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Community Property - Division of Property upon Divorce - Property Acquired during Marriage in a Common Law State Except by Gift, Devise, or Descent Should Be Treated as Community Property.

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CASENOTES

COMMUNITY PROPERTY—Division Of Property Upon Divorce—Property Acquired During Marriage In A Common Law State Except By Gift, Devise, Or Descent Should Be Treated As Community Property.

Cameron v. Cameron,
641 S.W.2d 210 (Tex. 1982).

After more than twenty years of marriage, Sue Cameron obtained a divorce from her husband Paul Cameron.[1] The couple married in Texas, and except for a three-month stay in California, lived in several common law property states for the remainder of their marriage.[2] Paul Cameron served in the military for nineteen of the twenty-one year marriage.[3] Upon retirement from the military, the couple moved to Texas where the divorce suit was filed.[4] The trial court awarded Sue Cameron thirty-five percent of the future gross military retirement funds and fifty percent of the United States Savings Bonds.[5] The court of civil appeals reversed the judgment in part and held that both the retirement pay and savings bonds were Paul Cameron's separate property because they were acquired in a common law property state, and, therefore, could not be divided.[6] On

1. *See* Cameron v. Cameron, 641 S.W.2d 210, 212 (Tex. 1982).

2. *See id.* at 212. The Camerons resided in the common law states of Arkansas, Indiana, Maryland, Nebraska, Ohio, and Oklahoma during Paul Cameron's years in the military. *See id.* at 212.

3. *See id.* at 213.

4. *See id.* at 212. Both spouses resided in Texas when the divorce suit was filed. *See id.* at 212.

5. *See id.* at 212.

6. *See* Cameron v. Cameron, 608 S.W.2d 748, 750 (Tex. Civ. App.—Corpus Christi 1980), *rev'd,* 640 S.W.2d 210 (Tex. 1982). Applying tracing principles, the court of civil appeals characterized the savings bonds as Paul Cameron's separate property. *See id.* at 751. The court based its decision on the Texas Supreme Court case of *Campbell v. Campbell,* which held that the separate property of one spouse may not be divested upon divorce. *See id.* at 751. *Campbell,* however, was subsequently withdrawn when the parties settled pending the rehearing. *See* Campbell v. Campbell, 23 Tex. Sup. Ct. J. 391 (June 4, 1980), *opinion withdrawn,* 613 S.W.2d 236 (Tex. 1980).

appeal to the Texas Supreme Court the wife contended that separate personal property of her husband, unlike separate realty, should be subject to division upon divorce.[7] Held—*Reversed.*[8] Property acquired during a marriage in a common law state, except that by gift, devise, or descent should be treated as community property.[9]

Texas is one of eight community property states which divide property owned by a married couple into two classes: separate and community.[10] Separate property consists of any property owned by either spouse prior to their marriage and that acquired during their marriage by gift, devise, descent, or agreement.[11] All other property acquired by either spouse dur-

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7. *See* Cameron v. Cameron, 641 S.W.2d 210, 213 (Tex. 1982).

8. *See id.* at 212.

9. *See id.* at 220.

10. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 25-211, -213 (1976) (distinctions between separate and community property); CAL. CIV. CODE §§ 5107-5110 (Deering 1972 & Supp. 1983) (characterizations of marital property as either separate or community); NEV. REV. STAT. §§ 123.130, .220 (1979) (definition of separate and community property). The community property system was based on the Spanish ganancial system and Mexican law. In the ganancial system, spouses were considered equal and a marriage was not a merger into one entity, but two "separate legal individuals . . . working on a common endeavor." Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 40-42 (1967). The community property system treated a marriage with aspects of partnership law and was designed to protect the interests of each spouse or partner. *See id.* at 42. Thus, the two classifications of community and separate property emerged to achieve these results. *See generally* McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CAL. W. L. REV. 117, 118-32 (1971) (brief history of community property system in Texas from origin in 1840).

11. *See* TEX. CONST. art. XVI, § 15 (amended 1980). A 1980 amendment to the constitution provides that spouses may enter into prenuptial agreements which stipulate that future income from separate property received during the marriage shall be separate property instead of community. *See id.* A statutory definition of separate property found in § 5.01(a) of the Texas Family Code tracks the language of the constitution but also includes a third type of separate property—"the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage." TEX. FAM. CODE ANN. § 5.01 (Vernon 1975). The Texas Supreme Court upheld the constitutionality of this statute, but declined to define a cause of action as "property" within the constitutional meaning. *See* Graham v. Franco, 488 S.W.2d 390, 392 (Tex. 1972). Otherwise, the Texas Supreme Court has ruled that the Texas Constitution contained the exclusive definition of separate property, which implicitly prohibited any legislative attempts to redefine separate property. *See* Arnold v. Leonard, 114 Tex. 535, 540-41, 273 S.W. 799, 802 (1925). This principle established in *Arnold* has been termed the doctrine of "implied exclusion." *See* Graham v. Franco, 488 S.W.2d 390, 392 (Tex. 1972). The Texas definition of separate property is basically the same as that of other community property states. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-213 (1976) (same as Texas but includes "increase, rents, issues, and profits" of separate property); N.M. STAT. ANN. § 40-3-8 (1978) (includes property owned by spouses as joint tenants or tenants in common and property acquired after legal separation); WASH. REV. CODE ANN. §§ 26.16.010, .020 (1961) (includes rents, issues, and profits from separate property).

ing the marriage is considered community property.[12] Both spouses receive present, vested, and equal property rights in community property,[13] while separate property is owned solely by the acquiring spouse.[14] In contrast, a common law state recognizes all property received by either spouse as the separate property of that spouse, the spouse becoming sole owner with vested legal title.[15]

In Texas, although the classification of property as either separate or community has incidental effects during the marriage,[16] the distinction becomes more important upon divorce when the property is divided between the spouses. Although court-ordered alimony is prohibited in Texas,[17] a court is authorized by statute to make a "just and right" divi-

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12. *See* TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975 & Supp. 1982-1983). Texas law defines community property as "the property, other than separate property, acquired by either spouse during marriage." *Id.* Generally, most community property states define community property as all property acquired during the marriage except that specifically delineated as separate property. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-211 (1976) (community property is all property acquired during marriage except by gift, devise, or descent); IDAHO CODE §§ 32-903, -906 (1963) (property acquired after marriage is community except that defined as separate); LA. CIV. CODE ANN. art. 2338 (West Supp. 1983) (all property acquired during "existence of the legal regime" is community unless classified as separate under statute). Furthermore, in Texas there is a statutory presumption that all property possessed by either spouse during the marriage is community property. *See* TEX. FAM. CODE ANN. § 5.02 (Vernon 1975).

13. *See, e.g.*, McCarty v. McCarty, 453 U.S. 210, 217 (1981) (each spouse has absolute right to one-half of community estate); Free v. Bland, 369 U.S. 663, 664 (1962) (spouses have equal rights in community); CAL. CIV. CODE ANN. § 5105 (Deering Supp. 1983) (spouses have present, vested rights in community).

14. *See, e.g.*, CAL. CIV. CODE ANN. §§ 5107, 5108 (Deering 1972) (separate property owned solely by acquiring spouse); TEX. FAM. CODE ANN. § 5.01 (Vernon 1975) (spouses have sole ownership of separate property); WASH. REV. CODE ANN. §§ 26.16.010, .020 (1961) (separate property held solely by acquiring spouse).

15. *See, e.g.*, Allen v. Hanks, 136 U.S. 300, 307 (1890) (property acquired in common law state is separate property of acquiring spouse); Gartman v. Gartman, 376 So. 2d 711, 713 (Ala. Civ. App. 1978) (separate property owned by acquiring spouse); Holland v. Holland, 406 So. 2d 496, 497-98 (Fla. Dist. Ct. App. 1981) (acquiring spouses own separate property).

16. *See* TEX. FAM. CODE ANN. § 5.21 (Vernon 1975). During the marriage each spouse has the sole power to manage, control, or dispose of his or her separate property and the community property that they would have owned if single. *See id.* §§ 5.21- .22. Classification of marital property as either separate or community will determine if that property is subject to the other spouse's liability during the marriage. For example, one spouse's separate property is not subject to the tortious liability of the other spouse unless both spouses are jointly liable while community property is subject to the tortious liability of either spouse during marriage. *See id.* § 5.61.

17. *See* Francis v. Francis, 412 S.W.2d 29, 32-33 (Tex. 1967). In *Francis*, the court defined alimony as "only those payments imposed by a court order or decree on the husband as a personal obligation for support and sustenance of the wife after a final decree of divorce." *Id.* at 33. Under this definition, the parties may contract between themselves in a

sion of the "estate of the parties" considering the circumstances surrounding the divorce.[18] The phrase "estate of the parties" has been interpreted to include both the community and separate estates;[19] but, as a general rule, the community property was divided between the spouses and the separate property was returned to its respective owner.[20] In addition, until 1970 courts were expressly prohibited by statute from divesting the title to a spouse's separate real property.[21] This prohibition was omitted, however, when section 3.63 of the Texas Family Code was enacted.[22]

In *Eggemeyer v. Eggemeyer*,[23] the Texas Supreme Court reinstated the prohibition against divestiture of separate real property.[24] Defining the "estate of the parties" as the community estate, the court in *Eggemeyer* concluded that section 3.63 only authorized a division of a couple's community property and not the separate real property of each spouse.[25] Fur-

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property settlement for the husband to make post-divorce payments. *See id.* at 37; *see also* Brown v. Brown, 442 S.W.2d 461, 462 (Tex. Civ. App.—Eastland 1969, writ dism'd).

18. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).

19. *See, e.g.*, Hedtke v. Hedtke, 112 Tex. 404, 408, 248 S.W. 21, 22 (1923) ("estate of the parties" includes separate and community property); Dorfman v. Dorfman, 457 S.W.2d 91, 95 (Tex. Civ. App.—Waco 1970, no writ) (court may dispose of separate and community funds); Klein v. Klein, 370 S.W.2d 769, 771 (Tex. Civ. App.—Eastland 1963, no writ) ("estate of the parties" includes both community and separate estates).

20. *See, e.g.*, Spencer v. Spencer, 589 S.W.2d 174, 176 (Tex. Civ. App.—El Paso 1979, no writ) (generally separate property returned to owner absent circumstances justifying invasion); Muns v. Muns, 567 S.W.2d 563, 567 (Tex. Civ. App.—Dallas 1978, no writ) (separate property generally returned to respective owner); Newland v. Newland, 529 S.W.2d 105, 108 (Tex. Civ. App.—Fort Worth 1975, writ dism'd) (separate property returned to owner).

21. *See* TEX. REV. CIV. STAT. art. 4638 (1925), *repealed by*, Act of May 16, 1969, ch. 888, § 1, 1969 Tex. Gen. Laws 2707, 2725 (enacting Family Code). The statute was almost identical to section 3.63, the current divorce statute, but also contained the provision that "[n]othing herein shall be construed to compel either party to divest himself or herself of the title to real estate." *Id.* The Texas Supreme Court determined that this prohibition had no application to community realty and, therefore, courts were free to divide community realty in a "just and right" manner. *See* Hailey v. Hailey, 160 Tex. 372, 376, 331 S.W.2d 299, 303 (1960). Thereafter, the only property not subject to divestiture in a divorce decree was separate realty. *See, e.g.*, Ramirez v. Ramirez, 524 S.W.2d 767, 769 (Tex. Civ. App.—Corpus Christi 1975, no writ) (separate realty cannot be divested); Hearn v. Hearn, 449 S.W.2d 141, 145 (Tex. Civ. App.—Tyler 1969, no writ) (statute prohibits divestiture of separate realty); Duncan v. Duncan, 374 S.W.2d 800, 802 (Tex. Civ. App.—Eastland 1964, no writ) (statutory prohibition applies only to separate realty).

22. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).

23. 554 S.W.2d 137 (Tex. 1977). The only property in question was the separate realty of the husband which was awarded to the wife by the trial court. *See id.* at 138.

24. *See id.* at 142.

25. *See id.* at 139. The court reasoned that the legislative intent when enacting section 3.63 was to codify existing law. Since existing law under article 4638 prevented divestiture of separate realty, the legislature intended to carry over the prohibition into section 3.63. *See id.* at 139. Further, "estate of the parties" refers only to the community estate and not

ther, the court stated that a divestiture of separate property upon divorce was not permitted by the Texas Constitution.[26] Because *Eggemeyer* dealt solely with the question of whether separate realty could be divided upon divorce, several courts refused to apply the *Eggemeyer* rationale to separate personal property.[27] Conversely, *Eggemeyer's* broad constitutional implications convinced several courts and commentators that its rationale extended to the divestiture of separate personalty, as well as realty.[28] Thus, a trial court's power to divest separate personal property in a divorce decree remained questionable.[29]

When a couple moves from a common law state where all property is "separate" to a community property state which recognizes both separate and community property, courts are faced with the dilemma of how to treat such property.[30] Traditionally, Texas courts have treated common

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separate property. *See id.* at 139.

26. *See id.* at 140-41. The *Eggemeyer* court's constitutional analysis was based on two grounds. First, the constitution contained the exclusive definition of separate property. Divesting one spouse of their separate property and awarding it to the other spouse creates a type of separate property not embraced within the constitutional definition. The legislature cannot enlarge the definition of separate property. *See id.* at 140. Additionally, due course of law requires a "justifying public purpose" before property may be taken from one person and given to another. *See id.* at 140 (quoting Thompson v. Consolidated Gas Co., 300 U.S. 55, 80 (1936)). There is no public benefit achieved, nor is the taking founded upon the state's police power. The divestiture, therefore, violates due course of law. *See id.* at 140-41.

27. *See, e.g.*, Price v. Price, 591 S.W.2d 601, 604 (Tex. Civ. App.—Tyler 1979, no writ) (court has discretion to award separate personalty if equity demands); Spencer v. Spencer, 589 S.W.2d 174, 176 (Tex. Civ. App.—El Paso 1979, no writ) (court may invade separate personalty if just and right under circumstances); Muns v. Muns, 567 S.W.2d 563, 566-67 (Tex. Civ. App.—Dallas 1978, no writ) (distinguishing *Eggemeyer* as only applicable to separate realty).

28. *See* Villarreal v. Villarreal, 618 S.W.2d 99, 100 (Tex. Civ. App.—Corpus Christi 1981, no writ) (court cannot divide separate property); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App.—San Antonio 1980, writ dism'd) (applying *Eggemeyer* rationale and prohibiting divestiture of separate personalty). *See generally* Comment, *The Division of Marital Property Upon Divorce and Quasi-Community Property Law in Texas: The Texas Legislature Amends Section 3.63 of the Family Code*, 23 S. TEX. L.J. 139, 150 (1982) (discussing applicability of *Eggemeyer* decision to separate personalty).

29. *Compare* Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App.—San Antonio 1980, writ dism'd) (court could not divest title to separate personalty) *with* Muns v. Muns, 567 S.W.2d 563, 567 (Tex. Civ. App.—Dallas 1978, no writ) (court could invade separate personalty of one spouse).

30. *See generally* Oldham, *Property Division in a Texas Divorce of a Migrant Spouse: Heads He Wins, Tails She Loses?*, 19 HOUS. L. REV. 1, 2-3 (1981) (discussion of dilemma Texas courts face with common law property in community property context); Comment, *The Division of Marital Property Upon Divorce and Quasi-Community Property Law in Texas: The Texas Legislature Amends Section 3.63 of the Family Code*, 23 S. TEX. L.J. 139, 150 (1982) (questioning applicability of *Eggemeyer* decision to separate personalty).

law marital property as separate property,[31] while most other community property states, either by case law or statute, have treated such property as community.[32] Thus, these states developed the concept of "quasi-community" property—common law marital property which would have been considered community property had it been acquired in a community property state.[33] Realizing the inherent inequity of treating separate common law property as separate in a community property sense and, at the same time, prohibiting divestiture of separate property, the Texas Legis-

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31. *See, e.g.*, Oliver v. Robertson, 41 Tex. 422, 425 (1874) (common law separate property is separate property in Texas); Muns v. Muns, 567 S.W.2d 563, 564, 567 (Tex. Civ. App.—Dallas 1978, no writ) (common law marital property treated as separate property); Gaulding v. Gaulding, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1973, no writ) (common law separate property considered separate property in Texas). Under the traditional approach, the rights of a spouse were determined by the law of the state where the couple was domiciled when the property was acquired. *See* H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 69-70 (1952). These vested property rights could not be changed by merely crossing state lines. *See* Avery v. Avery, 12 Tex. 54, 56-57 (1854). Professor Oldham gives three explanations as to why Texas courts characterized common law marital property as separate property. *See* Oldham, *Property Division in a Texas Divorce of a Migrant Spouse: Heads He Wins, Tails She Loses?*, 19 HOUS. L. REV. 1, 9-11 (1981). First, Texas courts may just adopt the characterization of separate common law property in the community property context. *See id.* at 8. The second reason was that, historically, common law separate property was, in character, closer to the concept of separate property in community states because no equitable division was allowed. *See id.* at 9-10. Finally, Oldham reasoned that the equitable rights of the nonacquiring spouse more closely resembled the "expectancies" one spouse has in regard to the other spouse's separate property. *See id.* at 11.

32. *See, e.g.*, Berle v. Berle, 546 P.2d 407, 409-10 (Idaho 1976) (common law separate property not separate property in context of community property system); Braddock v. Braddock, 542 P.2d 1060, 1063 (Nev. 1975) (common law marital property not "separate" property in Nevada); Hughes v. Hughes, 573 P.2d 1194, 1198 (N.M. 1978) ("separate" common law property treated differently than separate property in New Mexico). It should be noted, however, that Idaho, Nevada, and New Mexico do not allow the division of common law separate property on the reasoning that it should be treated as community property. Instead, these state courts apply the law of the state where the property was acquired. Since the property was acquired in a common law state which allows the division of common law separate property, the state courts of Idaho, Nevada, and New Mexico permit the divestiture of common law "separate" property. *See* Berle v. Berle, 546 P.2d 407, 410 (Idaho 1976); Braddock v. Braddock, 542 P.2d 1060, 1063 (Nev. 1975); Hughes v. Hughes, 573 P.2d 1194, 1201-02 (N.M. 1978). California and Arizona have adopted the concept of quasi-community property by statute which allows Arizona and California courts to treat common law property as community property if it would have qualified as such in those two states. *See* ARIZ. REV. STAT. ANN. § 25-318 (Supp. 1982-1983); CAL. CIV. CODE § 4803 (Deering 1972); *cf.* IDAHO CODE § 15-2-201 (1979) (recognition of quasi-community property in probate code).

33. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-318 (1976 & Supp. 1982-1983) (quasi-community property is common law property that would have been considered community if acquired in Arizona); CAL. CIV. CODE § 4803 (Deering 1972) (common law property that would be characterized community in California); IDAHO CODE § 15-2-201 (1979) (common law property which would have been community in Idaho is quasi-community property).

lature responded with their own "quasi-community" property statute.[34] Since the statute's enactment, however, the Texas Supreme Court has neither ruled on its constitutionality nor adopted it as part of the substantive law of the state.[35]

In *Cameron v. Cameron*,[36] the Texas Supreme Court addressed the issues of how both common law marital property and separate personal property should be treated upon divorce.[37] Considering the quasi-community property nature of the savings bonds, the court held that "separate" property acquired in common law states should be treated as community property upon divorce in Texas if such property would have qualified as community property in the state.[38] With the approval of the entire court,[39] the majority based its decision on the fact that most community property states treat common law property in this manner[40] and the Texas Legislature expressed its intention to treat quasi-community property as community property.[41] The court also held that the military retirement pay should be divided according to the recently enacted Uniformed Services Former Spouses' Protection Act.[42] Furthermore, the five-justice majority[43] stated that a trial court has no authority to divest the separate personal property, in a community property sense, of one spouse

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34. *See* TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1982-1983).

35. *See generally* Comment, *The Division of Marital Property Upon Divorce and Quasi-Community Property Law in Texas: The Texas Legislature Amends Section 3.63 of the Family Code*, 23 S. TEX. L.J. 139, 155-58 (1982) (general discussion about future of section 3.63 and its constitutionality).

36. 641 S.W.2d 210 (Tex. 1982).

37. *See id.* at 213, 220.

38. *See id.* at 220-21. Reasoning that a nonacquiring spouse retains an equitable interest in common law separate property, the court concluded that, in the same manner, the nonacquiring spouse's interest should be protected by treating such property as community property in Texas. *See id.* at 220-21.

39. *See id.* at 223 (McGee, J., concurring). Justice McGee concurred in the majority's treatment of common law marital property. Chief Justice Greenhill also concurred in the majority's decision on this issue. *See id.* at 228 (Greenhill, C.J., concurring).

40. *See id.* at 221.

41. *See id.* at 221-22.

42. *See id.* at 212-13. Although the court recognized that the United States Supreme Court decision of McCarty v. McCarty, 453 U.S. 210 (1981) prohibited a court from dividing military nondisability retirement pay on divorce, it noted that the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) had the effect of reversing *McCarty*. *See* Cameron v. Cameron, 641 S.W.2d 210, 212 (Tex. 1982). Under the Act, military retirement pay may be divided if the spouses were married 10 years or longer during which one spouse was performing military service applicable toward retirement. *See id.* at 213. The trial court's award of the military pay was affirmed, but only for the period beginning with the effective date of the Act. *See id.* at 213.

43. *See id.* at 211. Justice Pope authored the majority opinion joined by Justices Campbell, Ray, Spears, and Wallace.

upon divorce.[44] Following the reasoning of *Eggemeyer*, the justices concluded that a divestiture of separate personalty was prohibited by the Texas Constitution.[45] According to the majority, the Texas Constitution contained the exclusive definition of separate property and, therefore, permitting a court to award one spouse's separate property to the other spouse's separate estate would "impermissibly enlarge the exclusive constitutional definition of separate property."[46] Next, the court turned to the language of section 3.63 of the Family Code, in particular the "estate of the parties," and ruled that this phrase refers only to the community estate[47] and that the statute allows a "division" of the estate and not a "divestiture" of title to property.[48] Distinguishing between separate realty and separate personalty in dividing property upon divorce, the majority opined, would be an unreasonable classification of property.[49]

In a lengthy concurrence, three justices[50] disagreed with the majority's discussion of the prohibition against divestiture of separate personalty and considered such discussion obitur dictum.[51] Maintaining that *Eggemeyer's* holding was limited to its facts, the concurring opinion stated the belief that the constitutional grounds discussed in *Eggemeyer* were not necessary for the holding in that case and, consequently, only dictum.[52] The justices argued that the constitutional definition of separate property is not exclusive because there are instances in which separate

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44. *See id.* at 213.

45. *See id.* at 213.

46. *See id.* at 213. The court relied on its holding in Arnold v. Leonard, 273 S.W. 799 (Tex. 1925), which stated that article 16, section 15 of the Texas Constitution provided the exclusive definition of separate property and any attempt by the legislature to enlarge it would be unconstitutional. *See id.* at 213.

47. *See id.* at 213-14. The court traced the history of section 3.63 of the Texas Family Code and determined that the legislature had only intended the community estate to be divided. *See id.* at 214. Further, the court reasoned that the whole community property system is based upon a distinction between the two classes of property. Allowing the divestiture of both separate and community property, the court stated, would obliterate this distinction and all the case law pertaining to this distinction and defeat the purpose of the community property system. *See id.* at 216.

48. *See id.* at 215. Justice Pope compared a "division" to a partition suit in which a court merely terminates a tenancy in common rather than "divests" title out of one spouse. *See id.* at 215.

49. *See id.* at 219-20.

50. *See id.* at 228 (McGee, J., concurring). Justice McGee wrote a concurring opinion joined by Justices Barrow and Sondock.

51. *See id.* at 223 (McGee, J., concurring). Justice McGee believed that the majority's discussion regarding the prohibition against divesting separate property was not necessary for the disposition of the case since the court determined the savings bonds were not separate property. *See id.* at 223 (McGee, J., concurring).

52. *See id.* at 225 (McGee, J., concurring).

property is created which are outside that definition.[53] They further reasoned that due process is not violated because Texas has a sufficient state interest in marital relationships to justify divestiture of separate personalty.[54] Justice McGee also pointed to the fact that Texas courts have historically allowed the division of separate personal property.[55] Finally, in response to the majority's argument that other community property states prohibit the divestiture of separate personalty, the justices noted that these states also allow alimony payments, which Texas prohibits.[56] In a separate concurring opinion, Chief Justice Greenhill stated that the legislature should decide how to deal with separate personal property as this would provide an alternative to alimony.[57]

The *Cameron* decision firmly establishes the manner in which common law marital property will be treated in a Texas divorce.[58] The decision will have a great impact as Texas receives an increasing number of former residents of common law states.[59] The court adopted a more fair and equitable scheme to distribute property acquired during marriage in a common law state by rejecting the traditional approach to treating such property as separate upon divorce in Texas.[60] The new approach is consistent

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53. *See id.* at 226 (McGee, J., concurring). The concurring justices illustrated this point by the following three examples: (1) community property not divided upon divorce which is owned by the ex-spouses separately as tenants in common; (2) a mutation of separate property in which the separate property changes form; and (3) personal injury recoveries. *See id.* at 226 (McGee, J., concurring).

54. *See id.* at 227 (McGee, J., concurring). The divestiture of personal property, the justices reasoned, is allowed when ordering child support payments and imposing a duty of support upon one spouse; a valid state interest justifies both these invasions of separate personalty and, therefore, should justify divestiture of personalty upon divorce. *See id.* at 226 (McGee, J., concurring).

55. *See id.* at 225 (McGee, J., concurring).

56. *See id.* at 228 (McGee, J., concurring). The justices stated that alimony and divestiture of personal property are two distinct and different means of achieving the same result. Since alimony is prohibited, therefore, the justices reasoned that the legislature has implicitly approved divestiture of personalty to insure that the other spouse does not become a ward of the state. *See id.* at 228 (McGee, J., concurring).

57. *See id.* at 228 (Greenhill, C.J., concurring).

58. *See id.* at 220. The entire court agreed that common law marital property should be treated as community property if such property would have been community property had the spouse lived in Texas when it was acquired. *See id.* at 220; *id.* at 223 (McGee, J., concurring); *id.* at 228 (Greenhill, C.J., concurring).

59. *See* BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1980, at 13 (1980). From 1970 to 1980, the population of Texas increased by about 3,034,000 people. Approximately 48% of this increase was due to immigration from other states. *See id.*

60. *See* Mitchim v. Mitchim, 509 S.W.2d 720, 722-24 (Tex. Civ. App.—Austin 1974), *rev'd on other grounds*, 518 S.W.2d 362, 367 (Tex. 1975). The *Mitchim* case illustrates the inequities of the traditional approach to treating all common law property as separate prop-

with recent case law,[61] the intentions of the Texas legislature,[62] and the spirit of the community property system.[63]

The concept of quasi-community property does not conflict with the constitutional guidelines expressed in *Eggemeyer*.[64] In fact, the doctrine of implied exclusion, which prohibits enlarging the constitutional definition of separate property,[65] dictates that quasi-community property should be treated as community property.[66] Some common law marital property, being outside the constitutional definition of separate property, would be considered community property in Texas.[67] Treating all common law marital property as separate property, therefore, would impermissibly enlarge the constitutional definition of separate property.[68]

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erty. In *Mitchim*, the husband accumulated a large separate estate during the couple's twenty-three year marriage in a common law state. *See id.* at 722. The couple obtained a divorce after residing in Texas only three months. *See id.* at 722. Upon divorce, the court treated the common law property as the husband's "separate" property and, therefore, not subject to division. *See id.* at 724. Under the *Cameron* decision, a court may divide such property and achieve a fairer distribution of property. *Compare id.* at 724 (common law property treated as separate property) *with* Cameron v. Cameron, 641 S.W.2d 210, 220 (Tex. 1982) (common law property treated as community property).

61. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977). The Texas Supreme Court, in *Eggemeyer*, held that the phrase "estate of the parties" means only the community estate and, therefore, separate property of one spouse could not be divested upon divorce. *See id.* at 139.

62. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1982-1983). The Texas Legislature amended section 3.63 to allow courts to treat common law marital property as community property in a Texas divorce if such property would have been classified as community had it been acquired in Texas. *See id.* § 3.63(b).

63. *See generally* Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 40 (1967) (discussion of history of community property system and reasons why such system distinguishes between separate and community property).

64. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139-41 (Tex. 1977). The decision in *Eggemeyer* was based upon two constitutional grounds. First, the Texas Constitution provided the exclusive definition of separate property and any attempt to enlarge it, including divesting separate property upon divorce, is prohibited. *See id.* at 139. Additionally, the divesting of separate property was a violation of due course of law absent any public benefit. *See id.* at 141.

65. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1982); Arnold v. Leonard, 114 Tex. 535, 539, 273 S.W. 799, 801 (1925).

66. *Compare* Cameron v. Cameron, 641 S.W.2d 210, 220 (Tex. 1982) (quasi-community property is property considered community in Texas) *with* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977) (separate property cannot consist of that considered community in Texas).

67. *See* Gaulding v. Gaulding, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1974, no writ) (property acquired during marriage in common law state termed "separate" although not acquired by gift, devise, or descent).

68. *See* Coote v. Coote, 592 S.W.2d 52, 54 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.). In *Coote*, the court recognized that the husband's retirement benefits would have

Treating common law marital property as community property, moreover, does not violate due process.[69] According to *Eggemeyer,* due process did not allow the divestiture of separate property as defined by the Texas Constitution;[70] however, the *Cameron* decision permits a division of only the common law property that would be considered community property in Texas.[71] By definition, therefore, quasi-community property does not fall within the class of property defined by the Texas Constitution and prohibited from divestiture by *Eggemeyer.*[72] Furthermore, *Eggemeyer* involved a "taking" of one spouse's separate property in which the acquiring spouse had full equitable and legal title.[73] In contrast, *Cameron* dealt with common law property which was subject to the inchoate, equitable rights of the nonacquiring spouse.[74] Thus, as the majority reasoned, the acquiring spouse, as owner of the property, is not losing anything more when the common law property is divided in a Texas divorce.[75] Since separate property may be divested upon divorce in a common law state but is prohibited from divestiture in Texas, the acquiring spouse may actually receive more protection under Texas divorce law.[76] Thus, when compared

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been community property if the couple lived in Texas. *See id.* at 54. The court, however, labeled the benefits as "separate" property because they were earned while the couple resided in a common law state. *See id.* at 54. Since the "separate" property would not be included in the constitutional definition of separate property, it would be quasi-community property in Texas. Thus, the treatment of quasi-community property as separate property would violate the implied exclusion doctrine of *Eggemeyer. See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977) (property not defined as separate by constitution cannot be separate).

69. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140-41 (Tex. 1977). The court, in *Eggemeyer,* reasoned that dividing a spouse's separate property would amount to an unconstitutional "taking" of the property in violation of due course of law. *See id.* at 140-41.

70. *See id.* at 140. The *Eggemeyer* decision dealt with separate property as defined in a community property system. *See id.* at 140.

71. *See* Cameron v. Cameron, 641 S.W.2d 210, 220 (Tex. 1982).

72. *Compare id.* at 220 (quasi-community property is all property *not* acquired before marriage or afterwards by gift, devise, descent, or agreement) *with* TEX. CONST. art. XVI, § 15 (separate property is property acquired before marriage or afterwards by gift, devise, descent, or agreement).

73. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977). The property involved in *Eggemeyer* was the separate real property of one spouse which was acquired in Texas and protected from divestiture by statute at the time of its acquisition. *See id.* at 138. Although the statutory prohibition had been omitted at the time of divorce, the wife had no equitable right to receive her husband's separate realty. *See id.* at 138.

74. *See* Cameron v. Cameron, 641 S.W.2d 210, 212 (Tex. 1982). In *Cameron,* the property in question was acquired in a common law state which allowed the division of the property upon divorce. *See id.* at 212. Thus, the wife had an equitable interest in her husband's separate property. *See id.* at 220.

75. *See id.* at 223.

76. *Compare id.* at 220 (separate personalty may not be divided upon divorce) *with* Schmidt v. Schmidt, 325 N.W.2d 230, 233 (N.D. 1982) (common law state may divide all

to the state's interests involved,[77] the treatment of quasi-community property as community property does not violate the due process rights of the spouse who acquired the property in a common law state.[78]

An interesting aspect of the *Cameron* decision is the court's adoption of the quasi-community property concept as part of the substantive law of the state.[79] Although the constitutionality of the statute was not tested by either party, the court approved the community property treatment of quasi-community property.[80] As such, the court implicitly upheld the amended statute's constitutionality and, thereby, closed the door to the possibility of a later constitutional challenge.[81] Further, the amendment

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marital property including that considered separate in community property state). Of course, this does not hold true when the property was acquired in one of the three pure common law states where the property is divided strictly according to which spouse holds legal title. *See* Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 249-50 (1981) (only pure common law property states are Mississippi, Virginia, and West Virginia).

77. *See* Bouquet v. Bouquet, 546 P.2d 1371, 1377-78, 128 Cal. Rptr. 427, 433 (1976) (state has interest in "equitable dissolution of the marital relationship"). The state has interests in preventing a person from becoming a ward of the state, administering fair resolutions of marital disputes, ensuring that each spouse has sufficient resources to lead a productive life after divorce, and ensuring that divorced families have a stable, financially secure home life. *See* Oldham, *Property Division in a Texas Divorce of a Migrant Spouse: Heads He Wins, Tails She Loses?* 19 HOUS. L. REV. 1, 42 (1981). *But see* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 141 (1977) (no benefit to public welfare by taking of separate realty of one spouse). It must be noted, however, that *Eggemeyer* dealt with the separate realty of one spouse which had been previously protected from divestiture by statute. *See id.* at 139. In contrast, the *Cameron* case involved property which would have been community property if acquired while married in Texas and, furthermore, the division of such property was authorized by statute. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982-1983).

78. *See* Addison v. Addison, 399 P.2d 897, 901-02, 43 Cal. Rptr. 97, 102 (1965). In *Addison*, the husband argued that the California quasi-community property statute authorized an unconstitutional taking of vested property rights he acquired in common law marital property. *See id.* at 901, 43 Cal. Rptr. at 101. This argument was enhanced by the fact that one court held that states may not alter vested property rights solely on the basis of a change in domicile. *See In re* Thornton's Estate, 19 P.2d 778, 780 (Cal. 1933), *overruled on rehearing*, 33 P.2d 1, 3 (1934). The *Addison* court, however, rejected the husband's argument noting that the property rights were not altered merely because of the change of domicile, but rather upon an event, the divorce, which occurred after the change in domicile. *See* Addison v. Addison, 399 P.2d 897, 902, 43 Cal. Rptr. 97, 102 (1965); *see also* R. LEFLAR, AMERICAN CONFLICTS LAWS 569-71 (1968).

79. *See* Cameron v. Cameron, 641 S.W.2d 210, 222 (Tex. 1982).

80. *See id.* at 220. The petitioner, Sue Cameron, urged the court to either overrule *Eggemeyer* or to treat separate personalty differently than separate realty. *See id.* at 213. The respondent, Paul Cameron, argued that *Eggemeyer* is the correct rule of law and applies to separate personalty, as well as separate realty. *See* Brief for Appellant at 20-23, Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982).

81. *See* Cameron v. Cameron, 641 S.W.2d 210, 223 (Tex. 1982). The court states that its

to section 3.63 did not contain a retroactive provision.[82] The decision in *Cameron*, as part of the substantive law, however, is applicable to property acquired before the statute was amended.[83]

The second aspect of the *Cameron* decision is the prohibition against divestiture of separate personal property.[84] The majority based its decision in part on the doctrine of implied exclusion, reasoning that divesting one spouse's separate property and awarding it to the other spouse as separate property created a form of separate property not defined by the constitution.[85] Reliance on this principle to prevent the division of separate property upon divorce, however, is rather tenuous, if not erroneous.[86] A major flaw in this reasoning is the court's application of the doctrine to the nature of property which has been changed by the fact of the di-

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"judicial adoption of the quasi-community property amendment to Tex. Fam. Code Ann. § 3.63 does not violate article I, section 19 of the Texas Constitution." *Id.* at 223. Thus, it is apparent that the court would more than likely uphold the constitutionality of the statute if presented with the issue. *See* Addison v. Addison, 399 P.2d 897, 903, 43 Cal. Rptr. 97, 103 (1965) (upholding constitutionality of California quasi-community property statute).

82. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1982-1983).

83. *See* Cameron v. Cameron, 641 S.W.2d 210, 222 (Tex. 1982). Since the divorce suit was filed in 1978 and section 3.63 was amended in 1981, all the property accumulated by the Camerons in the common law states was acquired prior to the enactment of the amendment to section 3.63. *See id.* at 212. In *Bouquet*, one party argued that the retroactive application of the California quasi-community property statute unconstitutionally impaired his property rights which vested before the effective date of the statute. *See* Bouquet v. Bouquet, 546 P.2d 1371, 1375-76, 128 Cal. Rptr. 427, 431-33 (1976). The California court held that the impairment of property rights was justified by the state's "paramount interest in the equitable distribution of marital property." *Id.* at 1376, 128 Cal. Rptr. at 432-33. The amendment does not state whether it should be applied either retroactively or prospectively. *See* TEX. FAM. CODE. ANN. § 3.63(b) (Vernon Supp. 1982-1983). The enabling language of the Act, however, indicates that the Act applies only to suits for divorce in which a hearing has not been held before September 1, 1981. *See* 1981 Tex. Gen. Laws, ch. 712, § 3, at 2657. Since the Cameron's divorce suit was filed in 1978, the Supreme Court was precluded from relying on section 3.63(b) in deciding the quasi-community property issue. *See* Cameron v. Cameron, 641 S.W.2d 210, 212 (Tex. 1982). The judicial adoption of the statutory language and its retroactive effect on the common law property, dissipates any argument that section 3.63(b) should be applied only prospectively. *See* Bouquet v. Bouquet, 546 P.2d 1371, 1377, 128 Cal. Rptr. 427, 432 (1976) (applying California quasi-community property law retroactively). *See generally* Sampson, *Interstate Spouses, Interstate Property, and Divorce*, 13 TEX. TECH L. REV. 1285, 1351-55 (1982) (argument that section 3.63(b) intended to have retroactive effect). *But see In re* Marriage of Furimsky, 595 P.2d 662, 663 (1979) (Arizona quasi-community property statute applied only prospectively since no indication by legislature to apply retroactively).

84. *See* Cameron v. Cameron, 641 S.W.2d 210, 213 (Tex. 1982).

85. *See id.* at 213.

86. *See generally* Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 42-44 (1978) (general discussion concerning applicability of implied exclusion doctrine to property upon termination of marriage).

vorce.[87] Following this reasoning, the implied exclusion doctrine would prohibit a court from dividing community property upon divorce since the division would change the nature of the property from community to separate.[88] Further, the constitution envisions two circumstances in which separate property is acquired—either before the marriage or afterwards, the latter presupposing the existence of a marriage.[89] The constitutional definition of separate property, therefore, should be applicable to property acquired before and during the marriage and not, as the majority implies, upon termination of the marriage.[90] In sum, the reasoning that the implied exclusion doctrine prevents courts from divesting separate property is not completely flawless.[91]

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87. *See id.* at 43. The majority reasoned that one spouse would receive the other spouse's separate property and hold that property as his or her own separate property. *See* Cameron v. Cameron, 641 S.W.2d 210, 213 (Tex. 1982). Thus, the nature of the property would change upon divorce from one spouse's separate property to the other spouse's separate property. *See id.* at 213.

88. *See* Commissioner v. Chase Manhattan Bank, 259 F.2d 231, 236 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959). A divorce decree terminates the community estate and the property awarded each spouse from the community estate becomes the separate property of that spouse. *See id.* at 236. A division of community property upon divorce, thus, changes the nature of the property from community to separate property. *See id.* at 236. Consequently, a division of community property, as well as the divestiture of separate property, would create a form of separate property not defined by the Texas Constitution. *Compare id.* at 236 (division of community property upon divorce creates separate property not defined by constitution) *with* Cameron v. Cameron, 641 S.W.2d 210, 213 (Tex. 1982) (divestiture of separate property creates form of separate property not defined by constitution).

89. *See* TEX. CONST. art. XVI, § 15 (amended 1980). One commentator has noted that the constitutional definition controls the characterization of property acquired by a "wife." Therefore, the constitutional classification of property should "fix the status of property . . . as though the property were acquired during the marriage when the parties are working together as husband and wife." Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 42 (1978). Further, the purpose of a divorce proceeding is to terminate one's status as a "wife"; thus, the property acquired as a result of that proceeding would not be acquired as a "wife," making the constitutional definition inapplicable. *See id.* at 43.

90. *See id.* at 43.

91. *See* Cameron v. Cameron, 641 S.W.2d 210, 226-27 (Tex. 1982) (McGee, J., concurring). The concurring justices attack the majority's reasoning on the basis that there are instances in which separate property is created, such as undivided community property, personal injury recoveries, and mutations which do not fall within the constitutional definition of separate property. *See id.* at 226 (McGee, J., concurring). This attack is weakened, however, upon closer examination of each of these examples. For instances, the Texas Supreme Court refused to classify a cause of action for personal injures as property within the meaning of the constitutional definition of separate property. *See* Graham v. Franco, 488 S.W.2d 390, 395 (Tex. 1972) (reasoning cause of action not considered assignable property right when constitution written). Furthermore, a recovery for personal injuries is not property "acquired" during the marriage, but rather compensation for an infringement of a personal right which existed regardless of the marriage. *See id.* at 394-95. Additionally, a muta-

The majority's argument that the divestiture of separate personal property is not authorized by statute[92] provides a more concrete basis for the decision. Defining the "estate of the parties" as only the community estate is, admittedly, more restrictive than its apparent pre-*Eggemeyer* meaning.[93] Nevertheless, this definition of the phrase is consistent with the definition of the phrase pronounced by a majority of the court in *Eggemeyer* six years earlier.[94] Further, this construction of the statutory language is not such a radical departure from the statute's previous meaning and application.[95] Historically, the statute has distinguished between community and separate realty and has never been interpreted, as the concurring opinion suggests, to give courts unrestrained authority to divide *all* the property of both spouses irrespective of its nature.[96] The

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tion, the changing of form of separate property, does not create a different class of separate property not defined by the constitution. Instead, as one commentator reasoned, the separate property only takes a new form and "the owner's rights in the res remain the same." Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 42 (1978). The concurring justices, however, do have a valid argument by pointing to the fact that undivided community property becomes the separate property, owned as tenants in common by both spouses. *See* Cameron v. Cameron, 641 S.W.2d 210, 226 (Tex. 1982) (McGee, J., concurring).

92. *See* Cameron v. Cameron, 641 S.W.2d 210, 213-19 (Tex. 1982).

93. *See, e.g.*, Hedtke v. Hedtke, 112 Tex. 404, 408, 248 S.W. 21, 22 (1923) (court may award all personal property, separate or community, to other spouse); Klein v. Klein, 370 S.W.2d 769, 771 (Tex. Civ. App.—Eastland 1963, no writ) ("estate of parties" means both community and separate estates); McCart v. McCart, 275 S.W.2d 155, 157 (Tex. Civ. App.—Fort Worth, 1955, no writ) ("estate subject to division" includes separate and community estate).

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

95. *See* McElreath v. McElreath, 162 Tex. 190, 193, 345 S.W.2d 722, 724 (1961) (courts not authorized by statute to divest title to separate property). Other courts, although recognizing the statute allowed division of both community and separate property, returned the separate property to its owner. *See, e.g.*, Spencer v. Spencer, 589 S.W.2d 174, 176 (Tex. Civ. App.—El Paso 1979, no writ) (separate property returned to owner upon divorce); Newland v. Newland, 529 S.W.2d 105, 108 (Tex. Civ. App.—Fort Worth 1975, writ dism'd) (separate property generally restored to owner); Dorfman v. Dorfman, 457 S.W.2d 91, 95 (Tex. Civ. App.—Waco 1970, no writ) (courts return separate property to owner upon divorce).

96. *See* Cameron v. Cameron, 641 S.W.2d 210, 225 (Tex. 1982) (McGee, J., concurring). The concurring justices stated that the "courts of this state historically have interpreted 'estate of the parties' to mean *all* property of the parties, whether community or separate." *Id.* at 225 (McGee, J., concurring) (emphasis added). Texas courts have never been permitted by statute to divide all the property of the spouses. From 1841 to 1970, the predecessors to section 3.63 have prohibited the divesting of title to real property. *See* 1841 Tex. Gen. Laws, An Act Concerning Divorce and Alimony § 4, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898). The original statute enacted in 1841 was in effect until 1925 and stated that "nothing herein contained shall be construed to compel either party to divest him or herself of the title to real estate or to slaves." *See id.* at 484. From 1925 until 1970 the Act was codified as article 4638 which included the prohibition against divestiture of the title to real estate. *See*

Cameron interpretation of the "estate of the parties" is, moreover, consistent with the intent of the legislature, both past and present.[97] Acting within the framework of the community property system, it is certainly logical that by choosing the word "estate" instead of "estates," the early legislature intended that only the estate owned by both spouses in common should be divided.[98] In addition, the recent amendment to section 3.63 was enacted on the assumption by the legislature that separate property could not be divested upon divorce.[99]

TEX. REV. CIV. STAT. ANN. art. 4638 (1925), *repealed by*, Act of May 16, 1969, ch. 888, § 1, 1969 Tex. Gen. Laws 2707, 2725 (enacting Family Code). Until 1960, this prohibition was even applied to community realty. *See* Tiemann v. Tiemann, 34 Tex. 522, 524-25 (1871); *cf.* Puckett v. Puckett, 205 S.W.2d 124, 125 (Tex. Civ. App.—Texarkana 1947, no writ) (dictum). In 1960, the Texas Supreme Court finally ruled the prohibition inapplicable to community realty, thus, allowing courts thereafter to divest title to community real estate. *See* Hailey v. Hailey, 160 Tex. 372, 376, 331 S.W.2d 299, 303 (1960). Although the prohibition was omitted when the legislature enacted section 3.63 in 1970, courts were still reluctant to divest title to separate realty. *See* Ramirez v. Ramirez, 524 S.W.2d 767, 771 (Tex. Civ. App.—Corpus Christi 1975, no writ). Professor McKnight, a member of the Texas Bar Association committee responsible for drafting section 3.63, explained the omission of the prohibitive language as merely a legislative oversight. *See* McKnight, *Annual Survey of Texas Law: Matrimonial Property*, 27 SW. L.J. 27, 39 (1973). In any event, the meaning of the "estate of the parties" was never clearly established by the Texas Supreme Court and courts were never vested with the authority to divide all the property of both spouses without regard to its nature. *See generally* Comment, *The Division of Marital Property Upon Divorce and Quasi-Community Property Law in Texas: The Texas Legislature Amends Section 3.63 of the Family Code*, 23 S. TEX. L.J. 139, 143-46 (1982) (history of section 3.63).

97. *See generally* Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 40-44 (1973) (discussion of legislative intent of section 3.63).

98. *See* McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CAL. W.L. REV. 117, 118-23 (1971). The original Texas divorce statute utilized the phrase "estate of the parties." This statute was enacted in the context of a community property system which recognized two classes of marital property—separate property owned solely by the acquiring spouse and community property owned in common by both spouses. *See id.* at 118-23. Against this background, it is logical to conclude that the estate intended by the early legislature to be divided was the only "estate" owned by both spouses in common—the community estate. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977).

99. *See* HOUSE COMM. ON THE JUDICIARY, BILL ANALYSIS, Tex. H.B. 753, 67th Leg. (1981). The intention of the legislature in amending section 3.63 is demonstrated by the following:

> Lower court decisions indicate that Texas courts are bound by the nomenclature of the common law state and cannot consider as community property that which is not called community property in the common law state. The inequity arises because Texas courts are, at the same time, not allowed to recognize the equitable interest of both spouses in the property that would be found in the common law state. Therefore, one spouse unfairly receives no part of the property.

Id.

The majority's distinction between a "division" and a "divestiture" of property, however, does not add much merit to the argument that the legislature intended the "estate of the parties" to mean the community estate.[100] A divestiture of property can and does occur when community property is divided upon divorce in cases where one spouse is awarded a greater portion of the community estate or even the entire community estate.[101] The concurring justices criticize the majority's interpretation of the phrase as a departure from its historical definition,[102] yet they agree that common law property, which was historically treated as separate property, should now be treated as community property.[103]

It is obvious that the court's discussion of the prohibition against divestiture of separate personalty was not necessary for the holding in the case, yet it was an issue presented by one party.[104] Dicta or not, after *Eggemeyer, Campbell,* and *Cameron,* it is also readily apparent that the present state of the law in Texas is that courts may not divest separate property whether real or personal.[105] At first glance, the *Cameron* deci-

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100. *See* Cameron v. Cameron, 641 S.W.2d 210, 215 (Tex. 1982).

101. *See* Callaway v. Elliott, 396 S.W.2d 242, 243, 245 (Tex. Civ. App.—Tyler 1965, writ dism'd). A court, as in *Callaway,* may compel one party to convey title to property to the other spouse pursuant to a divorce decree. *See id.* at 243. Additionally, even though both spouses have vested rights in community property, a court has the discretion to award the entire community estate to one party and, thereby, divest the other party of his or her interest in the property. *See* Reardon v. Reardon, 163 Tex. 605, 607, 359 S.W.2d 329, 329-30 (1962). Thus, a "divestiture" of title can occur upon divorce. *See* Haiduk v. Haiduk, 374 S.W.2d 323, 326 (Tex. Civ. App.—San Antonio 1963, writ dism'd) (held that court can divest title to community property out of one spouse and vest it in other spouse). Although the distinction between a "division" and a "divestiture" may not be a valid reason that "estate of the parties" was intended as the community estate, mere use of the word "division" alone may indicate such intent. As one writer remarked, "[I]n order for the court to 'divide' property belonging to the parties, it seems reasonable to assume that the parties must have a joint or undivided interest in the property which the court is authorized to divide." Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce,* 10 ST. MARY'S L.J. 37, 49 (1978); *see also* Hailey v. Hailey, 160 Tex. 372, 377, 331 S.W.2d 299, 301 (1960) (court stated a division occurs when each party has an interest in property).

102. *See* Cameron v. Cameron, 641 S.W.2d 210, 225 (Tex. 1982) (McGee, J., concurring).

103. *See id.* at 213, 223 (McGee, J., concurring).

104. *See id.* at 220. Since the court determined that the property in question was not separate property, its subsequent discussion of the divestiture of separate property was not necessary to dispose of the case. *See id.* at 220, however, Sue Cameron urged the court to overrule *Eggemeyer* which prohibited the divestiture of separate realty. *See id.* at 213.

105. *See, e.g.,* Cameron v. Cameron, 641 S.W.2d 210, 213 (Tex. 1982) (held separate personalty may not be divided upon divorce, although discussion possibly dictum); Campbell v. Campbell, 23 Tex. Sup. Ct. J. 391, 394-96 (June 4, 1980) (held separate realty and personalty may not be divested upon divorce, although opinion withdrawn after parties settled), *opinion withdrawn,* 613 S.W.2d 236 (Tex. 1980); Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977) (courts prohibited from divesting separate realty upon divorce with

sion seems to have a stifling effect on the ability of a court to achieve a fair and equitable distribution of property upon divorce.[106] Several factors, however, operate to mitigate the apparent harshness of the decision.

One such factor is the latitude afforded a trial court in dividing the community estate.[107] In two other community property states, statutes mandate that courts split the community estate into two equal shares regardless of the circumstances.[108] Texas courts can consider several factors when dividing the community property including the size of each spouse's separate estate, earning capacity of each spouse, and the relative financial condition of each spouse.[109] Another mitigating factor is the strong statutory presumption that all property acquired during the marriage is community property.[110] Additionally, as a general rule, courts have returned the separate estates to each spouse and have rarely invaded the separate estate of one spouse.[111] A fourth mitigating factor is the ability of courts

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constitutional discussion encompassing separate personalty as well).

106. *See generally* Oldham, *Property Division in a Texas Divorce of a Migrant Spouse: Heads He Wins, Tails She Loses?*, 19 HOUS. L. REV. 1, 3 (1981) (describing inequity of prohibiting divestiture of separate property).

107. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1982-1983). The statute authorizes a trial court to divide the estate of the parties in a "manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." *Id.* § 3.63(a).

108. *See* Mitchelson v. Mitchelson, 520 P.2d 263, 266 (N.M. 1974) (stating court has statutory duty to divide community property equally); CAL. CIV. CODE § 4800 (Deering Supp. 1983); *cf.* IDAHO CODE § 32-712 (Supp. 1982) ("[u]nless there are compelling reasons otherwise, there shall be a substantially equal division in value").

109. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1982-1983) (estate of parties should be divided in "just and right" manner). Such discretion has allowed trial courts to award an unequal portion of the community estate to one spouse. *See* Keene v. Keene, 445 S.W.2d 624, 626 (Tex. Civ. App.—Dallas 1969, writ dism'd). Several factors are considered by the trial court when dividing the community estate. *See* Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981). The Texas Supreme Court listed several factors a trial court can consider when dividing community property. The factors listed are: (1) the spouse's capacities and abilities; (2) benefits which the party not at fault would have derived from the continuation of the marriage; (3) business opportunities; (4) education; (5) relative physical conditions; (6) relative financial conditions and obligations; (7) disparity of ages; (8) size of separate estates; and (9) the nature of the property. *Id.* at 699. Hence, the "facts and equities of the case may support an unequal division of the community estate in favor of that spouse not having much separate property." Ramirez v. Ramirez, 524 S.W.2d 767, 771 (Tex. Civ. App.—Corpus Christi 1975, no writ).

110. *See* TEX. FAM. CODE ANN. § 5.02 (Vernon 1975). The statute states that all "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property." *Id.*

111. *See, e.g.*, Bryant v. Bryant, 478 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1972, no writ) ("as a general rule separate property will be restored to its owner"); Dorfman v. Dorfman, 457 S.W.2d 91, 95 (Tex. Civ. App.—Waco 1970, no writ) (separate property generally given to its owner); Tullis v. Tullis, 456 S.W.2d 172, 173 (Tex. Civ. App.—El Paso 1970, writ

now to treat common law property as community property and also to divide military retirement pay as authorized by federal statute.[112] A fifth factor which alleviates *Cameron's* apparent harsh practical impact is that the decision does not affect a spouse's duty of child support, as courts are authorized by statute to "set aside property to be administered for the support of the child."[113] Another factor is the availability of contractual alimony payments upon which both parties agree and which are not imposed by the court.[114] As a final protective measure, a spouse may enter into a prenuptial agreement to insulate the revenues of his or her separate property.[115]

The concurring justices maintain that there is a distinct difference in alimony and the division of separate property.[116] Yet, they also imply that separate property should be subject to division upon divorce because Texas prohibits alimony.[117] The import of this argument is that alimony and the division of separate property are, for all practical purposes, interchangeable and, therefore, have the same financial consequences on the spouse obligated either to pay alimony, or part with his or her separate property.[118] Considering the strong public policy against alimony in Texas, the court should not provide a substitute by judicial decision.[119]

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dism'd) (separate property usually returned to owner).

112. *See* Cameron v. Cameron, 641 S.W.2d 210, 212-13, 220 (Tex. 1982).

113. *See* TEX. FAM. CODE ANN. § 14.05 (Vernon 1975). Several methods for providing for the support of a child and/or spouse which fall short of divesting title to property are: (1) imposing a trust on husband's separate property for the benefit of the wife, see Ramirez v. Ramirez, 524 S.W.2d 767, 769 (Tex. Civ. App.—Corpus Christi 1975, no writ); (2) imposing a lien on separate property to insure support payments, see *In re* Marriage of Jackson, 506 S.W.2d 261, 267 (Tex. Civ. App.—Amarillo 1974, writ dism'd); or (3) appointing a receiver or trustee of the separate property to oversee child support payments, see Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 142 (Tex. 1977).

114. *See* Francis v. Francis, 412 S.W.2d 29, 33 (Tex. 1967). In allowing contractual alimony, the Supreme Court distinguished between the court's approval of family settlement agreements which impose contractual obligations from court-ordered permanent alimony payments. *See id.* at 31-32.

115. *See* TEX. CONST. art. XVI, § 15 (amended 1980).

116. *See* Cameron v. Cameron, 641 S.W.2d 210, 228 (Tex. 1982) (McGee, J., concurring). The distinction made by the concurring opinion is that alimony is a continuing personal obligation while the division of separate property is an isolated event. *See id.* at 228 (McGee, J., concurring).

117. *See id.* at 228 (McGee, J., concurring). The concurring opinion points to the fact that all of the other community property states which prohibit the division of separate property also allow alimony. *See id.* at 228 (McGee, J., concurring).

118. *See id.* at 228 (McGee, J., concurring). The concurring justices admit that both alimony and the divestiture of separate personalty are merely two means to achieve one end. *See id.* at 228 (McGee, J., concurring).

119. *See* Eichelberger v. Eichelberger, 582 S.W.2d 395, 402-03 (Tex. 1979) (discussing Texas' policy of prohibiting alimony).

Such a change in the law should come from the Texas Legislature.[120]

The *Cameron* opinion, however, does leave several unanswered questions. For instance, is quasi-community property treated as community property only upon divorce or does this characterization extend to the life of the marriage?[121] In other words, will the property be subject to the nonacquiring spouse's tortious liability or creditors?[122] Who will have the right to manage and control the property during the marriage?[123] How will the property be treated upon the death of one spouse?[124] The answer to these questions may be found in the court's limiting language which affords the property community treatment only upon divorce.[125] It is likely that these unresolved issues will be presented to Texas courts in

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120. *See id.* at 402-03.

121. *See generally* Sampson, *Interstate Spouses, Interstate Property, and Divorce*, 13 TEX. TECH L. REV. 1285, 1355 (1982) (discussion of tangential issues presented by recognition of quasi-community property).

122. *See* TEX. FAM. CODE ANN. § 5.61 (Vernon 1975). The nature of the property is important in determining whether such property is subject to the liability of one spouse to third parties. *See id.* §§ 5.61- .62. If the property is separate, it is not subject to the other spouse's liability unless both spouses are jointly liable while all the community property is subject to the liability of either spouse. *See id.* § 5.61. Similar California statutes do not mention quasi-community property, but generally presume that such property is separate until death or divorce of one spouse. *See* W. REPPY, COMMUNITY PROPERTY IN CALIFORNIA 291-95 (1980). Texas, however, has the doctrine of implied exclusion which dictates that quasi-community property must be community property. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977). Thus, a potential conflict exists by treating quasi-community property as separate property as California does. A more rational approach would be to treat quasi-community property as Texas would treat community property under the sole management and control of the acquiring spouse. *See generally* Sampson, *Interstate Spouses, Interstate Property, and Divorce*, 13 TEX. TECH L. REV. 1285, 1355-58 (1982) (discussion of impact of quasi-community property concept on other areas of law).

123. *See* TEX. FAM. CODE ANN. §§ 5.21- .27 (Vernon 1975 & Supp. 1982-1983). Although the statutes concerning management and control of marital property are rather detailed, generally, both spouses have equal rights to manage and control community property and the acquiring spouse has sole rights to manage and control property obtained in his or her name. *See id.* at §§ 5.21- .27. Professor Sampson reasons that the "rights of a husband and wife respecting management and control of quasi-community property, the right to reimbursement, and claims arising from interspousal torts are unaffected by the concept" of quasi-community property. Sampson, *Interstate Spouses, Interstate Property, and Divorce*, 13 TEX. TECH L. REV. 1285, 1356 (1982).

124. *See* TEX. PROB. CODE ANN. §§ 148-155 (Vernon 1980). The classification of quasi-community property upon death of one spouse as either separate or community will dictate where the property will go under the Probate Code. *Cf.* § 148-53. The California treatment of quasi-community property exemplifies the importance of classifying it as either separate or community. *Compare* CAL. PROB. CODE § 201 (Deering 1974) (surviving spouse receives one-third or one-half of separate property depending upon issue) *with id.* § 201.5 (Deering 1974 & Supp. 1983) (surviving spouse inherits all of quasi-community property in absence of testamentary disposition).

125. *See* Cameron v. Cameron, 641 S.W.2d 210, 220 (Tex. 1982).

the future or will be the subject of future legislation.[126]

The *Cameron* decision allows a trial court to fashion an equitable division of property upon divorce without compromising the integrity of the community property system instituted by the Texas Constitution. By allowing a division of quasi-community property along with military retirement pay, the court subdues the need for alimony. At the same time a court's inability to divide separate personal property may generate inequitable consequences in some cases. In any event, whether it is in providing for alimony, authorizing division of separate property, or designating how quasi-community property is to be treated during the marriage, a legislative response is inevitable.

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126. *See generally* Sampson, *Interstate Spouses, Interstate Property, and Divorce,* 13 TEX. TECH L. REV. 1285, 1355-58 (1982) (suggestions how quasi-community property should be treated in other areas of marriage).