money, as well as the merchandise in which it was invested, became her separate property.
>
> Now, suppose that the debt incurred in securing the loan had been paid without any resort whatever to the deed of trust, it would not be insisted, we apprehend, that the money or merchandise either became the separate property of the wife, simply because her real estate had been used as a security for the debt.
>
> . . . .
>
> Here the transaction disclosed by the record is not equivalent to an exchange of the wife's separate property for the merchandise. And it is very clear that she did not acquire it by gift, devise or descent. Hence the conclusion that this merchandise, under the facts and circumstances shown by the record, must be considered as community property, and subject to the levy.[215]

The only significant difference between the logic of the 1885 *Heidenheimer Bros.* decision and the 1925 ruling in *Arnold v. Leonard* is that *Arnold* elevated the implied exclusion test used in *Heidenheimer Bros.* to constitutional status.[216] Perhaps one could argue on some theoretical basis that *Heidenheimer Bros.* does not address precisely the same facts that a separate credit scenario would present,[217] or that a separate-property-secured non-recourse loan somehow fits within an exception to the implied exclusion analysis.[218] However, the more likely explanation for *Gleich*'s failure to

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215. *Heidenheimer Bros.*, 63 Tex. at 230.

216. *See* Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799, 801-02 (1925) (emphasizing that the rule of implied exclusion applies equally to both statutes and the Texas Constitution).

217. It is not clear, for example, whether the loan at issue in *Heidenheimer Bros.* was non-recourse as to Mrs. McKeen. *Cf. Heidenheimer Bros.*, 63 Tex. at 229-30 (explaining the circumstances of the loan). Judging from the court's absolute language, however, it probably would have made no difference one way or another. Moreover, at the time of the loan, married women had very little contractual authority. *See infra* Part III.B.1. (discussing the legal world in which the separate credit exception arose). Accordingly, it probably would be fair to view the loan at issue in *Heidenheimer Bros.* as effectively non-recourse, whether the documents contained limiting language or not.

218. The best argument this writer has been able to envision, and it is not a very good one, is that the "separate credit" exception could be justified as an extension of mutation doctrine. *See generally supra* note 200 (discussing Texas mutation doctrine in detail). Assume, for example, that Harry is not able to get a home equity loan to follow up on his hot

address constitutional issues raised by the "separate credit" exception is that the *Gleich* court simply did not spend much time thinking about the issue. *Gleich*'s facts did not present a case for application of the separate credit exception. Any discussion of the issue would have been sheer dictum.

B. *The Exception Is Unnecessary*

One might reasonably ask why, if the separate credit exception runs counter to the Texas Constitution and basic community property doctrine, such a rule ever came about. It may be enough to say that the Texas credit acquisition rule developed in a bygone era, and that the separate credit exception to that rule serves no good purpose today. However, a slightly more detailed exploration of how the doctrine came into existence—or at least the circumstances under which it came into existence—sheds enough light on current policy issues to justify the exercise.

1. The Legal World in Which the Exception Arose

Before exhuming some of the older case law, two initial caveats are in order. First, the same complaint of theoretical confusion that has been leveled against "modern" (meaning post-*Gleich*) credit acquisition doctrine applies with equal force to pre-*Gleich* decisions.[219] The *Gleich* court itself noted, rather delicately: "It would appear that probably there is not complete harmony in the decisions."[220] A student-written article published more-or-less contemporaneously with *Gleich* put it a bit less delicately: The gen-

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stock tip. Instead, he sells his house and uses the proceeds to buy stock. When the stock value skyrockets, he sells just enough of it to repurchase his house, keeping the remainder of the stock. At the end of the day, Harry owns both his house and a substantial block of stock, all as separate property under mutation analysis. If one views a home mortgage, and the payoff of that mortgage, as the functional equivalent of a sale and subsequent repurchase, the argument might have some plausibility.

One problem with this approach is that it would require some very creative lawyering to equate a secured loan with a sale and repurchase of the collateral. *Cf.* James W. Paulsen, *Lenders and the Texas DTPA: A Step Back from the Brink*, 48 SMU L. REV. 487, 537-38 (1995) (distinguishing between secured loans and purchases for DTPA purposes). In turn, this would represent a substantial expansion of mutation analysis. Since, as already explained, even the standard mutation doctrine does not fit comfortably within *Arnold*'s implied exclusion analysis that would seem unlikely.

219. *See supra* note 34 and accompanying text (discussing the *Gleich* court's quotation from *Foster*).

220. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937).

eral area of law raised "intricate and somewhat vexatious problems,"[221] in consequence of which "the results of the cases are not easily reconciled."[222] As a result, readers should not expect any clear and easy explanation to emerge from the near-random sampling of older cases that follows.

Second, the public policy concerns underlying early Texas credit acquisition rulings were almost certainly gendered and reflected concerns rising from the unequal status of married women that simply have no analogue in present-day law. True, the actors in the 1937 *Gleich v. Bongio* decision and the two post-*Gleich* case examples of separate credit acquisitions highlighted in this Article were men,[223] but the great majority of early cases actually featured efforts by women to mortgage or obtain separate property.[224] One therefore needs to keep in mind that, at least as far as this segment of the law is concerned, 1937 was a very long time ago. The Nineteenth Amendment was less than two decades old,[225] and Texas women were still far from achieving equality in property rights.[226] A liberal state legislature had enacted reform legislation in 1917,[227]

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221. Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37, 37 (1942).

222. *Id.* at 38.

223. *See supra* Part II.A. (reviewing the origins of the modern Texas credit acquisition rule).

224. *See* William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 1 (1962) (stating that "[i]t should be kept in mind that in by far the greater number of cases which form the basis of this study the courts have dealt with claims of separate ownership by wives or their successors in interest").

225. Ratification of the Nineteenth Amendment was completed in 1920; hence, when the *Gleich* decision was handed down in 1937, the Amendment was only seventeen years old. *See generally* U.S. CONST. amend. XIX, cl. 1 (stating in part that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex").

226. *See* Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71, 72 & n.10 (1993) (recognizing that the Matrimonial Property Act of 1967 formally, though not practically, ended gender discrimination when it finally removed the last vestiges of statutory discrimination).

227. *See generally* W.S. Simkins, *Some Phases of the Law of Community Property in Texas*, 3 TEX. L. REV. 363 (1925) (offering an exceptionally interesting and exceptionally negative critique of the 1917 legislative changes). Simkins highlights that the purpose of his article is "to gather up the crumbs left on the community table" by the 1917 legislature. *Id.* Simkins further criticizes the "radical change in domestic affairs" resulting from a woman's control over the rents and profits from her own property. *See id.* ("While in the eyes of the law she would not be the head of the family, she would certainly be the neck moving the nominal head as she pleases.").

but court action undercut those reforms in 1925.[228] One should also remember that the divorce rate was low, and that marital property issues more commonly arose in debt collection or probate settings.[229]

This writer does not pretend to fully understand all the nuances of debtor-creditor or marital property law that constituted the legal backdrop for *Gleich v. Bongio*—few people alive today do.[230] Fortunately, an excellent student article published in the *Texas Law Review* five years after *Gleich*,[231] quite possibly written by J. Curtiss Brown[232] (then editor in chief of the *Texas Law Review* and later chief justice of the Fourteenth Court of Appeals),[233] is a time capsule of sorts, opening a window into the state of the law at the time the current credit acquisition rule crystallized.[234]

In the early 1900s, the general rule seems to have been that if a woman bought property on credit, making a substantial down payment from her separate property, the property thus acquired would be considered her separate property, at least if both husband and wife actually agreed on this point and understood that the deferred payments were to be made from the wife's separate property.[235] This rule held true even if the husband joined his wife in signing

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228. *See* Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799, 803 (1925) (striking down legislative attempts to define profits from the wife's separate property as separate on constitutional grounds).

229. *Accord* Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71, 81 (1993) (observing that in the last quarter of the nineteenth century, "[d]ivorce was not sufficiently prevalent to have presented many problems for judicial solution, and therefore most matrimonial problems before the courts arose in the context of debt-collection and succession").

230. Professor Joseph Webb McKnight is one welcome exception to this lamentable rule. *See generally* Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71 (1993) (examining the slow evolution of Texas community property law, from traditional Hispanic roots to a more modern, but still historically rooted system).

231. Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37, 37 (1942).

232. *See id.* at n.* (containing the statement "Editor: J. Curtiss Brown," although the article is officially unsigned).

233. J. Curtiss Brown—Biography, http://www.utexas.edu/law/about/connally/brown.html (last visited Oct. 25, 2005) (on file with the *St. Mary's Law Journal*).

234. *See generally* Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37 (1942) (providing a broad overview of the effects of obtaining property during marriage).

235. *Id.* at 38; *see also* W.S. Simkins, *Some Phases of the Law of Community Property in Texas*, 3 TEX. L. REV. 364, 368-69 (1925) (stating that "[i]t is the established doctrine in

the promissory note, thus making himself personally liable in the event of default.[236] Some cases appeared to place emphasis not only on the wife's bona fide intention to pay, but also on her actual ability to pay off the loan with separate property.[237]

While the crazy quilt of early credit-acquisition cases genuinely defies analysis, one can pick out at least three recurring threads. First, some of the cases use reasoning reminiscent of mutation analysis.[238] From early days, if a married woman bought property with pre-marriage money in a cash transaction, the courts would consider the new property as separate property because the funds used to purchase it were separate.[239] It is no great analytical leap to assume that the same result might come about if the wife fully intended to pay for a piece of property with her own money, but for one reason or another had to pay over time—a "delayed mutation," so to speak.[240] This might well explain the tendency of some

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Texas that money borrowed by the husband or wife during coverture is community unless by agreement or understanding at the time that it should be separate property").

236. *See* Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37, 38 (1942) (citing McClintic v. Midland Grocery & Dry Goods Co., 106 Tex. 32, 154 S.W. 1157 (1913)) (recognizing that the property would be classified as the wife's separate property even though the husband would be held liable on the notes).

237. *See id.* (citing Armstrong v. Turbeville, 216 S.W. 1101 (Tex. Civ. App.—El Paso 1919, writ dism'd w.o.j.)) ("If the obligation created by the sale is of the proper character, and the requisite intent exists, the whole parcel will be separate," irrespective of the fact that "the balance was not . . . paid out of the particular spouse's separate estate."); *see also* Sinsheimer v. Kahn, 24 S.W. 533, 534 (Tex. Civ. App.—San Antonio 1893, writ ref'd) (holding that actual payment of a loan from the wife's separate property entitled the wife to separate ownership of property).

238. *See, e.g.*, Trammell v. Trammell, 269 F. 114, 117 (5th Cir. 1920) (finding that if one party secures an obligation to pay all of the purchase price by a note and reservation of a vendor's lien, then the obtained property is separate property); Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900, 906-07 (1955) (holding that land acquired over time was community property, that fact being determined "according to what funds went into the purchase[ ]").

239. *See* Love v. Robertson, 7 Tex. 6, 11-12 (1851) (holding that a slave bought by a married man with his separate property inheritance remained separate property); *see also* Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71, 77 (1993) (referring to *Love* as "the first of many Texas Supreme Court cases favoring separate property ownership over a community claim when there is no clear statutory answer").

240. A prominent commentator on marital property issues during the early 1900s argued passionately for this position:

> [T]he wife's right when fairly exercised, to purchase upon credit, and to become the owner of the thing thus purchased, cannot well be denied. By the expression "fairly exercised" is meant that she must contract for the property purchased with a bona fide intention to pay therefor from her own funds; and that, when purchased, the same

courts to require a substantial separate property down payment, as well as a showing that the creditor or spouse(s) reasonably expected the credit payments also to be made with separate funds.[241] The problem with this way of thinking, of course, is that it runs counter to inception-of-title analysis.[242]

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shall belong to her in her separate right; that neither her husband's nor the community funds, nor the credit of either estate, are to enter into the acquisition. . . . That the delivery of her separate estate intended as payment of the new acquisition is delayed for a time, rather than made *in præsenti*, argues nothing, and should not convert into community property what would otherwise be separate.

O. SPEER, LAW OF MARITAL RIGHTS IN TEXAS 516 (3d ed. 1929); *see also* William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 8 (1962) (stating that, if it is proved that property acquired by one spouse on credit ultimately was paid for with separate funds, "from a common-sense viewpoint it is difficult to see any reason why the acquisition should not be deemed [the spouse's] separate property by virtue of the tracing principle, even though no agreement between the spouses is proved," and adding that the situation "would require recognition of a 'delayed' tracing operation"). Furthermore, Fritz's article provides a list of twenty cases in which the concept of "delayed tracing" was a factor. *Id.* at 12-14 n.23. Finally, Fritz even noted his belief that this sort of thinking may have played some part in the decision in *Edsall v. Edsall*, 240 S.W.2d 424 (Tex. Civ. App.—Eastland 1951, no writ). *See id.* at 8 (discussing the effects of the delay tracing cases on future decisions). *But see supra* text accompanying notes 135-51 (discussing the *Edsall* opinion).

241. *See Sinsheimer*, 24 S.W. at 534 (stating that the wife "had the right to buy the property, either for cash or on time; and the fact that she did not pay for the land in cash did not subject the land to which she had an equitable title to an attachment by a creditor of her husband," and also noting that "[t]he evidence in this case showed that the husband was insolvent, and the plain inference is that the wife was looked to for payment of the notes").

242. *See* Goddard v. Reagan, 8 Tex. Civ. App. 272, 28 S.W. 352, 353 (Tex. Civ. App.—Galveston 1894, no writ) (exemplifying the problems with the analysis). In *Goddard*, the wife's heirs claimed separate ownership of a parcel of land originally bought for $1000. *Id.* at 352. The wife paid $700 cash. *Id.* She and her husband jointly signed a promissory note for the remaining $300, which she paid off several weeks later with separate property funds received from Tennessee. *Id.* The deed was taken in the name of both husband and wife. *Id.* The Galveston Court of Civil Appeals held:

> The money borrowed . . . was community funds; the note given . . . was a community debt, and when paid out of the wife's money became, perhaps, a claim in her favor against the common estate, or against her husband. *The title to the land had, however, been acquired, and the status was fixed at the time of its acquisition.* As $300 of the price paid for it was common funds, and the $700 the separate funds of the wife, the equitable title in a three-tenths interest vested in the community estate, and seven-tenths in the wife.

Id. at 353 (emphasis added). Commentators have criticized *Goddard* on the ground that under the facts presented the wife had established a good claim under resulting trust doctrine. *See* William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 11 (1962) (disagreeing with *Goddard* because trust doctrine application would require land be held entirely as the wife's property). This writer would disagree, at

Even inception of title difficulties, however, could be circumvented in an appropriate case by using resulting trust theory. Under this long established trust doctrine, if one person pays, but another takes legal title, a trust arises in favor of the payor[243]—provided there was a mutual agreement to this effect at the time title was taken.[244] The doctrine applies equally to credit and cash purchases.[245] There would not seem to be anything immediately objectionable to application of resulting trust doctrine under appropriate facts; indeed, at least one of the earlier credit decisions cited in *Gleich* explicitly suggested this possibility.[246] However,

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least unless one assumes other facts not evidenced in the opinion. *Cf.* RESTATEMENT (SECOND) OF TRUSTS § 442 (1959) (providing justification for this writer's opinion).

> Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property.

Id.

243. *See* RESTATEMENT (SECOND) OF TRUSTS § 440 (1959) (explaining that "[w]here a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid, except as stated in [sections] 441, 442, and 444").

244. *See* Wright v. Wright, 134 Tex. 82, 132 S.W.2d 847, 849 (1939) (stating that "[i]t is familiar law that a trust must result, if at all, at the very time a deed is taken and the legal title vested in the grantee," and explaining further, "[t]he fundamental idea is that the beneficial title follows consideration, and unless the one claiming the trust has paid the consideration, or become bound for same, at the very time of the making of the deed, no trust is created"). The law initially presumes a resulting trust when the person paying and the person taking title are legal strangers, but not when the transaction is between family members. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 440-42 (1959) (establishing the presumption and placing the burden of rebutting the presumption on the proponent, but rejecting the presumption in transactions between relatives). In intra-family transactions, the proponent of a resulting trust therefore assumes the burden of proof. *See id.* § 443 (illustrating the process necessary to determine whether a trust has arisen when family members are involved).

245. *See* RESTATEMENT (SECOND) OF TRUSTS § 456 (1959) (stating that "[w]here a transfer of property is made to one person, and another person at the time of the transfer undertakes an obligation to pay the purchase price, a resulting trust arises in favor of the latter person, unless he manifests an intention that no resulting trust should arise").

246. *See* Solether v. Trinity Fire Ins. Co., 124 Tex. 363, 78 S.W.2d 180, 182 (1935) (stating that "[i]n Texas the husband and wife are separate and distinct persons in law, and each can hold separate property," and adding that "the . . . rules applicable to resulting trusts apply to transactions between them"); *see also* Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937) (citing *Solether*). *Solether* involved a part-cash, part-credit transaction. The husband bought a piece of land in his own name. He paid half the purchase price up front, and signed a note for the remainder. The cash came from his wife's separate property. *Solether*, 78 S.W.2d at 181. She apparently knew nothing of the transaction;

Gleich's holding seems to rule out future use of resulting trust doctrine in credit transactions.[247]

A second recurring theme is that of gift.[248] Gifts between spouses, like any other gifts, are a legitimate way to create separate property.[249] Some early credit acquisition cases involved circum-

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indeed, she was out of town at the time. *Id.* The husband got another loan to pay off the remaining debt, subdivided the land, put in some improvements, and sold enough lots to pay off the loan. *Id.* Trinity Fire Insurance obtained and abstracted a judgment against the husband. *Id.* After holding that the wife owned half the property outright, because she purchased it with her separate funds, the Texas Commission of Appeals rejected her ownership claim as to the remaining half. *Id.* at 182. In so holding, the court stated in part:

> [L]egal title to this land stood in the name of the husband. If the wife had any separate estate therein, such estate must have grown out of a resulting trust. When it was shown that the wife's separate money was used, under the circumstances above detailed, . . . a resulting trust was established . . . as to one-half of such land. On the other hand, no resulting trust was shown in her favor as to the other one-half of this land. Her separate funds were not used to pay for same, and there was no agreement at the time the legal title passed to the husband that the land should be her separate property or that the notes executed by the husband should be paid out of her separate funds.

Id.

Solether's discussion of resulting-trust doctrine is confusing in that, under the facts as recited, there does not appear to be any basis for the conclusion that the wife had the requisite intent (or the husband was estopped by his conduct from contesting intent) as to the portion of the property acquired on credit.

247. *Accord* William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 18-19 (1962) (stating that if *Foster* and *Solether* stand for the proposition that "if proper facts are proved to establish a resulting trust, *W*'s separate beneficial ownership may be recognized notwithstanding the fact that *H* incurs a community obligation by promising to pay the purchase money," then "both opinions contradict the *Gleich v. Bongio* thesis, a logical extension of the doctrine of *Goddard v. Reagan*, that separate ownership can be acquired in a credit transaction only if the vendor agrees to look solely to a spouse's separate estate for payment").

248. *See* Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37, 44 (1942) (discussing the "[e]ffect of recitals in the deed" on the presumption of a gift).

> Closely interwoven with recitations in deeds to married women is the presumption of a gift of the community or of the separate estate of the husband. Where the husband requests the conveyor to execute a deed to the wife with a recitation that it is to be for her separate use or has been paid for out of her separate funds, it will be difficult for him to rebut the presumption that the property is her separate property even though the consideration came from his separate estate or from the community.

Id.

249. *See, e.g.*, TEX. CONST. art. XVI, § 15 (stating in relevant part that "[a]ll property . . . of a spouse . . . acquired [after marriage] by gift . . . shall be the separate property of that spouse"); Green v. Ferguson, 62 Tex. 525, 529 (1884) (stating that "as between [husband and wife] he may make a gift of the common property in existence, or as it comes into existence").

stances where the husband seemingly tried to make a gift to his wife, or at least to disclaim his community property rights in order to help her acquire separate property on credit.[250] Fully understanding this thinking may help explain why some early decisions pay considerable attention to the husband's intentions when making a gift to his spouse. However, conflicts with basic gift principles arose whenever the husband's "gift" was given over time, such as through a succession of future monthly loan payments.[251] A spouse's intent to make a gift in the future, or to make a series of future gifts over time, does not satisfy legal requirements for making a gift.[252]

In some cases, in which fulfillment of all credit payments occurred before any controversy arose, a decision favoring the wife's acquisition of separate property on credit can be explained on the premise that a completed gift had been accomplished on a payment-by-payment basis, using the husband's passive acquiescence

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250. *See, e.g.*, Goldberg v. Zellner, 235 S.W. 870, 872 (Tex. Comm'n App. 1921, holding approved) (holding that the wife acquired separate property through a credit transaction, even though payments were made with community funds); William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 5-6 (1962) (explaining the holding in *Goldberg*). Since both husband and wife in *Goldberg* signed the paperwork, the case could have been decided on parol evidence grounds, or by application of the Texas marital property rule that "significant recitals" in documents of title determine ownership, absent fraud, accident or mistake. *See* Lindsay v. Clayman, 151 Tex. 593, 254 S.W.2d 777, 780 (1952) (noting that parol evidence may not be admitted without a showing of fraud, accident, or mistake). *See generally* Messer v. Johnson, 422 S.W.2d 908 (Tex. 1968) (reaffirming the general rule that parol evidence should not be admitted unless fraud, duress, or mistake occurred). The *Goldberg* court did not go down that road, though. Instead, the opinion simply stated: "Where the rights of creditors are not involved, no reason is perceived why the husband may not make a gift of his future earnings to his wife by causing a conveyance to be taken in her name and contracting to pay the deferred payments out of his future earnings." *Goldberg*, 235 S.W. at 872.

251. *Cf.* William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 5-6 (1962) (stating that "[t]he proposition that *H* may give to *W* his interest in community property not yet acquired cannot be reconciled . . . with the elementary law of gifts").

252. *See, e.g.*, Unthank v. Rippstein, 386 S.W.2d 134, 136 (Tex. 1964) (stating that "the most that [the supposed donor] did was to express an intention to make monthly gifts to [the supposed donee] accompanied by an ineffectual attempt to bind his estate *in futuro*; the writing was no more than a promise to make similar gifts in the future and as such is unenforceable"); Weatherley v. Choate, 21 Tex. 272, 274 (1858) (stating that "[t]his note is in the nature of a gift *in futuro*, or a promise of a gift upon a contingency; which cannot be enforced in law"); *see also* Woodworth v. Cortez, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (stating that "[a] gift may generally not be made to take effect in the future since a mere promise to give is unenforceable without consideration").

in the transaction as proof of continuing donative intent.[253] That approach, however, would conflict with inception of title doctrine because title determinations would hinge on events occurring long after the first enforceable rights in the property arose.[254]

A further problem with considering separate property acquired on credit as a gift arises because such an arrangement between spouses would look like an attempt to create separate property by agreement. At the time current credit acquisition doctrine developed, such agreements were not explicitly permitted by law and were viewed by the Texas Supreme Court with "marked hostility."[255] Under *Arnold v. Leonard*'s implied exclusion analysis, interspousal agreements to create separate property were even unconstitutional. Hence, the *Gleich* court acknowledged that "it does not lie in the power of the husband and wife by contract between themselves, made in advance, to set aside the Constitution of this state."[256] Even here, though, mention of an additional qualification is necessary: If both spouses signed or clearly acquiesced in documents of title that recited their separate property owner-

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253. *See, e.g.*, Cauble v. Beaver-Electra Ref. Co., 115 Tex. 1, 274 S.W. 120, 121 (1925) (referring to the fact that "[t]he husband has the right to give to the wife either his separate property, or his interest in community property, and thereby constitute it her separate property if he so desires," and concluding that "[i]n this case this seems to be the effect of what was done"); Armstrong v. Turbeville, 216 S.W. 1101, 1106-07 (Tex. Civ. App.—El Paso 1919, writ dism'd w.o.j.) (mentioning the "well-recognized right of the husband to make to his wife a gift of his interest in the community property then in esse"). The court concluded:

> [I]t was the mutual intention of [the spouses] that the property . . . should be the wife's separate property, and title was to be taken in her name to effect that purpose . . . [and] the note should be paid out of the wife's separate funds, and that such payments as have been made thereon have been made out of the rents accruing from the property, [then the land was the wife's separate property].

Id. at 1106-07.

254. *Cf.* William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 6 (1962) (speculating that in *Goldberg*, "the court's resort to an obviously untenable [gift] concept was an effort to rationalize *W*'s separate ownership in accordance with the inception-of-title rule").

255. *See* Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71, 81 (1993) (explaining the development of decisions surrounding spousal agreements).

256. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1923) (quoting Brokaw v. Collet, 1 S.W.2d 1090, 1091-92 (Tex. Comm'n App. 1928, judgm't adopted)).

ship, then a court would honor those recitals absent fraud or other wrongdoing.[257]

A third recurring theme in early cases was a concern for creditors' rights, or possibly, protection of a married woman's right to manage her separate property.[258] During the 1930s, Texas lagged behind most states in relaxing the rules of coverture and, as a result, debts contracted by married women were generally considered voidable.[259] However, the law upheld contracts for the benefit of the wife's separate estate.[260] One consequence of these

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257. *See* Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900, 905 (1955) (discussing the parol evidence rule and mentioning the possibility of "a theory of an implied gift . . . as a matter of law"); *see also* William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 20 (1962) (summarizing *Hodge v. Ellis* as asserting that "in proper circumstances an agreement between the spouses concerning W's separate ownership not only *can* be but *must* be given controlling effect, even in the absence of deferred payment with separate funds independently acquired").

258. *See Cauble*, 274 S.W. at 121 (1925) (exemplifying the not uncommon statement in early credit acquisition cases that the rights of the spouses are contingent on not interfering with the rights of creditors).

259. Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37, 43 (1942). In 1913, the Texas Legislature proposed and gave preliminary approval to legislation that would have removed the disabilities of coverture entirely. *See* Red River Bank v. Ferguson, 206 S.W. 923, 926 (1918) (reciting the history of the legislation in detail); *see also* Whitney Hardware Co. v. McMahan, 231 S.W. 694, 695 (1921) (reciting a brief history of the legislation). After the governor expressed his unwillingness to endorse such a radical change, the drafters substantially revised the bill. *See generally Red River Bank*, 206 S.W. at 926 (discussing the removal of certain clauses from the bill). The net result was that the rules of coverture remained in place, with the exception that the wife gained managerial control over her separate property and its proceeds. *Id.* The husband continued as manager of all community property. *Id.*

260. Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37, 43 (1942). It appears that courts viewed this rule, at least in part, as a logical consequence of statutes that let married women manage their separate property despite the rules of coverture that generally denied women the right to enter into enforceable contracts. *Id.* For example, the Texas Supreme Court observed in *Whitney Hardware*:

> As incidents to the wife's power of exclusive management and control of her separate property and of the specified portions of the community, she became vested with all such contractual power relative to same, as is requisite to make her power effectual.
>
> The right to control and manage a store building or an improved farm, and to receive the rents, would be or would soon become valueless if the holder of the right were denied the power to make a binding rental contract and the power to make engagements for repairs or betterments.
>
> . . . .
>
> The power granted by the statute to [a married woman] to manage and control the [separate property], belonging to her separate estate, and the rents to be derived therefrom, carried with it the incidental and collateral power to make a contract with

rules was that any debt incurred by a married woman was, with some exceptions, effectively non-recourse.[261] Consequently, she could pledge her separate property as collateral, but her signature would not ordinarily bind the community.[262] Thus, in an appropriate case, a court ruling that a particular credit transaction entered into by a woman created separate property would arise from an urge to validate a woman's effort to exercise independent legal rights, a desire to protect a creditor from fraud, or both.

2. The Exception's Irrelevance Today

The preceding exercise in legal archaeology could go on at greater length but to no real purpose. Whatever policy concerns once drove the legal doctrine developed in early credit acquisition cases, they no longer exist. The confluence of two changes in Texas law—legal equality for women and contractual empowerment of married couples—has swept aside all conceivable justifications for the separate credit exception.

So far as creditor rights are concerned today, either spouse has full capacity to make contracts,[263] either spouse has theoretically equal power to bind their respective separate and community estates,[264] and either spouse can act as an agent for the other.[265]

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her tenant to repair the store building and to employ others to make needed repairs. She would be liable for the breach of her contract and for the proximate results of negligence on the part of those employed by her, without protection from her coverture.

Whitney Hardware, 231 S.W. at 696.

261. *See* TEX. FAM. CODE ANN. §§ 2.501(b), 3.201(a)(2) (Vernon 1998) (setting out the right of a woman to make contracts binding on her husband for "necessaries," the one prominent exception to this rule still reflected in Texas law today).

262. *Cf.* Comment, *The Status of Real Property Acquired During Marriage in Texas*, 21 TEX. L. REV. 37, 44 (1942) (arguing that if a wife tried to secure property on credit, "it is submitted that neither the community nor the husband's separate estate should be liable").

Although this would leave the vendor with a remedy only against the particular tract sold, because of the limited contractual capacity of a married woman in Texas, it is reasonable to say that he has assumed the risk of such a transaction and should not be entitled to any further relief.

Id.

263. TEX. FAM. CODE ANN. § 1.104 (Vernon 1998) (providing in part that any married person "has the capacity and power of an adult, including the capacity to contract").

264. *See id.* § 3.102 (dividing the community into "sole management" and "joint management" portions); *id.* § 3.202 (setting out conditions under which property can be rendered liable to execution for the debts and torts of one spouse). The fact that each spouse has sole management during marriage of whatever property that spouse would have owned

Consequently, creditors are entitled to rely on outward appearances.[266] Pro forma joinder in contracts and lawsuits is not required,[267] and in certain credit contexts, such requirements may even violate federal law.[268] Texas's adoption of the Equal Rights Amendment in 1972 provides some assurance against legislative backsliding.[269]

Changes in the ability of married couples to alter general marital property rules to fit their mutual wishes have been even more dramatic.[270] To reiterate a point made earlier, when the "modern" credit acquisition rule was announced in *Gleich*, married couples had no right whatsoever to alter by agreement the status of property acquired during marriage.[271] To do so would have been unconstitutional. In the nearly seventy years that have passed since

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if single undercuts this theoretical equality to the extent one spouse takes home a bigger paycheck or has more income-producing separate property. *See id.* § 3.102(a) (stating that "each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single").

265. *See id.* § 3.201(a)(2) (establishing that a person is only liable for the acts of a spouse if that spouse is acting as an agent for the person).

266. *See id.* § 3.104(b) (establishing requirements for when a third party can effectively rely on a spouse's authority to control property).

267. *See id.* § 1.105 (stating that "a spouse may sue or be sued without the joinder of the other spouse").

268. *See generally* Linda M. Zimmerman, *The Equal Credit Opportunity Act and Texas Community Property Laws: When May a Creditor Require a Spouse's Signature on Credit Instruments*, 24 S. TEX. L.J. 273, 277-80 (1983) (explaining that Regulation B limits the circumstances under which one spouse's signature may be required in support of the other's application for credit).

269. *Cf.* TEX. CONST. art. I, § 3a. ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.").

270. Several sources offer good discussions of these changes. *See, e.g.*, ALOYSIUS A. LEOPOLD, 38 TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 8.4 (1993) (highlighting the presumption in Texas that "property possessed by either spouse during or on dissolution of the marriage" is community property); Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 273 (1997) (recognizing that "more and more couples are demanding from their lawyers partnership agreements that create 'community-free' marriages"); Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71, 71 (1993) (explaining that Texans have lifted most of the inhibitions on matrimonial property law by way of statutory reforms). *See generally, e.g.*, Thomas M. Featherston, Jr. & Julie A. Springer, *Marital Property Law in Texas: The Past, Present and Future*, 39 BAYLOR L. REV. 861 (1987) (tracing, throughout the entire article, the evolution of marital property law from 1845 to 1987).

271. *See supra* text accompanying note 255 (providing support for asserting that the Texas Supreme Court frowned on spousal agreements to create separate property).

the *Gleich* decision, the Texas Legislature and the general public have spoken to the subject repeatedly through a series of constitutional amendments and supplemental legislation that now ensure married couples can do pretty much whatever they please with their property—providing they actually agree, put the agreement on paper, and sign.[272]

When Texans initially amended the Texas Constitution in 1948, the process to establish interspousal agreements that created separate property was cumbersome. Spouses could only partition or exchange "existing" community property,[273] which for credit transactions would have created some of the same problems encountered with gift theory.[274] Subsequent amendments broadened the kinds of agreements permitted and explicitly authorized forward-looking arrangements.[275] Today the Texas Constitution authorizes spouses to "partition" property whether "then existing or to be acquired,"[276] even though that may sound (and is in fact) a lot like cutting a cake that has not yet been baked.

In sum, whether the Texas credit acquisition rules developed to aid or hinder women's efforts to enter the commercial sphere, to protect or expose property to liability, or to facilitate a married couple's efforts to manage their property as they saw fit, those objectives can be met more directly today. Any legitimate purpose once served by the separate credit exception can be served as well or better through standard loan documents and explicit interspousal agreements.[277]

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272. *See* TEX. CONST. art. XVI, § 15 (establishing rights of spouses to determine by agreement what is their separate and community property).

273. *See* Tex. H.R.J. Res. 13, 50th Leg., R.S., 1947 Tex. Gen. Laws 1189-90, 1189 (constitutional amendment to Art. XVI, § 15) (providing in part that spouses "may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property").

274. *See supra* notes 248-57 and accompanying text (discussing gifts between spouses).

275. *See, e.g.*, Tex. H.R.J. Res. 54, 66th Leg., R.S., 1979 Tex. Gen. Laws 3227 (constitutional amendment to Art. XVI, § 15) (authorizing premarital agreements); Tex. H.R.J. Res. 36, 76th Leg., R.S., 1999 Tex. Gen. Laws 6607-08 (constitutional amendment to Art. XVI, § 15) (authorizing agreements to convert separate property to community property).

276. TEX. CONST. art. XVI, § 15.

277. *See* Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225, 1235 (1995) (examining the reasoning in Jones v. Jones, 890 S.W.2d 471 (Tex. App.—Corpus Christi 1994, writ denied)). McKnight wrote:

C. *The Exception Is Unwise*

Even if the separate credit exception could withstand constitutional challenge and could be found to serve some useful purpose, one should ask whether the rule would work, and whether it would fit in with other marital property doctrine. The answer to both questions is "no."

1. Inconsistency with Basic Marital Property Doctrine

Like the common law, Texas marital property law develops in part by analogy. To give one classic example, Texas marital property doctrine on corporate stock is derived from explicit analogies to earlier cases involving "live" stock.[278] In determining how to classify property acquired during marriage by use of a separate-property-secured non-recourse loan, then, one would look to similar situations for guidance.

One very clear analogy comes easily to mind. Acquiring new property by using one's separate property as collateral looks a lot like a profit realized from use of that property. In most American community property jurisdictions, profit from separate property remains separate property; however, in Texas, profit from the use of separate property is community.[279] Thus, crops grown on separate property land, rent payments on a separately owned house, and interest earned on separate property money deposited into a bank account are all classified as community property in Texas.[280]

> The [Corpus Christi] court thus avoided an erroneous implication of its errant opinion in *Welder v. Welder* that the mere agreement of both spouses that a loan should be for the benefit of only one of them controls the character of the funds borrowed. Texas law requires a written spousal partition or exchange of property to achieve that result.

Id. at 1236; Richard L. Young, *Community Property Classification of Credit Acquisitions in California: Law without Logic?*, 17 CAL. W. L. REV. 173, 245 (1981) (stating that "Texas law might be improved by giving paramount effect to inter-spousal property agreements").

278. *See* Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 708-09 (1990) (referring to the "mule rule" and associated concepts).

279. *Cf.* James W. Paulsen, *Community Property and the Early American Women's Rights Movement: The Texas Connection*, 32 IDAHO L. REV. 641, 682 (1996) (discussing the distinction between various community property jurisdictions); *see also* Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71, 78 (1993) (explaining the difficulty in changing constitutionally defined marital systems).

280. *See, e.g.*, Moss v. Gibbs, 370 S.W.2d 452, 455 (Tex. 1963) (citing and quoting from Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925), in which the court explained that the

Mortenson v. Trammell, a Corpus Christi decision already discussed in a separate context, may best illustrate the aptness of the analogy and the fundamental absurdity of the separate credit exception.[281] The probate dispute in *Mortenson* involved several certificates of deposit (CDs).[282] The trial court and court of civil appeals found the CDs were separate property, by gift, but also ruled—correctly, at the time of the decision[283]—that the interest earned on the CDs was community property.[284] The same court, however, ruled (on consecutive pages of the *South Western Reporter*) that use of one of the same CDs as collateral for a loan rendered the loan proceeds separate property.[285] It is difficult to fathom why permitting a bank to use one's separate money during marriage generates community property interest, but permitting the same bank[286] to use the same money as collateral for a loan generates separate property loan proceeds. Both are uses of separate property for profit, and both should result in the characterization of the proceeds as community property.

Within this context, another decision deserves attention. In *Douglas v. Delp*[287] the Texas Supreme Court recently ruled that a claim for loss of credit reputation is community property.[288] The court's rationale was that the husband's "credit reputation is . . . sole management community property, as it was acquired, at least

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legislature may not deny a husband the right to interests guaranteed by the [Texas] Constitution); DeBlane v. Hugh Lynch & Co., 23 Tex. 25, 28-29 (1859) (noting that crops are produced by the joint effort of a household); Mortenson v. Trammell, 604 S.W.2d 269, 275 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (ruling that interest earned on separate property was community property).

281. *See supra* text accompanying notes 126-33 (discussing the loan agreement at issue in *Mortenson*).

282. *Mortenson*, 604 S.W.2d at 274.

283. *See* TEX. CONST. art. XVI, § 15 (illustrating that the Texas Constitution has since been amended to provide that an interspousal gift is presumed to include income from the gift); Tex. H.R.J. Res. 54, 66th Leg., R.S., 1979 Tex. Gen. Laws 3227 (constitutional amendment to Art. XVI, § 15) (changing the Texas Constitution to supply the presumption of income from a gift as community property).

284. *Mortenson*, 604 S.W.2d at 272.

285. *Id.* at 275-76.

286. The *Mortenson* court named both the "Rio Grande Building & Loan Association" and "Rio Grande Bank & Loan Association," but ostensibly the court was referring to the same institution. *Id.* at 276.

287. 987 S.W.2d 879 (Tex. 1999).

288. *See* Douglas v. Delp, 987 S.W.2d 879, 883 (Tex. 1999) (holding that credit reputation was sole-management community property).

in part, during the marriage and would have belonged solely to him were he not married."[289] Returning to the initial hypothetical for a moment, assume the husband used his separate property home as collateral for a non-recourse home equity loan to buy some stock. Because the stock skyrockets in value shortly after he buys it, he is able to repay the loan almost immediately. The improvement of the husband's credit reputation that results from use of his separate property to collateralize the loan is community property. It defies logic to suggest that the stock shares also acquired by use of the husband's separate property as collateral should be classified as separate.

2. Inability to Provide Answers in All Situations

As presently constituted, the credit acquisition rule suffers from a serious analytical flaw: It does not provide an answer in all situations. To recapitulate, the rule requires an inquiry into the property that might be sold to satisfy a judgment in the event of delinquency. If any community property might be at risk, as would be the case any time either spouse is personally liable for the debt,[290] the loan proceeds or property acquired on credit would be community. If only separate property will be at risk, the proceeds or property would be separate. But what would happen in a situation in which the only property at risk is the same property that is being acquired in the transaction? The separate credit exception offers no answer.

A non-home equity example may help.[291] Suppose Harry wants to develop some real estate. He convinces his banker the property is greatly undervalued. Because the real estate market is booming, Harry believes he can buy the land, put in utilities, subdivide, and sell in a few months at an enormous profit. The bank's appraisal supports Harry's claims, and Harry is willing to pay some very substantial fees—so the bank wants to make the loan. However, Harry insists that the loan be non-recourse, secured only by a contemporaneous lien on the property being acquired. The bank

289. *Id.*

290. *See* TEX. FAM. CODE ANN. § 3.302 (Vernon 1998) (permitting the remaining spouse to exercise control over community property).

291. This problem would not arise in a home equity loan setting because a home equity loan would be secured by the home.

agrees, the purchase goes forward, and the project is a phenomenal success. Harry celebrates by filing for divorce.

Under inception of title doctrine, the status of the real estate must be determined at the moment Harry first acquires an ownership interest. But in this hypothetical, Harry is acquiring legal rights to the real estate at the same time the loan is being made. If one assumes the real estate is separate, then the borrowed money used to acquire the real estate also is separate. But if one assumes the proposed subdivision is community, the money used to buy the land is community. The current formulation of the Texas credit acquisition rule simply offers no answer.

This observation is not original to this writer. In 1962, Professor William Fritz cogently observed that the Texas credit acquisition rule commits the logical fallacy of "assuming the consequent."[292] Dealing with a somewhat similar rule in California, a court commented on the "circular reasoning" that would be required when the loan proceeds were used to purchase the loan's collateral.[293]

Nor is this situation entirely hypothetical. Non-recourse loans for the purchase or improvement of real estate have long been a feature of the lending landscape.[294] In fact, loans such as these

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292. *See* William F. Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEX. L. REV. 1, 25 (1962) (discussing the problems with rationalizing the inception of title rule with credit purchases during marriage). Fritz states:

> [I]t is obvious that in seeking to determine the ownership character of a credit acquisition, the power to compel payment by foreclosure of a lien or levy of execution upon the property in question must be excluded as a criterion for classifying the promise to pay as a separate or community obligation, since to do otherwise would amount to assuming the consequent.

Id.

293. *In re* Marriage of Grinius, 212 Cal. Rptr. 803, 808 (Cal. Ct. App. 1985). Commenting on the *Grinius* court's concern with "circular reasoning," two California practitioners noted:

> This involves the situation of a "bricks and mortar lender." In the case where a bank lends money, the repayment of which will be secured by a structure to be constructed with the loan proceeds, the problem of characterization is difficult. The collateral is not yet in existence, so it cannot be characterized. Just as clear, the loan proceeds cannot be characterized by looking to the nature of a building not yet in existence.

S. David Rosenson & Timothy J. Paris, "Grinius *and Bear It": An Analysis of the Characterization of Loan Proceeds Made During Marriage*, 21 BEVERLY HILLS B. ASS'N J. 46, 49 (1986).

294. *See generally, e.g.*, First Nat'l Bank v. O'Dell, 856 S.W.2d 410 (Tex. 1993) (reviewing a non-recourse loan to a partnership for acquisition of a 237-acre parcel of land); Peveto v. D'Entremont, 900 S.W.2d 142 (Tex. App.—Beaumont 1995, writ denied) (recog-

were implicated in the collapse of Texas financial institutions during the 1980s.[295] Returning to the facts of *Gleich v. Bongio*, it seems altogether possible that if the Bongio brothers had put together their real estate deal in the 1980s instead of the 1930s, they would have tried to structure the transaction as a non-recourse loan.

Additionally, the flower bond case is worth another visit. In *Ray*, the loan documents recited that the bank was relying on Mr. Ray's separate property, "including the Government bonds purchased with proceeds of this loan."[296] The truth of the matter, though, was that the flower bonds purchased with the loan proceeds and held as collateral for the loan were the only "separate" property that would have been looked to for repayment.[297] Thus, the *Ray* decision itself may be an example of the sort of circular reasoning invited by the separate credit exception.[298]

The fact that the Texas credit acquisition rule, and the separate credit exception to that rule, cannot provide an answer to at least one likely scenario does not by itself condemn the rule. Courts

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nizing a non-recourse loan to an individual for acquisition of a commercial building); Bank United v. Bishop, No. 01-92-00999-CV, 1995 Tex. App. LEXIS 6 (Tex. App.—Houston Jan. 5, 1995, no writ) (discussing a non-recourse loan to an individual for the purchase of a condominium); BW Vill. v. Tricon Enters., 879 S.W.2d 205 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (describing a non-recourse loan to a corporation for the purchase of an eleven-acre tract).

295. *See Developers Told They Benefited from Thrifts*, NAT'L MORTGAGE NEWS, May 7, 1990, at 16 (reporting on a speech in which an attorney for the Office of Thrift Supervision told developers that non-recourse development loans, together with "a pattern of phony appraisals, lack of credit checks and underwriting and 100%-plus financing," created "a perfect vehicle for fraud"); *see also* Ray Perryman, *Mergers Another Way to Keep Up with Technology*, ARLINGTON MORNING NEWS, May 3, 1998, at 9A (stating that "Texas banks are a new breed of institution" that "gained valuable lessons from those dark days of the bust," and that "[m]any banking practices once commonplace, such as non-recourse loans for speculative investors, are now assiduously avoided by lenders").

296. Ray v. United States, 385 F. Supp. 372, 375 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976).

297. *See id.* at 376 (stating that Mr. Ray "owned only a negligible amount of separate property").

298. The *Ray* court may actually have been aware of some circularity in its own reasoning. In a different section of the opinion, after classifying the flower bonds as separate property, the federal district court noted: "Indeed, the bank loan itself provided the means to obtain the collateral, that is, the Treasury bonds, which was to secure the loan and repay it in the event of default." *Id.* at 381. The court went on to note that the facts did not suggest any attempt to defraud the community or to imply an expectation that the community would have to pay for the bonds. *Id.*

could create an exception to the exception, or perhaps just fall back on the general rule that everything acquired during marriage is community until proven otherwise. But when considered in light of other practical and theoretical objections, the circularity inherent in at least one application of the rule ought to cast even further doubt on the fundamental soundness of the separate credit exception.

IV. An Alternative and Better Rule: No Separate Credit Exception

There is no good reason why Texas credit acquisition law needs to be confusing or complicated. A simpler rule—that *all* property acquired on credit during marriage is community property—would be conceptually more sound, easier to apply, and more fair to married couples. Furthermore, such a rule would have only one "exception"—any spouse can acquire separate property on credit, but only by securing the other spouse's agreement, memorialized in a signed document.[299] To state the obvious, a rule that all property acquired on credit during marriage is community property gives effect to the community property presumption and simplifies inception of title analysis. Finally, this rule contains several less obvious but practical benefits.

A. *A Rule Without Exception Is More Equitable*

If the rule characterizes all property acquired on credit during marriage as community property, unless the spouses agree otherwise through an agreement meeting constitutional standards, it will reduce problems at divorce. As mentioned earlier, a Texas divorce court has broad-ranging discretion to divide community property "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."[300]

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299. Tex. Const. art. XVI, § 15. In actuality, this "exception" would not be a true exception because the Texas Constitution already permits agreements between spouses. *See id.* (permitting spousal agreements).

300. Tex. Fam. Code Ann. § 7.001 (Vernon 1998). Courts commonly refer to one often-cited, non-exclusive list of the things a divorce judge legally can consider in dividing community property as "the *Murff* factors," after a 1981 Texas Supreme Court case. *See* Murff v. Murff, 615 S.W.2d 696, 698-99 (Tex. 1981) (stating that in addition to "disparity of incomes or of earning capacities," a trial court "may consider such factors as the spouses' capacities and abilities, benefits which the party not at fault would have derived from con-

The court, however, has no equitable discretion whatsoever in the division of separate property.[301] Moreover, because the Texas Constitution protects separate property, courts cannot divest one spouse of even the tiniest fragment of his or her separate property interest.[302] This added constitutional element complicates divorce proceedings,[303] increases the chance of reversible error,[304] and gives a recalcitrant spouse negotiating leverage disproportionate to his or her ownership rights.[305]

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tinuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property").

301. *See* Cameron v. Cameron, 641 S.W.2d 210, 213 (Tex. 1982) (emphasizing that "[a]llowing a trial court to divest separate property from one spouse and award it to the other spouse as part of the latter's separate estate would impermissibly enlarge the exclusive constitutional definition of separate property").

302. *See* Whorrall v. Whorrall, 691 S.W.2d 32, 36-37 (Tex. App.—Austin 1985, writ dism'd) (interpreting *Eggemeyer* to require that a husband who had a .9% interest in a house purchased by his spouse could not be divested of that ownership right at divorce).

303. Because alimony is only available in Texas under limited circumstances, and because courts cannot divide separate property at divorce, spouses have an obvious incentive to litigate property issues that might not be considered important in other jurisdictions. *See generally* James W. Paulsen, *Remember the Alamo[ny]! The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law*, 56 LAW & CONTEMP. PROBS. 7, 49 (1993) (stating that "*Eggemeyer*, *Cameron*, and 'no fault' divorce . . . have combined to place great pressure on divorce courts in matters of property characterization and division," and in consequence, "some issues of little consequence in other jurisdictions have taken on economic life-or-death dimensions in Texas divorces").

304. There is no such thing as *de minimis* error in Texas divorce court decisions regarding the award of separate property. *See, e.g.*, Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 142 (Tex. 1977) (stating that the trial court's discretion in the division of property at divorce "does not extend to a taking of the fee to the separate property of the one and its donation to the other"); McLemore v. McLemore, 641 S.W.2d 395, 398 (Tex. App.—Tyler 1982, no writ) (mandating, with citation to *Eggemeyer*, that "where the trial court takes the fee to separate realty of one spouse and donates it to the other, it is prima facie an abuse of discretion; or, stated another way, such action lies entirely outside the trial court's discretion").

305. Consider the situation presented in *Whorrall v. Whorrall*, 691 S.W.2d 32 (Tex. App.—Austin 1985, writ dism'd w.o.j.). Once the divorce court concluded that the husband owned nine-tenths of the one percent interest in the couple's home and that the wife had a considerably larger separate property interest, it was not possible to simply award the house to either spouse. Rather, the ex-spouses would be required to continue as cotenants, voluntarily buy the other spouse's interest out (quite possibly at an inflated price), or have the house sold—probably at a bad price—and the proceeds divided in accordance with the spouses' respective ownership interests. *See Whorrall*, 691 S.W.2d at 37 (commenting that the wife's argument to the effect that "to require her to maintain a tenancy in common with a .9% interest is economically unrealistic and impracticable" has "practical appeal"); *see also* 39 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: MARITAL PROPERTY AND

The saving grace of the separate credit exception set out by *Gleich* and its progeny, if there be any, is that until recently it has been very difficult to create separate property by accident. It is no mere coincidence that the loan documents at issue in *Ray* and *Holloway* were drawn up by, or with the assistance of, an attorney.[306] In each case, one can safely assume that the husband had good reasons for desiring the marital property consequences that resulted from the form of the loan. By contrast, home equity loans are marketed to a much wider segment of the population,[307] and will be sought out for reasons that have nothing to do with their marital property consequences.[308] Today, married couples who choose to do so may create separate property at will.[309] Elimination of the separate credit exception will simply reduce the chance that such couples will create separate property by accident.

HOMESTEADS § 20.15, at 152-54 (1993) (discussing options and practical difficulties with dividing marital property at divorce).

306. *See* Ray v. United States, 385 F. Supp. 372, 375 (S.D. Tex. 1974), *aff'd*, 538 F.2d 1228 (5th Cir. 1976) (stating that the loan agreement was secured in part on the advice of Mr. Ray's attorney); Holloway v. Holloway, 671 S.W.2d 51, 55 (Tex. App.—Dallas 1983, writ dism'd w.o.j.) (indicating that Pat Holloway himself was an attorney).

307. *See* James L. Baker, Comment, *The Texas Homestead Exemption's Near Ban on Home Equity Lending: It's Time for the People to Decide*, 33 HOUS. L. REV. 239, 245 (1996) (stating that "home equity lending can sharply increase a homeowner's income while enabling the owner to continue to live on the property," and adding that "[t]his is especially important in the case of low to modest income persons, the elderly, and individuals on a fixed income").

308. *See* Jerry Patterson, *Forum: Home Equity Reform in Texas*, 26 ST. MARY'S L.J. 323, 334 (1994) (reporting the results of a study estimating that "a Texas homeowner with an average level of consumer debt could save from $443 to $544 per year by substituting equity borrowing for other forms of consumer debt," and adding that "[t]hese savings would result from the lower interest rate on home equity loans compared to other forms of consumer debt and from the federal income tax deduction of interest payments on home equity loans"). Home equity loans typically involve lower interest rates than other loans, as well as offering some tax advantages. *See, e.g.*, James L. Baker, Comment, *The Texas Homestead Exemption's Near Ban on Home Equity Lending: It's Time for the People to Decide*, 33 HOUS. L. REV. 239, 245 (1996) (stating that "[t]apping this collateral is important because it affects interest rates and income tax deductions"); Charles C. Boettcher, Comment, *Taking Texas Home Equity for a Walk, but Keeping It on a Short Leash*, 30 TEX. TECH L. REV. 197, 213 (1999) (stating that "[i]n addition to tax benefits, proponents argue that home equity loans usually have a lower interest rate than other consumer loans").

309. *See* TEX. CONST. art. XVI, § 15 (providing in part that "spouses may agree in writing that all or part of their separate property owned by either or both of them shall be the spouses' community property").

B. *A Rule Without Exception Is Less Confusing*

Typically, the average couple acquires a home during marriage. Most likely, one or both spouses assume personal liability for the mortgage payments associated with the purchase. In any event, the home will be community property. Consequently, any property acquired through subsequent home equity loans will be community property as well. In this scenario the theoretical issues discussed in this Article will remain only theoretical problems.

However, many Texans live in separately owned homes. For married couples living in those homes, *Gleich*'s hypothetical exception will become real. Separate ownership is commonly encountered in second marriages,[310] in marriages between spouses with significant disparities in age or income,[311] in marriages where one spouse's parents give a home to their child,[312] and in many other situations in which one prospective spouse is a homeowner and the other is not,[313] or in which both prospective spouses initially own

310. *See, e.g.*, *In re* Marriage of Louis, 911 S.W.2d 495, 496 (Tex. App.—Texarkana 1995, no writ) (addressing a situation in which the wife had received the couple's home as part of an earlier divorce settlement); Tanner v. Tanner, No. 08-94-00214-CV, 1996 Tex. App. LEXIS 5899, at *2 (Tex. App.—El Paso Feb. 15, 1996, no writ) (not designated for publication) (involving similar facts).

311. *See, e.g.*, Peterson v. Peterson, 595 S.W.2d 889, 890 (Tex. Civ. App.—Austin 1980, writ dism'd w.o.j.) (finding separate ownership when both the husband and the wife were in their fifties at the time of marriage and the husband had paid for the house); Hampshire v. Hampshire, 485 S.W.2d 314, 315 (Tex. Civ. App.—Fort Worth 1972, no writ) (addressing a situation in which the husband paid cash for a home shortly after marriage, using his inheritance).

312. *See, e.g.*, Dutton v. Dutton, 18 S.W.3d 849, 851 (Tex. App.—Eastland 2000, pet. denied) (finding, under the facts and by judicial admission, that the wife's parents had given her 150 acres on which to build a home); Pemelton v. Pemelton, 809 S.W.2d 642, 646-47 (Tex. App.—Corpus Christi 1991) (involving a house and land deeded to the wife by her parents as a gift), *rev'd on other grounds sub nom.*, Heggen v. Pemelton, 836 S.W.2d 145 (Tex. 1992).

313. *Cf.* Carter v. Carter, 736 S.W.2d 775, 779 (Tex. App.—Houston [14th Dist.] 1987, no writ) (involving a situation in which the prospective husband merely signed an earnest money contract and put $1000 down before marriage); Johnson v. Johnson, 584 S.W.2d 307, 308 (Tex. Civ. App.—Texarkana 1979, no writ) (involving a situation in which the prospective husband simply signed the contract before marriage); Gates v. Gates, No. 14-95-01089-CV, 1996 Tex. App. LEXIS 5137, at *1 (Tex. App.—Houston [14th Dist.] Nov. 21, 1996, no writ) (not designated for publication) (addressing a situation in which one spouse owned land before marriage onto which the couple moved a house during marriage).

homes but decide to consolidate households after marriage.[314] To reiterate a point just made, home equity loans appeal to a wide spectrum of borrowers, both because of lower interest rates and advantageous tax treatment. It truly is only a matter of time before real world separate credit situations will start trickling into Texas courts.

The problem is that when such home equity cases do begin to present themselves for judicial resolution, they may not come up in the comparatively simple fact setting just described; that is, where one spouse's separately owned home is pledged as collateral for a standard home equity loan. Other likely scenarios are much more sticky. It therefore might behoove a court to look down the road a bit before setting out to follow *Gleich*'s signposts.

For example, one wonders just how a court might apply *Gleich*'s rule to resolve a home equity situation in which the home is part separate and part community property.[315] Assume that a couple wants to buy a house. Most any seller, or lender, will require a substantial down payment. The couple may wish to make an even bigger up-front payment to save money down the road. If any part of that initial payment comes from the pre-marriage savings of either spouse,[316] or from parental gifts,[317] or from an inheritance,[318]

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314. *Cf.* Grimsley v. Grimsley, 632 S.W.2d 174, 176 (Tex. App.—Corpus Christi 1982, no writ) (involving a double second marriage in which the husband sold the house he owned and used the proceeds to pay for about 2/3 of a new house, into which his new wife—who previously had been renting—moved).

315. It is altogether possible that *both* spouses' separate estates, in addition to the community estate, could own the same home. *See, e.g.*, *In re* Marriage of Thurmond, 888 S.W.2d 269, 273-74 (Tex. App.—Amarillo 1994, writ denied) (involving a situation in which the husband's separate property trust income was used to purchase part of the couple's home, with the court acknowledging the possibility that half of that separate property interest would belong to the wife by presumption of gift, because title to the property was taken in both names); Whorrall v. Whorrall, 691 S.W.2d 32, 34 (Tex. App.—Austin 1985, writ dism'd w.o.j.) (addressing a situation in which the husband contributed $500 earnest money, the wife contributed a $21,000-plus down payment, and the couple signed a note for $35,000).

316. *See, e.g.*, Garcia v. Garcia, 170 S.W.3d 644, 647 (Tex. App.—El Paso 2005) (mem. op.) (noting the purchase of property, in part, with a down payment from the wife's retirement funds).

317. *See, e.g.*, Bakken v. Bakken, 503 S.W.2d 315, 317 (Tex. Civ. App.—Dallas 1973, no writ) (addressing a situation in which part of the down payment was a gift to the wife from her father).

318. *Cf.* Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565, 567 (1961) (discussing the separate property status of inherited property).

inception of title doctrine would dictate that the home is part separate property—again, in proportion to the overall purchase price.[319]

This is, of course, the same sort of proportional ownership created by the Bongio brothers' part-cash, part-credit real estate transaction in *Gleich v. Bongio*. Take the analysis one step further, though. Assume Mr. and Mrs. Bongio had built on one of those proportionally owned lots, and (courtesy of the sort of time warp made possible by legal hypotheticals) secured a post-1997 home equity loan. Would the proceeds of that loan be separate property? At first blush, one would think not. Because the property that secures the loan is part separate and part community, the lender did not agree with either spouse, in *Gleich*'s words, "to look *only* to his or her separate estate for . . . satisfaction."[320]

One must remember, however, that *Gleich* was decided forty years before the Texas Supreme Court discovered in *Eggemeyer* that separate property could not constitutionally be divested at divorce.[321] It will be a skillful judge indeed who first manages to craft an opinion explaining how pledging a $100,000 separate property home as collateral will result in $75,000 in separate property loan proceeds, but pledging one's separate property half of a $200,000 home will result in $150,000 in community property loan proceeds. It would seem that, in the latter case, $75,000 worth of separate property has gone missing—in violation of the Texas Constitution.

The situation in which a home is part community property and part one spouse's separate property is not the only problem area. Consider the lucky newlyweds whose parents give them a house,[322]

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319. *See* 38 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 8.4, at 220 (1993) (giving as an example a piece of real estate bought with a $10,000 separate property down payment and a community obligation for the remaining $90,000).

320. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937) (emphasis added).

321. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 142 (Tex. 1977) (stating that the trial court's discretion in the division of property at divorce "does not extend to a taking of the fee to the separate property of the one and its donation to the other").

322. *See* McLemore v. McLemore, 641 S.W.2d 395, 396 (Tex. App.—Tyler 1982, no writ) (involving a gift of a home by the wife's parents to both spouses); *cf. In re* Royal, 107 S.W.3d 846, 849 (Tex. App.—Amarillo 2003, no pet.) (addressing a situation in which the husband's grandparents gave each spouse $20,000 to pay down a home loan); *In re* Gill, 41

the long-term couple who buy a house together before marriage,[323] the spouse who buys a house with separate property but orders that the deed be made out in both names,[324] or any other couple who just want to get the closing out of the way so one can carry the other over the threshold of "their new home" after the honeymoon.[325] In any of these cases, the home would be separately owned, but separately owned by *both* husband *and* wife. If such a home is used as security for a home equity loan, neither spouse would be personally liable, nor would any community property be at risk. Rather, the loan would be secured only by separate property of *both* spouses.

Just as in the earlier example, literal application of the separate credit exception, as articulated in *Gleich* and synthesized in *Cockerham*, would class the loan proceeds as community. The constitutional difficulties would be even greater, though, because *both* spouses would now seem to have been divested of separate property for the benefit of the community estate. Additionally, though community property can be created by agreement in Texas (at least since 1999),[326] the transaction has skipped a statutory step or two.[327]

S.W.3d 255, 257 (Tex. App.—Waco 2001, no pet.) (discussing a situation in which the wife received a house as a gift from her parents during marriage).

323. *See* Harrington v. Harrington, 742 S.W.2d 722, 725 (Tex. App.—Houston [1st Dist.] 1987, no writ) (finding joint separate property ownership, pursuant to an oral partnership agreement, of a home purchased during the six-year period that the couple lived together before their ceremonial marriage); *cf. In re* Marriage of Murray, 15 S.W.3d 202, 204 (Tex. App.—Texarkana 2002, no pet.) (addressing a situation in which the couple acquired the land by joint pre-marriage deed).

324. *See In re* Marriage of Morris, 12 S.W.3d 877, 881 (Tex. App.—Texarkana 2000, no pet.) (finding a gift when the husband purchased land with separate funds but ordered the deed made in both names); *cf.* Fellows v. Fellows, No. 05-98-00618-CV, 2000 Tex. App. LEXIS 4834, at *3 (Tex. App.—Dallas July 24, 2000, no pet.) (not designated for publication) (finding the presumption of gift refuted under the facts).

325. *Cf.* Carter v. Carter, 736 S.W.2d 775, 779 (Tex. App.—Houston [14th Dist.] 1987, no writ) (finding separate ownership of a house when the prospective husband signed the earnest money contract alone and paid $1000 down before marriage).

326. *See* TEX. CONST. art. XVI, § 15 (providing in part that "spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property"); *see also* Tex. H.R.J. Res. 36, 76th Leg., R.S., 1999 Tex. Gen. Laws 6607-08 (constitutional amendment to Art. XVI, § 15) (amending the language of TEX. CONST. art. XVI, § 15).

327. *See* TEX. FAM. CODE ANN. § 4.205 (Vernon Supp. 2004-05) (setting out disclosure requirements).

Yet, there is another possible way to resolve the problem. In either of the two preceding scenarios, a court might try to avoid constitutional problems by rejecting the literal language of *Gleich* and its progeny and going with the "spirit of the exception," so to speak. The court could simply rule that the loan proceeds belong to the separate estates of both spouses (or to one spouse's separate estate and the community) in the same percentages that the respective spouses owned the home that secures the loan.[328] While there are some conceptual difficulties, the idea of proportional ownership for the proceeds of home equity loans would fit nicely with the Texas Constitution's requirement that the total amount of such loans be capped at total indebtedness equaling eighty percent of the home's fair market value.[329] Such a solution, however, would only compound the before-mentioned practical problems associated with separate property fractional ownership.

To these theoretical challenges, one should add the previously discussed problem that would be presented, though only in a non-home equity setting, when the property acquired by virtue of a credit transaction is the same property that secures the non-recourse loan under which the extension of credit was made.[330] In sum, if Texas courts choose to go any further down *Gleich*'s road,

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328. This sort of proportional approach undergirds the current Texas economic contribution statutes. *See id.* § 3.403 (setting out a proportional formula for separate property improved by community cash contributions, and vice versa). That is particularly interesting, since the statute specifically extends to reduction of home equity lending debt. *See id.* § 3.402(3) (stating that "economic contribution" includes the reduction of principal of debt, "including a home equity loan"). Some jurisdictions, and legal commentators, also have suggested the possibility of classifying punitive damage awards in personal injury litigation according to the nature of the underlying recovery. *See, e.g.*, Pamela E. George, *Whose Injury? Whose Property? The Characterization of Personal Injury Settlements upon Dissolution of Marriage in Community Property States*, 32 IDAHO L. REV. 575, 619-22, 633-34 (1996) (discussing, among other options, the possibility of classifying punitive damage awards in proportion to the separate or community property nature of the underlying recovery of actual damages).

329. *See* TEX. CONST. art. XVI, § 50(a)(6)(B) (providing requirements for an extension of credit on a homestead).

> [A]n extension of credit that: . . . is of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made.

Id.

330. *See supra* Part III.C.2. (questioning what would happen where the only property at risk is the same property that is being acquired in the transaction).

they will find some thorny analytical questions waiting around the first bend. A simpler rule—one that classifies all postmarital credit acquisitions as community property—offers no such intellectual challenges. In family law that is not a bad thing.

C. *A Rule Without Exception Is Less Tempting*

Another practical benefit to be gained from simplifying Texas credit acquisition doctrine deserves brief mention. By permitting a married person to acquire separate property during marriage by unilateral arrangements with a third party, the separate credit exception makes it easier for one spouse to violate fiduciary duties owed to the other. The problem is not unique to this obscure corner of marital property law. For example, under current Texas doctrine, one spouse can effectively change community property profits into separate property retained earnings by the simple expedient of incorporating a separately owned sole proprietorship.[331] Nor is the problem as serious in the area of credit acquisitions as it might be elsewhere. If one spouse decides to acquire separate property on credit during marriage, the separate credit exception at least assures that the spouse who structures the transaction is putting only his or her separate property at risk.

Nonetheless, the potential for abuse that inheres in the separate credit exception could be reduced by a simpler rule. The *Holloway* case[332] offers a good example. The reader will recall that Mr. Holloway acquired a $60 million oil exploration company during marriage by structuring a $3000 bank loan to (arguably) meet *Gleich*'s requirements.[333] What has not yet been mentioned here is one of Mrs. Holloway's allegations, that her husband "breached a fiduciary duty owed to the community estate" and used his businesses "so as to defraud his wife of her community interest."[334] While the trial court was apparently convinced, the Dallas Court of Appeals

331. *See* Vallone v. Vallone, 644 S.W.2d 455, 461 (Tex. 1982) (Sondock, J., joined by Pope, C.J. & McGee, J., dissenting) (criticizing the majority opinion on this ground).

332. Holloway v. Holloway, 671 S.W.2d 51 (Tex. App.—Dallas 1983, writ dism'd w.o.j.).

333. *See supra* Part II.B.2. (discussing *Holloway*).

334. *Holloway*, 671 S.W.2d at 59.

rejected Mrs. Holloway's argument.[335] As Chief Justice Clarence Guittard explained:

> In engaging in a new and speculative venture and borrowing funds for that purpose, a married entrepreneur may well consider whether the risk is one that should properly be undertaken by himself alone without jeopardizing the assets of the community estate. If the venture turns out to be successful, as it did here, he cannot be held guilty of breach of a fiduciary duty in the absence of evidence of an intent to defraud.[336]

Chief Justice Guittard may well have been correct. However, one can easily imagine the case in which a spouse engages in a little judicious cherry picking, funding speculative ventures with community property and reserving separate property for "sure things." Ordinary fiduciary doctrine might put the burden of proving good faith on the managing spouse. The separate credit exception, at least as applied in *Holloway*, puts the burden on the non-participating spouse.[337]

Elimination of the separate credit exception would reduce temptation. To reiterate a point already made, any spouse who wishes to acquire separate property on credit today can do so by explicit agreement with the other spouse.[338] If there were no separate credit exception, the spouses could simply confer in advance instead of making a private deal with a banker and risking litigation down the road. The spouses' joint decision, reduced to writing and signed, would be presumptively enforceable.[339] For example, Mrs. Holloway apparently acted as her husband's bookkeeper.[340] Nothing in the opinion suggests she lacked the business acumen necessary to decide for herself whether the $3000 proposed investment was a "new and speculative venture" too risky for the investment

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335. *See id.* (reciting that the trial court entered a fact finding to the effect that Mr. Holloway "unjustly enriched his separate estate by diverting community funds into separate corporations," but concluding that the evidence did not support a constructive trust finding, at least as a matter of law).

336. *Id.* at 59-60.

337. *See id.* (requiring the non-participating spouse to show evidence of intent to defraud).

338. *See infra* Part III.B.2. (pointing out the irrelevance of the separate credit exception today).

339. *See* TEX. FAM. CODE ANN. § 4.105(a) (Vernon 2002) (placing the burden of proof on the party resisting enforcement of the agreement).

340. *Holloway*, 671 S.W.2d at 55.

of community funds. If Mr. Holloway had secured his spouse's signature in advance, through a proper interspousal agreement, that agreement would be enforceable absent proof that Mrs. Holloway signed the agreement involuntarily, or that the agreement was both unconscionable and was signed by Mrs. Holloway without any access to basic financial data.[341] In short, the spousal agreement approach seems both more practical and more respectful of the equal legal status of both spouses in today's world.

V. CONCLUSION

This Article has set out in detail some serious analytical and practical problems with the Texas credit acquisition doctrine, and in particular, the separate credit exception to that doctrine. Until recent revisions to Texas homestead law created a new class of separate-property-secured non-recourse lending, this Article would not have been worth writing. Circumstances under which separate property could be acquired on credit (other than by misunderstanding Texas Supreme Court doctrine) rarely arose. The system could tolerate widespread confusion.

Now that the question can be expected to arise in everyday litigation, the formerly arcane nature of the separate credit exception is in one sense beneficial. Texas courts are not nearly as constrained by prior decisions as one might think. Because circumstances under which a separate-property-secured non-recourse loan might have been encountered rarely arose, the vast majority of judicial statements of the modern separate credit exception are dicta.[342] For example, in *Gleich*, *Broussard*, and *Cockerham*, the Texas Supreme Court acknowledged a separate credit exception, but did not find circumstances justifying its application.[343] That is dicta.

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341. *See* TEX. FAM. CODE ANN. § 4.105 (Vernon 2002) (setting out the conditions under which marital agreements are not enforceable).

342. This Article never set out to be, and is not, a comprehensive survey of all credit acquisition cases. A fair number of post-*Gleich* decisions, some of which are discussed in Part II.C., have held that separate property was acquired through a credit transaction, but only through ignorance or incorrect application of the Texas Supreme Court's modern rule. The writer knows of only two post-1937 decisions, discussed in Part II.B., that constitute examples of arguably correct application of the rule.

343. *See* Cockerham v. Cockerham, 527 S.W.2d 162, 171-72 (Tex. 1975) (determining that the debts were community obligations, in part on a theory of the husband's implied consent to the wife's debts); Broussard v. Tian, 156 Tex. 371, 295 S.W.2d 405, 407-08 (1956)

This is not to suggest, as at least one practice commentary seems to suggest,[344] that *Gleich*, *Broussard*, and *Cockerham* should be disregarded. The reasoning that led the Texas Supreme Court to reject the "spousal agreement" method of acquiring separate property on credit was sound.[345] Moreover, repeated statements from the Texas Supreme Court—even if dicta—should not be lightly disregarded by any other court.[346]

That said, it is nonetheless important that almost all statements of the supposed separate credit exception are dicta. Any court that considers the issue today should be alert to the possibility that, no matter how many times the exception has been recited by the Texas Supreme Court or repeated by other courts, it has not yet been subjected to the sort of judicial scrutiny one would expect of any rule of law. This Article is written in the hope that when the

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(holding that the former wife was entitled to a community half-interest in the property); Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 884 (1937) (holding that Felix Bongio's half of the $7000 credit acquisition was community property).

344. *See* Gary L. Nickelson et al., *Characterization and Tracing*, *in* 1 STATE BAR OF TEX. PROF. DEV. PROGRAM, ADVANCED FAMILY LAW COURSE H, H-59, H-60 (1999) (stating that "[t]he actual holding in *Gleich v. Bongio* . . . was not inconsistent with . . . prior decisions; only the language was," and further stating that "[t]he primary consideration affecting the community or separate nature of the property remains today the intention of the spouses as shown by the circumstances surrounding the acquisition of the property").

345. In particular, any doctrine that would let spouses create separate property through agreements that do not meet the Texas Constitution's standards would itself be unconstitutional. *See generally* Part III.A. (asserting that the separate credit exception is unconstitutional).

346. *See, e.g.*, West Orange-Cove Consol. I.S.D. v. Alanis, 107 S.W.3d 558, 580 (Tex. 2003) (observing that "[t]he State successfully argued to the trial court that these statements were dicta, but they were an important part of our rationale" (citation omitted)); Hooper v. Holt, 416 S.W.2d 916, 918 (Tex. Civ. App.—Texarkana 1967, no writ) (referring to the importance of dicta). More specifically, the *Hooper* court stated:

> On more mature consideration . . . the conclusion is reached that the Supreme Court majority expressed an opinion . . . on a question directly involved in the case before it and deliberately declared the law on the proposition presented to it. Although the pronouncement may not have been necessary to its decision, it does constitute judicial dictum. Such declaration by the Supreme Court, if not binding, is in any event entitled to great weight in this court and should not be disregarded unless there is extraordinary reason for doing so.

Id.; *see also* Thomas v. Meyer, 168 S.W.2d 681, 684-85 (Tex. Civ. App.—San Antonio 1943, no writ) (stating that "we need not discuss at length the force of dicta as applicable to the doctrine of stare decisis, except to the point that it can hardly be said that the language employed . . . was lightly used," and concluding that "these holdings must at least be considered as judicial dicta rather than mere obiter" and "should be followed in the absence of some cogent reason for departing therefrom").

issue is first squarely presented to the Texas Supreme Court, or to a Texas Court of Appeals, that court will examine the legal merits closely, and not simply assume that any statement repeated by many courts over many years is, or ever should become, law.