CHARACTERIZATION & TRACING: AN OVERVIEW

Moderator
KELLY AUSLEY-FLORES, Austin

Panelists
PATRICE L. FERGUSON, Houston
RICHARD L. FLOWERS, JR., Houston
WILLIAM C. LOVE, CPA, Austin
MARY JOHANNA MCCURLEY, Dallas

Written by
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State Bar of Texas
37TH ANNUAL ADVANCED FAMILY LAW COURSE
August 1-4, 2011
San Antonio

CHAPTER 59

KELLY AUSLEY-FLORES

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Austin, Texas 78731
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EDUCATION

Texas Tech University, B.B.A. in 1987, cum laude
Texas Tech School of Law, J.D., 1995, cum laude

PROFESSIONAL ASSOCIATIONS AND HONORS

Board Certified by Texas Board of Legal Specialization, Family Law, since 2000
Fellow, American Academy of Matrimonial Lawyers
Member, Texas Academy of Family Law Specialists
Named Texas Super Lawyers® - Rising Stars® Edition (Texas Monthly, 2004 and 2005)
Member, Collaborative Law Institute of Texas
Member, International Academy of Collaborative Professionals
Member, State Bar of Texas (Family Law Section)
Member, College of the State Bar of Texas
Member, Austin Bar Association (Family Law Section)
Member, Texas Bar Foundation, 2004-2009
Member, Pro Bono College of the State Bar of Texas, 1999-2009
Recipient, 1998 and 1999 Pro Bono Award, Volunteer Legal Services of Central Texas

CAREER PROFILE

Practiced family law with Ausley, Algert, Robertson & Flores, L.L.P. since August, 1995 and became a partner in December, 2001.
Trained in Collaborative Law and trained as a family law mediator.
Volunteer, Volunteer Legal Services of Central Texas since 1996 as a mentor and lawyer.
Volunteer, Texas Advocacy Project previously Women's Advocacy Project since 2004 as a lawyer.
Obtained certification as a specialist in the area of family law through the Texas Board of Legal Specialization (December, 2000).

PERSONAL

Born February 23, 1965, in Lubbock, Texas and raised in Austin.
Married to Joe Flores - two children.
Member, First United Methodist Church, Austin.

AUTHOR and LECTURER

"Closing the File," Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 17, 2003.

"Post Trial Basics & Closing the File," Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 8, 2004.

"Effective Use of ADR in Family Law Cases," 2005 Poverty Law Conference, Texas Lawyers Care, March 30 - April 1, 2005.

"Closing the Friendly and Unfriendly File," Advanced Family Law Drafting Course, State Bar of Texas, December 8-9, 2005.

"Traveling Light: Collaborative Law Without Paralegals or Assistants," Collaborative Law Spring Conference 2008, State Bar of Texas, February 28-29, 2008.

"Collaborative Law," Alternative Dispute Resolution Course, University of Texas Law School, Professor Cynthia Bryant, March 6th, 2008.

"Child Support (What Do Judges Do in Various Counties) Above & Below the Guidelines, the High Income Earners (Death of the Obligor)," Marriage Dissolution Institute, State Bar of Texas and Family Law Section, April 17-18, 2008.

"Closing the File," Summer School - State Bar College, State Bar of Texas, July 17-19, 2008.

"Closing Documents Other than QDROs," Advanced Family Law Drafting Course, State Bar of Texas, December 4-5, 2008.

"Putting Agreements on Paper," Collaborative Law Course 2010, State Bar of Texas and Collaborative Law Institute of Texas, March 4-5, 2010.

"Closing the File," Advanced Family Law Drafting Course, State Bar of Texas, December 9-10, 2010.

LECTURER

"Creative Discovery," Family Law Essentials, Family Law Council, Nacogdoches, Texas, June 4, 2004.

"Post Trial Basics & Closing a File," State Bar Convention - Boot Camp, June 25, 2004.

"Closing Out Your File," Williamson County Family Law Seminar, October 29, 2004.

"How to Study for and Pass the Board Certification Exam," Advanced Family Law Course, State Bar of Texas, August 10, 2005.

"Trends in Family Law," 2009 Statewide Assistant Attorneys General Conference, Austin, Texas, July 10, 2009.

"Changes in SAPCR Issues and Trends for the Future," 35th Annual Advanced Family Law Course, State Bar of Texas, August 3-6, 2009.

"Collaborative Law," Travis County Family Law Section Luncheon, January 6, 2010.

"The Paradigm Shift," Nuts & Bolts of the Collaborative Process Course, State Bar of Texas and the Collaborative Law Institute of Texas, March 3, 2010.

COURSE DIRECTOR/PLANNING COMMITTEES:

Planning Committee - Collaborative Law Course 2010
Planning Committee - Advanced Family Law Course 2010
Course Director - Family Law Boot Camp 2010

Patrice Ferguson, CPA/ABV, JD, Houston
Founder and President of Ferguson Camp Poll, P.C.

Patrice Ferguson, CPA/ABV, JD founded Ferguson Camp Poll, P.C. in 1977, after beginning her career in the tax department of Ernst & Ernst. For 30+ years, Patrice has provided consulting services to her clients and has included in her practice marital property issues, tracing and characterization, business valuation, and expert testimony, as well as assistance with structure of settlement and decree language. She has been a frequent speaker for the State Bar of Texas in the areas of valuation, characterization and tracing, mediation, and tax issues. Patrice has been a member of The University of Texas at Austin Accounting Advisory Council for many years, and is a former Board Member and Past President of the University of Houston Law Alumni Association Board, as well as a Director of the University of Houston Law Foundation. She has been honored as a Distinguished Alumnus of the University of Texas College of Business and was named The University of Houston Law Center Alumna of the Year - 2003. She is a Houston Bar Foundation fellow and member of the Texas Family Law Foundation. When her schedule permits, Patrice enjoys baseball, cooking, travel, and wine tasting.

Education: The University of Texas at Austin: BBA - Accounting - 1973
The University of Houston Law Center: JD - 1989

Licenses & Certificates: Certified Public Accountant, Texas - 1975
Licensed, State Bar of Texas - 1991
AICPA Accredited in Business Valuation - 1998

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Houston, Texas 77002

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CURRICULUM VITAE
RICHARD L. FLOWERS, JR.

EDUCATION:

University of Texas (B.B.A., Finance 1979)
South Texas College of Law (J.D. 1982)
Honors include Dean's List and Order of the Lytae (honorary academic society) and Law Review.

PROFESSIONAL BACKGROUND:

McEvily & Flowers, Lawyers - October, 1996 - Present

Alexander & McEvily - June, 1991 - September, 1996

Creole International, Inc., Vice President/General Counsel - (February, 1990 - June, 1991)

Richard L. Flowers, Jr., Attorney at Law (April, 1988 - February, 1990)

Mueller, Oaks & Hartline, Houston, Texas (June, 1986 - April, 1988)

Butler & Binion, Houston, Texas (September, 1983 - June 1986)

Court of Appeals, First Supreme Judicial District – Briefing attorney to Chief Justice Frank G. Evans, (September, 1982 - August, 1983)

LEGAL PRACTICE:

Mr. Flowers' practice has been devoted to trial, arbitration and appeal of family law matters and other civil cases.

PROFESSIONAL MEMBERSHIPS/ADMISSIONS:

Member:

American Bar Association
Member, Family Law Section
State Bar of Texas

Member, Family Law Section
Member, Texas Family Law Council (term expires 2012)
Houston Bar Association
Member, Family Law Section
Former member, board of directors of Family Law Section
Texas Family Law Foundation, Lifetime Sustaining Member
Life Fellow, Texas Bar Foundation
Fellow, Houston Bar Foundation
U. S. District Courts for the Southern and Eastern Districts of Texas
U. S. Court of Appeals for the Fifth Circuit
AV Rated, Martindale-Hubbell
Bar Register of Preeminent Lawyers, Martindale-Hubbell

PROFESSIONAL ACTIVITIES:

Member: Family Law Council of the State Bar of Texas, Term expires 2012

Director, Family Law Section, Houston Bar Association (2005 – 2007)

Officer (Treasurer), Houston Young Lawyers Association (1987 - 1988)

Board Member, Houston Young Lawyers Association (Two terms: 1985 - 1986; 1986 - 1987)

Chairman, Houston Young Lawyers Association's Houston Area Women's Center Committee. (Two terms: 1985 - 1986; 1986 - 1987)

Board Member, The New School in the Heights, 403 Heights Boulevard, Houston, Texas 77007 (2008 – present)

Moderator, Family Law Essentials Seminar, Kingsville, Texas, 2010

Speaker, Preparing Your Expert for Cross Examination, Family Law on the Front Lines, July, 2010

Speaker, Personal Goodwill Issues: When the Consideration Received is in the Form of Executive Retirement Plans, Stock Options & Other Executive Perquisites, AICPA/AAML National Conference on Divorce, May, 2010

Author and speaker, Preparation and Use of the Inventory and Appraisement, 33rd Annual Marriage Dissolution Boot Camp, May, 2010

Speaker, Characterization Workshop: Big, Small, Unusual, and Unique; Mixed Characterization, 35th Annual Advanced Family Law Course, August 2009

Moderator, Family Law Essentials Seminar, Victoria, Texas, 2009

Speaker and co-author, Mandamus and More: Are Pre-Trial Appellate Rulings a New Free-For-All or Just the Same-Old-Same-Old?, 9th Annual Family Law On The Front Lines, The University of Texas School of Law, June, 2009

Moderator, Family Law Essentials Seminar, Victoria, Texas, 2008

Speaker and co-author, Dealing with Family Limited Partnerships, Trusts, and other Estate Planning , 34th Annual Advanced Family Law Course, August, 2008

Moderator and Speaker, Family Law Section's Continuing Legal Education Program, 2008 Annual Meeting of the State Bar of Texas, July 2008

Speaker and author, Tracing: Case Law Update
33rd Annual Advanced Family Law Course, August, 2007

Co-Chair and Moderator of Family Violence Seminar, 1986 (HYLA received Houston Area Women's Center's Community Service Award, 1986 for this program.)

REPORTED CASES:

In re: Michael G. Brown, relator, cause number 14-08-00548-CV, (Tex. App. – Houston [14th Dist.] 2009, no writ) (Original proceeding; lead counsel for children's mother at trial and on appeal)

J.T.T. and M.T.T. v. Chon Tri, et al, 162 S.W.3d 552; (Tex. 2005) (Co-counsel for J.T.T. and M.T.T at trial and on appeal)

In re M.A.M., 35 S.W. 3d 788 (Tex. App. – Beaumont 2001, no pet.) (Lead counsel for grandparent at trial and co-counsel on appeal)

In re Riedmueller, 2001 Tex. App. LEXIS 6150, (Tex. App. – Amarillo, 2001) (Unpublished opinion; lead counsel for Mr. Riedmueller at trial and on appeal)

Minnesota Mining & Manufacturing Company v. Nishika, Ltd., et al, 955 S.W. 2d 853 (Tex. 1996) (Co-counsel for 3M at trial)

CPS International v. Harris & Westmoreland, 784 S.W.2d 538 (Tex. App.— Texarkana 1990, no writ) (Lead counsel for CPS International at trial and on appeal)

Falcon Construction Company v. Bacon Towing Company, et. al, 797 F. 2d 975 (5th Cir. 1989) (Unpublished opinion; trial court opinion published at 613 F. Supp. 221) (Co-counsel for Falcon Construction Company at trial and on appeal)

Ismail v. Ismail, 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (Lead counsel for Mrs. Ismail in post-trial matters and co-counsel on appeal)

Bullock v. Kehoe, 678 S.W. 2d 558 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (Co-counsel for Mrs. Kehoe on appeal)

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EDUCATION

University of Texas — 1967 - 1971
Austin, Texas
BBA Accounting with Honors

Texas State Board of Public Accountancy — 1974
Licensed Certified Public Accountant
License # 13385

Accredited in Business Valuations — 2006
American Institute of Certified Public Accountants
Certificate # 3202

Member, Collaborative Law Institute of Texas — 2007
Past panel provider

PROFESSIONAL EXPERIENCE

KPMG Peat Marwick — 1972 - 1993

Began career as a staff accountant in June 1971, promoted to Manager in 1977, and elected to the Partnership in 1979; Served as Partner in charge of Audit Department until 1981; transferred to the Tax Department under a special program to develop new Tax Partners; Promoted to Partner in Charge of Tax in 1987, and subsequently Managing Partner of the Austin office in 1991.

Experience with KPMG provided rich tax and financial accounting knowledge, including business acquisitions, mergers and consolidations.

- Significant experience in structuring numerous types of tax-free transactions with complex negotiations for financial related institutions, car dealerships, large HVAC institutions and numerous other structured organizations.
- Financial background includes working with various types of financial institutions, insurance companies, and other business entities. Experienced and skilled in the understanding of financial reporting for governmental entities and Securities and Exchange filings, including intimate involvement with initial public offerings with exposure to international acquisitions.
- Significant experience in dealing with financial institutions with respect to work-out issues including both Resolution Trust Corporation and FDIC; Responsible for debt workouts in both insolvency and bankruptcy situations in excess of $800 million of debt restructure.
- Skilled in settlement negotiations involved in valuation procedures for marital property divisions, car dealerships, professional organizations, public affairs firms, law firms, and other business interests.

William C. Love, CPA 1993 - Present

Formed **William C. Love, CPA** accounting firm in January 1993. I have continued to practice public accounting and serve many of the same clients while in my tenure with KPMG. The practice has been most successful and has provided new opportunities to utilize my background and skills. Such experience includes:

- Organized and assisted in negotiations of a consolidation of national mechanical and plumbing contractors, including assistance in combining and merging 12 companies;
- Significant experience in modifying and restructuring debt arrangements in adversarial situations;
- Represent taxpayers before the IRS and successfully negotiates settlements of complex tax and financial issues before the Appellate Division;
- Significant experience in structuring, negotiating, and evaluating complex acquisition terms and agreements;
- Litigation support services for attorneys, expert testimony, property division, business valuations and separate and community & forensic tracing issues.
- Significant experience in Collaborative Law and work as financial neutral in numerous collaborative cases.

PROFESSIONAL AFFILIATONS

- Member - American Institute of Certified Public Accountants
- Member - Texas Society of Certified Public Accountants
- Member - Austin Chapter of Certified Public Accountants
- Member – Accredited Business Valuation by AICP
- Member – Certified Financial Forensics
- Member – Collaborative Law Institute of Texas
- Member – Texas Family Law Foundaion
- Member – The University of Texas Golf Club
- Member- Barton Creek Country Club
- Former Audit Committee, Baptist General Convention of Texas
- Board member and Audit Chair of EZ CORP, Inc., Austin, Texas
- Board member Cash Converters, Intl., Perth, Australia

MARY JOHANNA M^{C}CURLEY

M^{c}Curley, Orsinger, M^{c}Curley, Nelson & Downing, L.L.P.
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Dallas, Texas 75225
Phone: 214/273-2400
maryjo@momnd.com

MARY JOHANNA M^{C}CURLEY: born Baton Rouge, Louisiana, October 3, 1953; admitted to bar, 1979, Texas.

EDUCATION:
Centenary College (B.A., 1975).
Louisiana State University; St. Mary's University of San Antonio (J.D., 1979).
Board Certified - Family Law, Texas Board of Legal Specialization (1984).

EXTRACURRICULAR RESPONSIBILITIES:
Delta Theta Phi (Vice President, 1978-1979).
President, Student Senate, St. Mary's School of Law, 1979.

PROFESSIONAL RESPONSIBILITIES:
American Academy of Matrimonial Lawyers - Member since 1990;

Texas Chapter - Treasurer, 1993-1995; Secretary, 1995-1996; President-Elect, 1996-1997; President, 1997-1998.

National - Secretary, 2000-2002, Vice-President 2002-2004;

Special Concerns for Children Committee, 1997-present (Co-Chair, 2001-2002)

Co-Chair, Continuing Legal Education, 1995 and 1997-1998.
CLE Committee, 1990-1997 (co-chair, 1996)

Chair, Mediation Study Committee, 1993

Member, Board of Governors, 1998 - 2004

Member, Advertising Committee; Member, Marketing / Public Relations Committee.

Member, Stepfamilies' Rights and Adoption Committee, 1994.

Member, Interdisciplinary Relations - Mental Health, 1997 - present.

American Bar Association - Current member.

Texas Academy of Family Law Specialists - Current member; Board of Directors, 1990-1992.

State Bar of Texas -
Family Law Council, 1987-present; Adjunct Member, 1982-1985;

Family Law Section - Secretary/Treasurer, 1983; Vice Chairman, 1984; Chair, 1985; Past Chairman, 1986; Chair, 2003;

Member, Texas Supreme Court Child Support and Child Visitation Guidelines Committee, 1996-1997; Co-Chairperson, 1991-1992.

Chairman, Associate Judge's Training, 1998-1999.

Assistant Editor, Family Law Manual, State Bar of Texas, 1982-1989. Co-Editor: Family Law Manual, State Bar of Texas 1989-1990.

Annette Stewart American Inn of Court - Current member; Master, Secretary/Treasurer, 2003-2004.

Dallas Bar Association - Current member; Chair - Family Law Section, 1997.

AWARDS AND RECOGNITION:
Lexis-Nexis / Martindale-Hubbell - "A-V" ® Pre-Eminent ™ rated - (Highest Possible Rating in Both Legal Ability and Ethical Standards)
The Best Lawyers in America - 2005 - 2011 editions
Texas SuperLawyers, Thomson Reuters, Legal Division - 2003 - 2010
Top 50 Women Lawyers in Texas (Texas Monthly) - 2003 - 2010
Top 100 Lawyers in Texas (Texas Monthly) - 2009
Top 100 Lawyers in Dallas/Fort Worth (Texas Monthly) - 2005-2006, 2008-2010
Best Lawyers in Dallas (D Magazine) - 2004, 2005, 2009, 2010, 2011
Top Personal Lawyers in Dallas (D Magazine) - 2008, 2009
Best Women Lawyers in Dallas (D Magazine) - 2010

FACULTY:
Co-Course Director - Advanced Family Law Course, State Bar of Texas, 2005.
Assistant Course Director - Advanced Family Law Course, State Bar of Texas, 2000. Course Director - "Matrimonial Law", American Academy of Matrimonial Lawyers, 1998. Course Director - "Art and Advocacy of Family Law", State Bar of Texas, 1997.
Course Director - "Life, Lawyering and the Pursuit of Happiness", State Bar of Texas, 1995.
National Business Institute, Inc. - Child Custody and Child Visitation in Texas, 1992.

AUTHOR AND LECTURER:
"A Happy, Healthy You: A Woman's Guide to Happiness, Health & Harmony" (co-author), 2010

"Property and Debt Division: Creative Alternatives" with Larry L. Martin, Brad M. LaMorgese and Lindsay Daye Barbee, Advanced Family Law Course - State Bar of Texas, August 2009.

"Mr. & Mrs. & Mrs & Mrs. – Learning from Zion" with Elizabeth Branch, Advanced Family Law Course - State Bar of Texas, August 2008.

"Impaired Clients and Impaired Professionals" with Mike McCurley, Advanced Family Law Course - State Bar of Texas, August 2007.

"Parenting Plans - Who, What, Where & Why" with Keith M. Nelson, Advanced Family Law Course - State Bar of Texas, August 2006.

"Divorce: Prevention, Survival and Recovery" with Mike McCurley, Canyon Ranch, June 2006.

"Relocation: Long Distance Families" with Jan Marie DeLipsey and Kathryn J. Murphy, American Bar Association, May 2006.

"Psychological Testing" with Jonathan Gould, Ph.D. and Kathryn Murphy, American Academy of Matrimonial Lawyers - Annual Meeting, March 5, 2005.

"Relocation Debate" with Kathryn Murphy, Advanced Family Law Course - State Bar of Texas, August, 2004.

"Two People, Two Professions, One Marriage" with Mike McCurley, Fort Worth Business Press, June of 2004

"Family Law: Changes to Keep in Mind" with Laura M. Hilliard, Texas Bar Journal, January 2004 edition

"Did Your Client 'Get Hitched' Without A Hitch - Defending and Attacking Premarital and Post-Marital Agreements" with Carson P. Epes, New Frontiers in Marital Property Law - State Bar of Texas, 2003

"Don't Forget the Child" - Advanced Family Law Course - State Bar of Texas, 2003

“Top Ten Things You Should Know to Ask About Handling Kid Cases” with Laura M. Hilliard, Marriage Dissolution Course - State Bar of Texas, 2003

“Love and Money - Why More People are Seeking Prenuptial Agreements in the Millennium” with Carson P. Epes, Fort Worth Business Press, October 3, 2003

“Instant Message, Instant Email, Instantly Gone? - The Role of Technology in Infidelity and Divorce” with Laura M. Hilliard, Fort Worth Business Journal, October 3, 2003

“Maintenance is Alive and Well in Texas” with A. Michelle May, Advanced Family Law Course - State Bar of Texas, 2002

“A Primer on Psychological Testing,” Advanced Family Law Course - State Bar of Texas, 2001.

“Reimbursement Issues” with Drew Ten Eyck, Marriage Dissolution Course - State Bar of Texas, 2000.

“Shrinking the Shrinks Down to Size” with Mike McCurley and Drew Ten Eyck, Advanced Family Law Course - State Bar of Texas, 1999.

“Defending Against Malpractice” with Julie Pruett, Marriage Dissolution Course - State Bar of Texas, 1999.

“Effectively Dealing with The Child’s Choice of Managing Conservator” with R. Scott Downing and Kenneth W. Rockenbach, Texas Academy of Family Law Specialists, 1998.

“Shrinking the Shrinks Down to Size” with Mike McCurley, Chris Lake and Ken Rockenbach, Advanced Family Law Course - State Bar of Texas, 1998.

“Preparing for the Petitioner’s Financial Temporary Hearing,” with R. Scott Downing, Marriage Dissolution Course - State Bar of Texas, 1997.

“Dealing with Ad Litems,” with Jack W. Marr & Kathleen Cardone, Advanced Family Law Course - State Bar of Texas, 1997.

“Pensions, Stock Options and Other New Sources of Wealth,” Annual Divorce Conference of the Dallas Chapter, Texas Society of Certified Public Accountants, 1997.

“Attorney Ad Litem and Guardian Ad Litem Practice,” with Reginald A. Hirsch and R. Scott Downing, Advanced Family Law Course - State Bar of Texas, 1996.

“Preparation for and the Direct Examination of Husband (Black Hat) in a Hidden Assets, Fraud, and Breach of Fiduciary Duty Case” - with R. Scott Downing, TAFLS 10th Annual Trial Institute, 1996.

"Gender Bias in Our Courts and Practice - Fact or Fiction?," Advanced Family Law Course - State Bar of Texas, 1995.

"Peculiar Characterization Issues," 18th Annual Marriage Dissolution Course - State Bar of Texas, 1995.

"An Overview of Psychological Testing," Illinois State Bar Association Family Law Handbook, 1994.
"An Overview of Psychological Testing," Advanced Family Law Course - State Bar of Texas, 1994.
"Psychological Testing and the Expert Witness," The Practical Lawyer, October 1994.

"An Overview of Psychological Testing," Utah Chapter of the American Academy of Matrimonial Lawyers, 1994.

"An Overview of Psychological Testing," American Bar Association Family Law Conference, 1993.
"Discovery," Marriage Dissolution Course - State Bar of Texas, 1993.

"Social Studies and Psychological Evaluations: Their Use in Evidence and How to Cross Examine," Advanced Family Law Course - State Bar of Texas, 1993.

"We Have Found The Enemy - It Is Us! or, Self Management, Not Stress Management,” Advanced Family Law Course - State Bar of Texas, 1993.

"Tracing," State Bar of Texas, Advanced Family Law Course - State Bar of Texas, 1992.

"Child Support Issues - Modification, Second Family and Other Significant Problems," South Texas College of Law, 1992.

"Ethics," State Bar of Texas, Advanced Family Law Course - State Bar of Texas, 1992.

"Modification, From Sole to Joint and Back Again," Annual Family Law Institute, South Texas College of Law, 1990, 1992.

"Managing Stress," New York Bar Association, 1991.

"Attorney and Guardian Ad Litems," Advanced Family Law Course - State Bar of Texas, 1991.

"Divorce Taxation," American Academy of Matrimonial Lawyers, 1991.

"Dealing with Experts and Psychological Tests," Marriage Dissolution Course - State Bar of Texas, 1991.

"Alimony," with Jimmy L. Verner, Jr., Advanced Family Law Drafting Course - State Bar of Texas, 1990.

"Innovative Ideas for Setting and Collecting Attorney Fees," American Academy of Matrimonial Lawyers, 1990.

"Managing Stress," Advanced Family Law Course - State Bar of Texas, 1990.

"Psychological Testing: An Update," Marriage Dissolution Course, State Bar of Texas, 1989.

"Enforcement - Support and Visitation", Marriage Dissolution Course - State Bar of Texas, 1986.

"Jury Selection in Custody Cases," Advanced Family Law Course - State Bar of Texas, 1987.

"Evidentiary Issues in Child Support, Texas Revolution in Child Support: Perspective, Pleading and Practice," State Bar of Texas, 1986.

BRAD M. LAMORGESE
MCCURLEY, ORSINGER, MCCURLEY, NELSON & DOWNING, L.L.P.
5950 Sherry Lane, Ste. 800; Dallas, Texas 75225
(214) 273-2400; E-mail: **brad@momnd.com**

PROFESSIONAL HISTORY:

McCurley, Orsinger, McCurley, Nelson & Downing, L.L.P. (2006-present)

Actively practicing in the areas of family law and appeals.
Appellate experience includes interlocutory appeals, direct appeals, petitions for review, preparation of appellate briefs, oral advocacy in appellate proceedings, and original proceedings.

Cooper & Scully, P.C.
Shareholder 2002-2006

Trials and appeals in family law, medical malpractice, insurance defense, and general civil litigation.

Holmes, Woods, Diggs & Eames (Present Name) 1997-2002

Full-service trials and appeals in family law, civil litigation, and probate litigation.

Law Offices of Brad M. LaMorgese 1996-1997

EDUCATION

Trinity University (B.A. 1993) (University Court Appellate Justice); Southern Methodist University (J.D. *cum laude*, 1996) (Top 20%) (Fort Worth Real Estate Law Council Award for the highest grade in Property)

BAR ADMISSIONS

State Bar of Texas, United States Supreme Court, United States Court of Appeals - Federal Circuit, United States 1st Circuit Court of Appeals, United States 5th Circuit Court of Appeals, United States 6th Circuit Court of Appeals, United States 11th Circuit Court of Appeals, United States District Court (Northern, Southern, Western, Eastern District of Texas)

AWARDS AND HONORS

Fellow – American Academy of Matrimonial Lawyers
Board Certified – Family Law – Texas Board of Legal Specialization
Texas Super Lawyers – *Texas Monthly and Law & Politics Magazine* (2004-2010)
Top Lawyers under 40 – *D Magazine* (2002), (2004), (2006)
Texas Rising Stars – *Texas Monthly and Law & Politics Magazine* (2004)
Award of Merit – Nation Center of Missing and Exploited Children (2005) (for 5th Circuit appeal)
Published Author of Law Review Article in University of Texas Law Journal
Visiting Attorney Associate Judge - Dallas County Family District Courts

PROFESSIONAL ORGANIZATIONS

American Academy of Matrimonial Lawyers
Texas Academy of Family Law Specialists
State Bar of Texas (Family, Appellate Sections)
State Bar Family Law Section Amicus Curiae Committee (2006-present)
State Bar Family Law Section Checklist Committee (2009)
Dallas Bar Association (Family, Appellate Sections)
Dallas Bar Association Family Law Section Board of Directors (2007-2009)
Dallas Bar Association Clerk and Coordinator Training Seminar Planning Committee (2006)
Texas Board of Legal Specialization (Family Law Legal Assistants Testing Commission 2006-present)
Federalist Society – Dallas Lawyers Chapter
The Annette Stewart American Inn of Court
The College of the State Bar of Texas (Member)
Episcopal Church of the Incarnation – Member
Republican Lawyers of Dallas – Executive Committee
Republican Precinct Chair – Dallas County Precinct 4642 and 4644 (2006-present)
Alternate Election Judge – Dallas County 2006-09; Elections Pollwatcher – Dallas County 2006

SELECTED CASES

Sealed Appellant v. Sealed Appellee, 394 F.3d 338 (5th Cir. 2004)
Hidalgo v. Hidalgo, 310 S.W.3d 887 (Tex. 2010)(per curiam)
In re Zandi, 270 S.W.3d 76 (Tex. 2008)(per curiam)

Kiefer v. Touris, 197 S.W.3d 300 (Tex. 2006)(per curiam)
In re Sanders, 153 S.W.3d 54 (Tex. 2004) (Amicus Curiae)
In re Forlenza, 140 S.W.3d 373 (Tex. 2004) (orig. proceeding)
Naaman v. Grider, 126 S.W.3d 76 (Tex. 2003) (per curiam)
In re K.M.S., 91 S.W.3d 331 (Tex. 2002) (per curiam)
Mock v. Mock, 216 S.W.3d 370 (Tex. App.–Eastland 2006, pet. denied)
First Prof. Ins. Co. v. Heart & Vascular Inst., 182 S.W.3d 6 (Tex. App.-San Antonio 2005, pet denied)
Haynes v. Haynes, 180 S.W.3d 927 (Tex. App.–Dallas 2006, no pet.)
Ricks v. Ricks, 169 S.W.3d 523 (Tex. App.–Dallas 2005, no pet.)
Sunbridge Healthcare Corp. v. Penny, 160 S.W.3d 230 (Tex. App.–Texarkana 2005, no pet.)
In re K.B.A., 145 S.W.3d 685 (Tex. App.–Fort Worth 2004, no pet.)
Columbia Med. Ctr. of Las Colinas v. Hogue, 132 S.W.3d 671 (Tex. App.–Dallas 2004, pet. granted)
Cigna Healthcare of Texas v. Pybas, 127 S.W.3d 400 (Tex. App.–Dallas 2004, pet. granted, judgm't vacated w.r.m.)
In re Oates, 104 S.W.3d 571 (Tex. App.-El Paso 2002, orig. proceeding)
Bates v. Tesar, 81 S.W.3d 411 (Tex. App.-El Paso, 2002, no pet.)
In re Powell, 79 S.W.3d 814 (Tex. App.-Fort Worth 2002, orig. proceeding)
In re K.M.S., 68 S.W.3d 61 (Tex. App.-Dallas 2001, pet. denied)
In re A.J.M., No. 05-07-01196-CV, 2008 WL 1810319 (Tex. App.–Dallas Apr. 23, 2008) (mem. op.)
In re White, No. 05-06-00318-CV, 2006 WL 1000228 (Tex. App.–Dallas Apr. 18, 2006, orig. proceeding) (mem. op.)
In re R.D., No. 02-04-165-CV, 2005 WL 503055 (Tex. App.–Fort Worth Mar. 3, 2005) (mem. op.)
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CHARACTERIZATION & TRACING

I. SCOPE OF DISCUSSION.

This article discusses the character of property and methods of tracing under the Texas community property system. It includes an analysis of the community property system, a review of the Texas constitutional provisions, and a discussion of the importance of characterization and the methodologies used in determining the characterization of property.

We have updated a 2009 State Bar Advanced Family Law Course by these authors and Larry Martin. That article in turn was the culmination of significant work by Larry Martin and Doug Fejer's for the 2007 State Bar Annual Meeting article.

The article is in the nature of an overview. Many topics are discussed in this paper that are themselves the subject other articles. Therefore, this article should be viewed as a starting point with respect to more detailed research.

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II. THE COMMUNITY PROPERTY SYSTEM

A. In General. Texas utilizes the community property system to determine the property rights of a husband and wife. Marital property is characterized as separate, community or mixed. All property of whatever kind acquired by the husband and wife, or either of them, during the marriage is community property of the two spouses, except for that property which meets the definition of separate property.

The character of property is determined by operation of law according to the time and circumstances of acquisition. Property acquired before marriage by any method, or during marriage by gift, devise, or descent, is separate property. Recovery for personal injuries is separate property, subject to narrow exceptions. Property purchased with separate funds is separate property. Property correctly specified as separate property in an enforceable premarital agreement and community property partitioned in the manner provided by statute constitutes separate property. All other property, whether acquired by the husband or the wife or by their joint efforts, is community property. The community estate is a variable one. It begins at marriage with nothing and ends at the dissolution of the marriage.

B. Community Property. Texas law does not define community property any more specifically than all property acquired by either the husband or wife during marriage, except that property which is the separate property of either the husband or the wife. The Supreme Court has held that no other definition is necessary. *See* Lee v. Lee, 247 S.W. 828 (Tex. 1923). The principle at the foundation of the system of community property is that whatever is acquired by the efforts of either the husband or wife shall be their common property. This is true, even though one spouse contributed nothing to the acquisitions, and the acquisitions of properties were wholly attributable to the other spouse's industry. Graham v. Franco, 488 S.W.2d 390 (Tex. 1972).

1. Texas Constitution. No specific definition of community property is contained in Article XVI, Section 15 of the Texas Constitution. Rather, the Texas Constitution merely states the following:

> **. . .** laws shall be passed more clearly defining the rights of the spouse in relation to separate and community property **. . .**

2. Texas Family Code.[1] TFC §3.002 defines community property as follows:

> Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Id.

Therefore, all marital property, not specifically within the scope of the statutory and constitutional definition of separate property, is by implication excluded, and therefore is community property regardless of how it is acquired. Hilley v. Hilley, 342 S.W.2d 565 (Tex. 1961); Arnold v. Leonard, 272 S.W. 799 (Tex. 1925); Lee, 247 S.W.2d at 832. In Lee, the Supreme Court stated an affirmative test: i.e. that property is community, which is acquired by the work efforts, or labor of the spouses or their agents or as income from the property. Lee, 247 S.W.2d at 832. Property acquired by the joint efforts of the spouses, was regarded as acquired by "onerous title" and belonged to the community. Graham, 488 S.W.2d 393. The rule is the same regardless of whether the new acquisition is the result of the husband's or wife's individual labor, skill, or profession. Norris v. Vaughan, 260 S.W.2d 676 (Tex. 1953); Lee, 247 S.W.2d at 832.

C. Separate Property

1. Texas Constitution. Art. XVI, §15 defines separate property as:

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

The 1980 amendment to §15 revised that part of the constitutional provision (added in 1948) to allow an agreement to partition community property to include partition of property existing or to be acquired, and to include income from separate property:

Art. XVI, §15 now includes the following:

> **. . .** provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned, or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other, that gift is presumed to include all the income or property which might arise from that gift of property; spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse; and 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.

Id. (*emphasis added*.)

In Beck v. Beck, 814 S.W.2d 745 (Tex. 1991) the Supreme Court held that the 1980 constitutional amendment to article XVI, section 15, of the Texas Constitution was retroactive and thus negated contrary prior court decisions. Id.; *compare* Williams v. Williams, 569 S.W.2d 867 (Tex. 1978) ([under prior law] agreement attempting to recharacterize income or property acquired during marriage as separate property was "void" under article XVI, section 15, of the Texas Constitution). The court in Beck specifically stated:

[1] Texas Family Code [hereinafter "TFC"].

> We hold that the 1980 amendment to article XVI, section 15, of the Texas Constitution demonstrates an intention on the part of the legislature and the people of Texas to not only authorize future premarital agreements, but to impliedly validate section 5.41 [Now Section 4.001] of the Texas Family Code and all premarital agreements entered into before 1980 pursuant to that statute. The legislature and the people of Texas have made the public policy determination that premarital agreements should be enforced. If we refuse to enforce Audrian's and Lillian's premarital agreement, we would thwart, rather than advance, our state's public policy enforcing these contracts. This we decline to do.

Beck, 814 S.W.2d at 749.

2. Agreements to Convert Separate Property. Marital property agreements can profoundly change Texas marital property law. In 1999, the final phrase was added to Article XVI, § 15 of the Constitution to permit spouses to agree that their separate property would become community property. See also Sections 4.102 and 4.103 of TFC.

3. Texas Family Code. TFC §3.001 defines the separate property of a spouse:

> A spouse's separate property consists of:
>
> a. the property owned or claimed by the spouse before marriage;
> b. the property acquired by the spouse during the marriage by gift, devise, or descent; and
> c. the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

Although Texas courts have held that the legislature is without power to enlarge or to diminish the scope of the constitutional definition of separate property, the language of the statute providing for recovery for personal injuries to the body of a spouse, including disfigurement and physical pain and suffering, as being separate property is within the scope of the constitutional provision and therefore valid. Graham, 488 S.W.2d at 395; Schwirm v. Bluebonnet Express. Inc., 489 S.W.2d 279 (Tex. 1973).

TFC §4.102 provides that:

> At any time, the spouses may partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. (*emphasis added)*

Id.

TFC §4.103 provides that:

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

Id.

A detailed discussion of partition agreements, transmutation agreements and premarital agreements is beyond the scope of this article.

4. Separate Property Summary. In summary, separate property consists of:

a. Property owned or claimed by a spouse before marriage;
b. Property acquired during marriage by gift;
c. Property acquired during marriage by devise or descent;
d. Current or future community property that the spouses have agreed in writing, in a premarital or marital partition and exchange agreement, will be separate property;
e. Income or property derived from a spouse's existing or future separate property shall be separate property, if agreed to in a written premarital agreement or partition and exchange agreement executed by the spouses or future spouses;
f. All income or property arising from a gift of property from one spouse to the other spouse;
g. By survivorship for probate purposes, any part of the community property that the spouses have agreed in writing shall become the property of the surviving spouse on the death of the other spouse; and

h. Property received as recovery for personal injuries sustained by a spouse during marriage, except any recovery for loss of earning capacity during marriage.

5. Community Property Summary.

a. All income and property acquired by either spouse during marriage, other than separate property; and
b. Current separate property of either or both spouses that the spouses have agreed in writing to convert to community property.

D. The Importance of Characterization.

The community property concept is treated in detail in Chapter 3 of the TFC. Characterization of property is necessary for the proper determination of the rights of each spouse upon divorce. Section 7.001 of the TFC provides for division of property in a suit for dissolution of marriage by divorce or annulment, and states that:

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

Id.

The starting point in a contested property case is establishing the nature of the property to be divided as separate or community. Muns v. Muns, 567 S.W.2d 563 (Tex.Civ.App.-Dallas 1978, no writ); Cooper v. Cooper, 513 S.W.2d 229 (Tex. Civ. App.-Houston [1st Dist.] 1974, no writ); Myers v. Myers, 503 S.W.2d 404 (Tex.Civ.App.-Houston [14th Dist.] 1973, writ dism'd w.o.j.). The trial court, pursuant to the mandate of §7.001 to divide the estate of the parties having due regard for the rights of each party, must determine the character of the marital property, in light of the definition provided by the constitution and the statutes.

While the trial court has broad latitude in the division of the community estate, it does not have the discretion to award separate real or personal property of one spouse to the other spouse. Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977) (real property); Cameron v. Cameron, 641 S.W.2d 216 (Tex. 1982)(personal property). The trial court has no authority to divest an interest in separate property even though the interest is small, and to require the spouses to maintain a tenancy-in-common is economically unrealistic and impractical. *See* Whorrall v. Whorrall, 691 S.W.2d 32 (Tex. Civ. App. - Austin 1985, writ dism'd) (husband owned a separate 9/10 of 1% interest in house as his separate property).

The mischaracterization of property by the trial court could have an impact on the legality of the property division in a divorce case. As Eggemeyer indicated, the trial court may not characterize separate property as community property. Furthermore, when a trial court mischaracterizes separate property as community property, such an error will require the reversal of the property division because a spouse may not be divested of his or her separate property. Eggemeyer, 544 S.W.2d at 140; Leighton, 921 S.W.2d at 368.

However, the reverse does not hold true. If a trial court mischaracterizes community property as separate property, a reversal is not always required. McElwee, 911 S.W.2d 182, 189 (Tex. App. - Houston [1st Dist.] 1995, writ denied). See the case of Humphrey v. Humphrey, 593 S.W.2d 824, 828 (Tex. Civ. App. - Houston [14th Dist.] 1980, writ dism'd) where it was not reversible error when the trial court mischaracterized the house sale proceeds as husband's separate property, rather than community property, and awarded those proceeds to the husband when the overall property division was fair and equitable.

If a trial court mischaracterizes community property as separate property, before the appellate court will reverse the case and remand it back to the trial court, the appellate courts will conduct a "harm analysis." Pace v. Pace, 160 S.W.3d 706 (Tex. App. - Dallas 2005, pet. denied); Rohling v. Rohling, No. 07-05-0183, 2006 W.L. 1112825 (Tex. App. - Amarillo).

In Pace, the Dallas Court of Appeals held that, "when the trial court finds that its property division is just and right, regardless of any mischaracterization of the property, even though the value of the property mischaracterized is great, the mischaracterization does not effect the trial court's just and right division of the property."

"Here, even if we were to assume that Pace's contention is correct and the trial court mischaracterized the property, his arguments nevertheless fail. Pace must also conduct a harm analysis and demonstrate how the purported mischaracterization caused the trial court to abuse its discretion or that it had more than a de minimis impact on a just and right division of the community estate. Vandyler, 4 S.W.3d at 302; Tate, 55 S.W.3d at 7. Pace makes no argument as to why the property division is unfair or unjust apart from the alleged mischaracterization. In short, he has failed to conduct

the harm analysis. Our review of the record indicates that no harm can be shown."

In Rohling, the appellate court did find that the trial court erred in the characterization of four items of property as the separate property of the husband. The appellate court stated that:

> In reviewing an alleged characterization error, we must determine not only whether the trial court's findings are supported by clear and convincing evidence, but also whether the characterization error, if established, constitutes more than a de minimis effect. In Re Marriage of Royal, 107 S.W.3d 846 (Tex. App. - Amarillo 2003, no pet.). If the mischaracterization has more than a de minimis effect on the just and right division of the community estate, then we must remand the entire case to the trial court for a just and right division based upon the correct characterization of the property.

In Rohling, the appellate court openly concluded that, due to the mischaracterization error as well as a reimbursement error by the trial court, it effected the division of property by 20% to 30% of the total community estate value. As a result, the appellate court found that the trial court's rulings had more than a de minimis effect on the division of the community estate and, as a result, remanded the entire case back to the trial court for a just and right division based upon a correct characterization of all the property.

Additionally, §7.003 of the TFC provides that the court "shall determine the rights of both spouses in a pension, retirement plan, annuity, individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit sharing, or other employer plan or financial plan of an employee or a participant, regardless of whether the person is self-employed, in the nature of compensation or savings."

Therefore, because the trial court is required to determine a spouse's interest in the assets owned by the three (3) marital estates, (i.e. husband's separate property estate, wife's separate property estate and the community estate) it is imperative that the trial court properly characterizes all of the assets owned by the parties as either separate or community property.

The ability to characterize marital property as separate or as community is essential if the lawyer is to properly discharge his or her professional responsibility to the client. *See* Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976).

III. ESTABLISHING THE CHARACTER OF PROPERTY

The basic rules of characterization are: (1) property acquired before marriage or brought into marriage is separate property; (2) property acquired during the marriage is presumed to be community property, but this presumption may be overcome by showing (a) acquisition by gift or inheritance, or (b) mutation of separate property demonstrated by tracing; or (c) a proper premarital or post-marital agreement which alters the character of property.

A. Doctrine of Inception-of-Title. The character of property as separate or community is determined at the time and under the circumstances of its acquisition. Ray v. United States, 385 F.Supp. 372 (S.D.Tex. 1974); Bradley v. Bradley, 540 S.W.2d 504 (Tex. Civ. App. - Fort Worth 1976, no writ). Hilley, 342 S.W.2d 565.

Property is characterized as separate or community at the time of "inception of the title". Saldana v. Saldana, 791 S.W.2d 316 (Tex. Civ. App. - Corpus Christi 1990, no writ). Under the inception of title doctrine, the character of property, whether separate or community, is fixed at the time of acquisition. Henry S. Miller Co. v. Evans, 452 S.W.2d 426 (Tex. 1970); Colden v. Alexander, 171 S.W.2d 328 (Tex. 1943); Hernandez v. Hernandez, 703 S.W.2d 250 (Tex. Civ. App. - Corpus Christi 1985, no writ). Villarreal v. Villarreal, 618 S.W.2d 99 (Tex. Civ. App. - Corpus Christi 1981, no writ); Bell v. Bell, 593 S.W.2d 424 (Tex. Civ. App. - Houston [14th Dist.] 1980, no writ);

The terms “owned and claimed” as used in the Constitution and the Texas Family Code mean that if the right to acquire the property accrued before the marriage, the property is separate, even though the legal title or evidence of the title might not be obtained until after marriage. Inception of title occurs when a party first has a right of claim to the property by virtue of which title is finally vested. Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984); Welder v. Lambert, 44 S.W. 281 (Tex. 1898). The existence or non-existence of the marriage at the time of incipiency of the right by which title eventually vests determines whether property is community or separate. Jensen, 665 S.W.2d 107; Creamer v. Briscoe, 109 S.W. 911 (Tex. 1908). The word “acquired” as used in the Constitution and TFC refers to the inception of the right, rather than the completion or ripening thereof.

Where a contract to purchase was entered into before marriage, although the title is not finally obtained until after marriage, the property becomes the separate property of the purchaser-spouse. The case of Welder v. Lambert establishes the rule that title and ownership refer back to the time of making the contract. 44 S.W. at 287. Also, see Roach v. Roach, 672 S.W.2d 524 (Tex. App. - Amarillo 1984, no writ) where the court held: "It is a familiar principle of law that the separate or community character of property is determined not by the acquisition of the final title..... but by the origin of title."

1. Property Acquired Before Marriage. Once character as separate property has attached, it is immaterial that part of the unpaid purchase price is thereafter paid from community funds, since the status of property as being either separate or community is determined at the time of acquisition and such status is fixed by the facts of the acquisition. Villarreal, 618 S.W.2d 99; Hilley, 342 S.W.2d 565; Lindsay v. Clayman, 254 S.W.2d 777 (Tex. 1952); Grost v. Grost, 561 S.W.2d 223 (Tex. Civ. App. - Tyler 1977, writ dism'd). In such a case, the community estate is entitled only to a claim from the separate estate. Welder, 44 S.W.2d 281; Colden v. Alexander, 171 S.W.2d 328 (Tex. 1943); Bishop v. Williams, 223 S.W. 512 (Tex. Civ. App. - Austin 1920, writ ref'd).

2. Property Acquired During Marriage. Property with respect to which inception of title occurs during marriage is community property unless it is acquired in one of the following manners, in which event it is the separate property of the acquiring spouse:

- by gift;
- by devise or descent;
- by a partition or exchange agreement or premarital agreement specifying that the asset is separate;
- as income from separate property made separate as a result of a gift, a premarital agreement or a partition and exchange agreement;
- by survivorship;
- in exchange for other separate property; or
- as recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

A problem sometimes arises as to just what step in the purchase of property marks the acquisition of ownership, or inception of title after which purchase-money tracing establishes, not an interest in the property, but a right of reimbursement. Is the ownership of land acquired, for example, when the executory contract to buy is signed or at closing?

It is well established that a claim to real property can arise before the legal title or evidence of title has been attained. The Supreme Court in Welder, 44 S.W.2d 281, established the rule that title and ownership refer back to the time of making the contract. In Welder, a contract right giving the husband the right to acquire land was obtained before marriage, but the conditions of the contract were not met until after marriage, at which time title vested. The court held that the property was the husband's separate property because his claim to the property was acquired before marriage. Id.

In Wierzchula, the husband entered into an earnest money contract to purchase a home before marriage. 623 S.W.2d 730. He applied as a single man for a home loan and was issued a certificate of loan commitment as a single man. Thereafter, the parties were married and the husband received a deed conveying the property to him after marriage. The court held the house to be the separate property of the husband:

> In our case, the appellee acquired a claim to the property at the time the purchase money contract was entered into. The earnest money date being prior to the marriage of the parties, the appellee's right of claim to the property preceded the marriage, and the character of the property as separate property was established and the community property presumption was rebutted.

Id. at 732-733.

When even a parol contract for purchase of land is made before marriage, and title to the land is received by the spouse after marriage, the parol contract constitutes such an equitable right to purchase prior to marriage as to establish the character as separate. Evans v. Ingram, 288 S.W. 494 (Tex. Civ. App. -Waco 1926, no writ).

In Bishop, a single man contracted to perform certain services for his mother and she agreed to convey certain realty to him in payment for these services. The man married before all the services were performed. He completed his part of the bargain while he was married, at which time the promised conveyance was made to him. The conveyance was an integral part of the premarital contract and the property was, therefore, the man's separate property. Bishop, 223 S.W. 512. Similarly applied, if a single

man enters into a contract of insurance on his life and after the marriage he keeps his part of the bargain by paying premiums, the proceeds payable on his death while married are separate property since the performance of the contract relates back to its inception. McCurdy v. McCurdy, 372 S.W.2d 381 (Tex. Civ. App. - Waco 1963, writ ref'd).

However, in Duke v. Duke, 605 S.W.2d 408 (Tex. Civ. App. - El Paso 1980, writ dism'd), the earnest money contract for purchase of realty had been entered into by the husband prior to marriage, was signed only by the husband, and the husband paid $500 earnest money listed as part of the consideration. The earnest money contract provided that the property would be conveyed to both the husband and the wife and the property was conveyed to both the husband and the wife as grantees by warranty deed after marriage. Id. at 410. The court held:

> Title to the property was by the deed and, being in both of their names and acquired during marriage, prima facie establishes that the property is community property. Title is from the deed, and the contract of sale is merged in it . . . It is a rule of general application that in the absence of fraud, accident or mistake, all prior agreements entered into between the parties are considered merged in the deed.

Id at 410.

Query: If you were representing the wife, could you argue that a gift was made?

In Carter v. Carter, 736 S.W.2d 775 (Tex. Civ. App. - Houston [14th Dist.] 1987, no writ) husband signed an earnest money contract for a house on October 29, 1974, prior to the December 7, 1974, marriage. The closing took place on January 15, 1975, and both husband and wife signed the note and deed of trust. The wife claimed that there was insufficient "clear and convincing evidence" that husband had acquired the right to title in the property prior to marriage, basing her argument on the fact that the earnest money contract was not offered into evidence and on the lack of evidence to indicate when the contract was accepted by the seller. Id. at 779. The court held:

> Ownership of real property is governed by the rule that the character of title to property as separate or community depends upon the existence or nonexistence of the marriage at the time of the incipience of the right by virtue of which the title is finally extended and that the title, when extended, relates back to that time. Appellee acquired a right to title to the property when he entered into the earnest money contract. As the date of execution of the earnest money contract was prior to the marriage, appellee's right to title preceded the marriage and the separate character of the property was thereby established . . . The date of acceptance by the seller is not relevant.

Id. at 779 (emphasis added).

In Carter the wife also contended that the earnest money contract merged into the deed; therefore, the right to acquire the property ripened after marriage. The wife cited Duke, 605 S.W.2d 408, to support her proposition. The court stated:

> However, though the earnest money contract in Duke had been entered into prior to marriage, it provided that the property would be conveyed to "James H. Duke and wife, Barbara J. Duke . . . " In this case there is no evidence that both spouses were named in the earnest money contract. Therefore, Duke is not applicable . . . "

Id. 736 S.W.2d at 780.

In Burgess v. Burgess, 282 S.W.2d 118 (Tex. Civ. App. - Waco 1955, writ ref'd n.r.e.), the court of appeals affirmed the trial court's imposition of a constructive trust that effectively circumvented the inception of title rule. Specifically, in Burgess the wife claimed that, prior to marriage, she and her future husband entered into an oral agreement whereby certain property would be acquired by them jointly. Title was acquired solely in the name of the husband. The trial court held that a constructive trust should be instituted in order to protect wife's one-half interest in the real property. The court of appeals affirmed. Burgess, 282 S.W.2d at 121.

In Gutierrez v. Gutierrez, 791 S.W.2d 659 (Tex. Civ. App. - San Antonio, 1990, no writ) the court held that a car purchased two years before marriage is separate property under the inception of title rule, even though it may have been paid for with community funds and its final title acquired during marriage. Id.

In Burgess v. Easley, 893 S.W..2d 87 (Tex. Civ. App. - Dallas 1995, no writ), wife filed a post-divorce

action requesting that the court partition property that was deeded to husband by his parents during their marriage. Although the deed was dated on July 28, 1980 it was not recorded until July 18, 1984 which was after husband and wife were divorced. The Court found that husband had no right in the property itself until the deed was delivered. The earliest time that husband's right vested in such property was when his father recorded the deed on July 18, 1984 which was two months after husband's marriage to wife was dissolved, therefore making the property his separate property. Id.

B. Presumption of Community Property.

1. In General. An evaluation of the legal rights of the divorcing parties begins with the community property presumption of TFC §3.003(a), which provides:

> Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.

Id. TFC §3.003(b) states that:

> The degree of proof necessary to establish that property is separate property is clear and convincing evidence.

Id.

The statute creates a rebuttable presumption that all property possessed by a husband and wife upon divorce is community property and imposes the burden upon one asserting otherwise to prove the contrary by satisfactory evidence. Tarver v. Tarver, 394 S.W.2d 780 (Tex. 1965); Schreiner v. Schreiner, 502 S.W.2d 840 (Tex. Civ. App. - San Antonio 1973, writ dism'd); Southern Title Guaranty Co., Inc. v. Prendergast, 494 S.W.2d 154 (Tex. 1973). The statutory presumption of Section 3.003(a) makes no distinction between property acquired before marriage and that acquired after the marriage; it refers to property "possessed" by either spouse.

Since property possessed by either husband or wife during or on dissolution of marriage is presumed to be community property, it makes no difference whether the conveyance is in form to the husband, to the wife, or to both. McGee v. McGee, 537 S.W.2d 94 (Tex. Civ. App. - Amarillo 1976, no writ); Hilley, 342 S.W.2d 565.

2. Specific Presumptions.

a. Purchase Money. Money used for the purchase of property is presumed to have been community funds unless the evidence to the contrary is clear and convincing. *See* Cooke v. Cordray, 333 S.W.2d 461 (Tex. Civ. App. -Beaumont 1960, no writ).

b. Debts and Loans. A debt or loan incurred during the marriage is presumptively an obligation of the community estate unless the lender agreed to look solely to the borrowing spouse's separate property for repayment. Cockerham v. Cockerham, 527 S.W.2d 162, 171 (Tex. 1975). Property acquired with community credit is community property and property acquired with separate credit is separate property. However, property acquired with community property can become separate property by interspousal gift or partition. Id., Anderson v. Royce, 624 S.W.2d 621, 623 (Tex. Civ. App. - Houston [1st Dist.] 1981, writ ref'd n.r.e.); Glover v. Henry, 749 S.W.2d 502, 503 (Tex. Civ. App. - Eastland 1988, no writ).

c. Withdrawals From Accounts. Money spent during the marriage is presumed to be community property. Horlock v. Horlock, 533 S.W.2d 52, 59 (Tex. Civ. App. - Houston [1st Dist.] 1976, writ dism'd).

d. Transfer to Child. A parent's transfer of a property interest to a child is presumptively a gift, but this presumption may be rebutted by evidence showing the facts and circumstances surrounding the conveyance. Woodworth v. Cortez, 660 S.W.2d 561, 564 (Tex. Civ. App. - San Antonio 1983, writ ref'd n.r.e.).

e. Deed Recitals. When a deed recites that separate property was paid for the acquisition, or that the property is taken as the receiving spouse's separate estate, a rebuttable presumption arises. When the other spouse is grantor or otherwise chargeable with causing or acquiescing in the recital, the presumption becomes irrebuttable absent fraud. Kyles v. Kyles, 832 S.W.2d 194, 196 (Tex. Civ. App. - Beaumont 1992, no writ); Henry S. Miller Co., 452 S.W.2d 426.

f. Interspousal Conveyance. When one spouse, as grantor, conveys property to the other spouse, some courts have held, depending upon the circumstances, that there is an irrebuttable

presumption of a gift, even absent a recital in the instrument of conveyance. Raymond v. Raymond, 190 S.W.3d 77 (Tex. App. - Houston [1st Dist.] 2005, no pet.).

g. Including Other Spouse's Name in Title. Where one spouse furnishes separate property consideration and title is taken in the name of the other spouse, a rebuttable presumption of a gift arises. Where one spouse furnishes separate property consideration and title is taken in both spouse's name, a rebuttable presumption arises that the purchasing spouse intended to make a gift of a one-half separate property interest to the other spouse. Pemelton v. Pemelton, 809 S.W.2d 642, 646 (Tex. Civ. App. - Corpus Christi 1991, rev'd on other grounds sub nom.), Heggen v. Pemelton, 836 S.W.2d 145 (Tex. 1992); In Re Marriage of Thurmond, 888 S.W.2d 269, 273 (Tex. Civ. App. - Amarillo 1994, no writ).

h. Income From Interspousal Gift. Where one spouse makes a gift of property to the other spouse, that gift is presumed to include all the income or property which might arise from the property given. TFC § 3.005.

i. Withdrawal of Mixed Funds. Where an account contains both community and separate monies, it is presumed that community money is withdrawn first. Horlock, 533 S.W.2d 52; Harris v. Ventura, 582 S.W.2d 853, 855-856 (Tex. Civ. App. - Beaumont 1979, no writ). The act of placing separate property funds into a joint account does not make the funds community property or constitute a gift. Celso v. Celso, 864 S.W.2d 652, 655 (Tex. Civ. App. - Tyler 1993, no writ); Higgins v. Higgins, 458 S.W.2d 498, 500 (Tex. Civ. App. - Eastland 1970, no writ).

j. Rebuttal of Presumption. The statutory presumption that property possessed by either spouse upon dissolution of the marriage is community is a rebuttable presumption and is overcome by evidence that a specific item of property is the separate property of one spouse or the other. Jackson v. Jackson, 524 S.W.2d 308 (Tex. Civ. App. - Austin 1975, no writ). The general practice is to introduce evidence which traces and clearly identifies the property claimed as separate property. McKinley v. McKinley, 496 S.W.2d 540 (Tex. 1973). The Supreme Court has clearly held that the statute creates only a rebuttable presumption. In Tarver, Chief Justice Calvert wrote:

> The plain wording of the statute creates a rebuttable presumption that all property possessed by a husband and wife when their marriage is dissolved is their community property and imposes the burden upon one asserting otherwise to prove the contrary by satisfactory evidence.

Id. at 783.

While the presumption is rebuttable, the general rule is that to discharge the burden imposed by the statute, a spouse, or one claiming through a spouse, must trace and clearly identify property claimed as separate property. McKinley, 496 S.W.2d 540; Tarver, 394 S.W.2d 780; Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200 (Tex. 1974).

In Pearson v. Fillingim, 332 S.W.3d 361 (Tex. 2011), Dan complained to the Court that he was divested of his separate property mineral deeds due to the Court's mischaracterization of the deeds as community property. He argued that the mineral rights were gifts from his parents during his marriage. However, he did not attend the final hearing or offer any proof of the character of the property. The Texas Supreme Court held that the Court has the authority to characterize community property - even if it does so incorrectly. Id. at 364. The trial court's characterization was not a divestiture of separate property, but a necessary classification of property as set by the community presumption.

C. What Constitutes Separate Property.

1. Property Owned or Claimed Before Marriage. Any property owned or claimed by a spouse before marriage remains the separate property of that spouse after marriage. Tex. Const. Art. XVI, §15; TFC §3.001. *See* Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984) (property held by either a husband or wife before marriage remains the separate property of such spouse and the status of the property is to be determined by the origin of the title to the property, and not by the acquisition of final title); Tarver, 394 S.W.2d 780 (evidence showed husband received conveyance of specific land before marriage, land was his separate property); Norris, 260 S.W.2d 676 (husband's interest in partnership acquired before marriage is separate property, although salary and profits from partnership during marriage were community property); *see also* Marshall v. Marshall, 735 S.W.2d 587 (Tex. App. - Dallas 1987, writ ref'd n.r.e.); Beeler v. Beeler, 363 S.W.2d 305 (Tex. Civ. App. - Beaumont 1962, writ dism'd) (note for balance

due on sale of ranch and cattle owned prior to marriage and sold thereafter was separate property).

2. Property Acquired by Gift.

a. In General. It is suggested that the reader also review section III D. of the article involving presumptions of separate property in conjunction with this portion of the article.

Property acquired by a spouse by gift, whether before or during the marriage, is separate property. Tex. Const. Art. XVI, §15; TFC §3.001.

Furthermore, if one spouse makes a gift of property to the other, the gift is presumed to include all the income and property which may arise from that property. Tex. Const. Art. XVI, §15; TFC §3.005.

A "gift" is a voluntary transfer of property to another made gratuitously and without consideration. Zoller v. Zoller, 01-09-00992-CV, 2011 WL 1587358 (Tex. App. Apr. 21, 2011)(mem. op.); Hilley, 342 S.W.2d 565; Bradley, 540 S.W.2d 504. There are three elements necessary to establish the existence of a gift: (1) intent to make a gift; (2) delivery of the property, and (3) acceptance of the property. Harrington v. Bailey, 351 S.W.2d 946 (Tex. Civ. App. - Waco 1961, no writ); Sumaruk v. Todd, 560 S.W.2d 141 (Tex. Civ. App. -Tyler 1977, no writ); Pankhurst v. Weitinger & Tucker, 850 S.W.2d 726 (Tex. Civ. App. - Corpus Christi 1993, writ denied). Generally, one who is claiming the gift has the burden of proof. Grimsley v. Grimsley, 632 S.W.2d 174 (Tex. Civ. App. - Corpus Christi 1982, no writ).

Harmon v. Schmitz, 39 S.W.2d 587 (Tex. Comm'n App. - 1931, holding approved) is one of the early discussions of an effective gift. The court said:

> To constitute a valid gift inter vivos the purpose of the donor to make the gift must be clearly and satisfactorily established and the gift must be complete by actual, constructive, or symbolic delivery without power of revocation.

Id; *see also* Akin v. Akin, 649 S.W.2d 700 (Tex. Civ. App. - Fort Worth 1983, writ ref'd n.r.e.); Ellsworth v. Ellsworth, 151 S.W.2d 628 (Tex. Civ. App. - El Paso 1941, writ ref'd); Kennedy v. Beasley, 606 S.W.2d 1 (Tex. Civ. App. - Houston [1st Dist.] 1980, writ ref'd n.r.e.).

The promise to give property in the future is generally not a gift, being unenforceable without consideration. Woodworth v. Cortez, 660 S.W.2d 561, 564 (Tex. Civ. App. - San Antonio 1983, writ ref'd n.r.e.). Our courts have held that the crucial point of inquiry is the intent of the asserted donor. The controlling factor in establishing a gift is the donative intent of the grantor at the time of the conveyance. Ellebracht v. Ellebracht, 735 S.W.2d 659 (Tex. Civ. App. - Austin 1987, no writ). If a fair inference exists that a gift was intended, then there remains the question of did the donor intend for it to be effective at that time or in the future? An effective means of determining if an immediate gift were intended is to inquire if the possession were delivered to the donee. Hester v. Hester, 205 S.W.2d 115 (Tex. Civ. App. - Fort Worth 1947, no writ).

Delivery of the property should be such that all dominion and control over the property is released by the owner. *See* Harmon v. Schmitz, 39 S.W.2d 587 (Tex. Comm'n App. 1931, Judgment adopted). Actual delivery is not always necessary; rather, where the circumstances make actual delivery impractical, delivery may be symbolic or constructive. Bridges v. Mosebrook, 662 S.W.2d 116 (Tex. Civ. App. - Fort Worth 1983, writ ref'd n.r.e.); Mortenson v. Trammell, 604 S.W.2d 269 (Tex. Civ. App. -Corpus Christi 1980, writ ref'd n.r.e.).

b. Real Estate. There are two ways to make a gift of real estate, one is by deed, and the other is by parol gift of realty when certain conditions are met. Grimsley, 632 S.W.2d 174. A parol gift of realty is enforceable in equity if there is established: (1) a gift in present; (2) possession under the gift by the donee with the donor's consent; and (3) permanent and valuable improvements made on the property by the donee with the donor's knowledge or consent; or without improvements, the existence of such facts as would make it a fraud upon the donee not to enforce the gift. Moody v. Ireland, 456 S.W.2d 494 (Tex. Civ. App. - Waco 1970, writ ref'd n.r.e.).

(i) Parol Gift of Realty. The dispute in Grimsley, focused on a letter that the husband had written to the wife shortly before their marriage. Grimsley, 632 S.W.2d 174. In the letter, the husband indicated that he was giving her an extensive list of real and personal property. Shortly after their marriage, the spouses purchased a home with a down payment from the proceeds of the sale of assets that were included in the premarital letter. On divorce, the district court awarded the home and several items of listed real and personal property to the wife as her separate property. The court attempted to determine whether the husband had made a gift of all of the assets to his wife prior to marriage, thus making the down payment for the home a part of her separate estate. The court of appeals held that the attempted

gift of the husband's realty could be accomplished only by deed or by showing: (1) a present gift; (2) possession by the donee with the donor's consent; and (3) the donees having made valuable improvements. The court found none of the prerequisites satisfied. Moreover, the purported gift of the personalty was invalid because the husband never relinquished total dominion and control. The husband was, therefore, entitled to a separate property interest in the house to the extent his separate property was used as the down payment. It is not stated in whose name title to the house was taken, and the court did not discuss the presumption of an interspousal gift when the husband's separate property is used to purchase property with title taken wholly or partially in the wife's name. *See* Id.

(ii) Gift of Realty Via Deed. As will be seen in reviewing paragraph III D, there are several presumptions involved with respect to a gift of real property via deed. It is incumbent upon the practitioner to ascertain several important points with respect to an alleged gift of realty by deed. These include:

1. Was the title to the property the subject of the purported gift already owned by one or both of the spouses;
2. Was title to the property owned by a third party and a conveyance was made into one or both of the spouses' names during marriage; and
3. Did one or both spouses participate in the transaction.

Some courts have held that if title to the property was in the name of one spouse as his or her separate property and that spouse subsequently, during marriage, conveyed an interest in the property to the other spouse, there is an irrebuttable presumption that a gift was being made unless the conveying spouse can provide evidence of fraud, accident or mistake. Otherwise, no parole evidence will be admissible to attack the conveyance.

For example, in the case of Raymond v. Raymond, 190 S.W.3d 77 (Tex. App. - Houston [1st Dist.] 2005, no pet.), Mr. Raymond owned real property prior to the marriage. After the marriage, the parties built a house on his separate property and subsequently paid off the loan. Later, during the marriage, the wife requested that Mr. Raymond convey an interest in the property to her, which he did. After the divorce was filed, the trial court found that the property constituted Mr. Raymond's separate property. The appellate court in ruling that Mr. Raymond had made a gift of a one-half interest in the real property, stated the following:

> In this case, Frank purchased the property in Lake Jackson, Texas and owned it prior to his marriage as his separate property. The real question is, what is the effect of the conveyance made by Frank on the property to Brenda during the marriage. Both parties cite cases holding that evidence of a gift of separate property from one spouse to another can be rebutted by evidence that a gift was not intended. However, the cases cited by the parties do not apply in this particular case. In the cases cited by the parties a rebuttal presumption is raised that a spouse intended to give the other spouse an undivided interest in property as a gift, in situations where one spouse purchases real estate with his or her separate property but both spouses' names appear as grantees on the deed from that particular sale.
>
> Those are not the facts in this particular case. In this case, it is undisputed that Frank owned the property before marriage and he was the only grantee named on the deed. As a result, it was his separate property from inception. After the marriage, Frank executed a separate deed to Brenda conveying an undivided one-half interest in the Lake Jackson property. Frank was the only grantor and Brenda was the only grantee.
>
> This case instead falls in line with Massey where we have held that parole evidence is not admissible to vary the terms of an unambiguous document. Massey v. Massey, 803 S.W.2d 391, 405 (Tex. App. - Houston [1st Dist.] 1991 writ den'd). It is for the court to construe an unambiguous document as a matter of law. Coker v. Coker, 650 S.W.2d 391, 393 (Texas 1983). A spouse who is a party to a deed transaction may not introduce parole or extringent evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident or mistake. In this case, Frank never presented evidence at trial of fraud, accident or mistake, nor did he establish any ambiguity in the deed to Brenda. Absent such evidence, the trial court erred in

> considering parole evidence of intent. The deed was unambiguous on its face, and, as a matter of law, it effectively transferred an undivided one-half interest in the Lake Jackson property to Brenda. Therefore, we hold "when there has been a conveyance of property by one spouse to another and a delivery of the deed, the presumption exists that it was the intention of the grantor spouse to make the property the separate property of the grantee spouse and in the absence of fraud, accident or mistake, such conveyance cannot be disturbed. Thus, we hold that an undivided one-half interest in the Lake Jackson property became Brenda's separate property."

In Purser v. Purser, 604 S.W.2d 411 (Tex. Civ. App. - Texarkana 1980, no writ) the court held that, in the absence of any other evidence, husband's testimony that he did not intend to make a gift to his wife of any interest in certain real property (the deed to which was taken in both parties' name) was not sufficient to establish conclusively that husband did not intend to make a gift to his wife; and that the testimony of an interested witness without corroboration, even when uncontradicted, only raises an issue of fact. Id.

In the Matter of the Marriage of York, 613 S.W.2d 764 (Tex. Civ. App. - Amarillo 1981, no writ), the wife's parents conveyed real property to husband and wife as grantees. The consideration recited in the deed was "the sum of Ten and no/100 ($10.00) Dollars (sic) and other good and valuable consideration." Id. The wife's father testified he intended to give the real property to wife as her sole and separate property. However, at the time of the conveyance, the Yorks contemplated building a house on the property to serve as the primary residence. Contemplating community indebtedness to pay for a part of the construction of the residence, husband told the wife that he would not go into debt for the house construction unless he owned the property with her. Holding that the presumption of community was not overcome by wife, the court held the evidence in support of wife's separate property claim created no more than an issue for the trier of fact. Id.

In Saldana v. Saldana, 791 S.W.2d 316 (Tex. App. - Corpus Christi 1990, no writ), the husband's mother conveyed title to property by a general warranty deed to her son and daughter-in-law during their marriage. 791 S.W.2d 316. The wife testified that she paid husband's mother $10.00 at the time his mother executed the deed. Husband offered no evidence to rebut the presumption that the $10.00 came from the community estate. Id. The court held: "Thus, as a result of their ten dollar community investment, whatever right [the spouses] owned vested as a part of the community estate." Id. at 320. The court also noted that consideration of $1.00 is sufficient to support a deed conveying land or an interest in land. Id.

In Smith v. Smith, 620 S.W.2d 619 (Tex. Civ. App. - Dallas 1981, no writ), the wife's mother conveyed to husband and wife by deed, which recited ten dollars paid and other valuable consideration and the execution of a promissory note. The wife claimed that the principal payments were set up to be "gifts back" under a method to take advantage of the Internal Revenue Code life-time and annual gift exclusion. Id. The court held that, since the gifts by wife's mother were entirely voluntary and could have been discontinued at any time (as they subsequently were), the conveyance evidenced a sale rather than a gift, and the property was community property. Id.

In Massey v. Massey, 807 S.W.2d 391 (Tex. Civ. App. - Houston [1st Dist.] 1991, writ denied), husband acquired property during marriage by two deeds which reflected a $180,000 promissory note. Husband did not plead that the documents were ambiguous. Nevertheless, he offered the testimony of his brother and his mother that, contrary to the terms of the documents, the transactions were actually intended to be gifts and were treated as gifts but were made to look like credit transactions in order to avoid gift taxes. Id. The court in Massey held:

> Parol evidence is not admissible to vary the terms of an unambiguous document. It is for the court to construe an unambiguous document as a matter of law. The courts will give effect to the intention of the parties as is apparent in an unambiguous writing. When a writing is intended as a completed memorial of a legal transaction, the parol evidence rule excludes other evidence of any prior or contemporaneous expressions of the parties relating to that transaction. A spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake. Only if the intention of the parties as expressed on the face of the document is doubtful may the court resort to parol evidence to resolve the doubt.

Id. at 405. (Emphasis added)

The Massey court also noted that, even if parol evidence had been admitted to show that no payments had yet been made on the due dates under the note, the transaction would still not qualify as a gift. Id. In order to be a valid inter vivos gift, the transfer of the property must be absolute. It may not be open for future reconsideration by the donee, as would this alleged gift on each of the payment due dates. Id., *citing* Akin v. Akin, 649 S.W.2d 700 (Tex. App. - Fort Worth 1983, writ ref'd n.r.e.).

c. Bank Accounts. To sustain a gift of a joint interest in a bank account two requisites are necessary: (1) intention by the depositor to make a gift of a joint interest in the deposit by the co-depositor, and (2) divesting by the depositor of exclusive dominion and control over the money, and a vesting of such dominion and control jointly in himself and another with the attendant right of survivorship . Ottjes v. Littlejohn, 285 S.W.2d 243 (Tex. Civ. App. - Waco 1955, writ ref'd. n.r.e.), 285 S.W.2d 243; Kennedy v. Beasley, 606 S.W.2d 1 (Tex. Civ. App. - Houston [1st Dist.] 1980, writ ref'd. n.r.e.) (emphasis added).

The opening of an "or" account does not of itself constitute a gift of the funds by one of the depositing parties to the other. Carnes v. Meador, 533 S.W.2d 365 (Tex. Civ. App. - Dallas 1975, writ ref'd n.r.e.); Higgins v. Higgins, 458 S.W.2d 498 (Tex. Civ. App. - Eastland 1970, no writ). Signature card language that such deposited sums "shall be owned by the undersigned jointly and be subject to the withdrawal or receipt of (1) either of them, or (2) the survivor of them" does not conclusively establish an agreement between the parties as to the ownership of the funds deposited. Kennedy v. Beasley, 606 S.W.2d 1 (Tex.Civ.App.- Houston [1st Dist.] 1980, writ ref'd n.r.e.).

Usually, the controlling question in determining whether there has been a gift of a joint interest in a bank account is the donor's true intent. Ottjes v. Littlejohn, 285 S.W.2d 243 (Tex. Civ. App. -Waco 1955, writ ref'd n.r.e); Kennedy, 606 S.W.2d 1.

In Olive v. Olive, 231 S.W.2d 480 (Tex. Civ. App. - Dallas 1950, no writ), the court held that, where an aunt intended to retain beneficial interest in her funds which were in a joint deposit with nephew, there was no completed gift to the nephew, and on the aunt's death the title to funds passed to aunt's estate, notwithstanding the fact that the aunt intended that on her death the nephew should become sole owner of the account and that during the aunt's lifetime the nephew had legal right to withdraw funds and had done so for the convenience of his aunt. Id. The court stated:

> A gift intended to take effect at death is uniformly characterized as an attempted testamentary disposition of property and effectuated only by means of a valid will.

Id. at 483.

When husband removed his name from a community bank account opened in the names of both spouses, it was held that this act alone does not change the funds from community to the separate estate of the wife. Wohlenberg v. Wohlenberg, 485 S.W.2d 342 (Tex. Civ. App. - El Paso 1972, no writ).

No presumption of gift to the husband results from the wife depositing her inheritance into their joint bank accounts. Higgins, 458 S.W.2d 498.

In the case of Celso v. Celso, 864 S.W.2d 652 Tex. Civ. Av. - Tyler 1993, no writ) the court held that there was clear and convincing evidence to establish that funds in a certificate of deposit could be traced to the husband's separate property and were not community property, notwithstanding the fact that the certificate was in the names of both husband and wife. The court held that the certificate of deposit was purchased with funds that were traced to the husband's separate property and the mere fact that the certificate was jointly held did not alter the character of the separate asset and did not establish a gift by the husband to the wife of a portion of the funds constituting a part of the certificate deposit.

The court further held that the spouse who makes a deposit to a joint bank account of his or her separate property does not presumptively make a gift to the other spouse.

Also see the case of Parker v. Parker, 2006 Tex. App. Lexis 5134 (Tex. App. - San Antonio 2006) in which the San Antonio court of appeals, in a memorandum opinion, held that when a spouse uses separate property to acquire property during marriage and takes title to that property in the names of both spouses, a presumption arises that the purchasing spouse intended to make a gift of one-half of the separate funds to the other spouse. However, the presumption can be rebutted by evidence that no gift was intended.

In Parker , the wife purchased, in both spouses name, a certificate of deposit during the marriage from her separate property funds. In the divorce proceedings, Husband obviously took the position that because the wife was a party to the transaction and put

his name on the certificate of deposit, that she made a gift of one-half of the funds making up a part of the certificate of deposit. The court, in following the Celso opinion, held that the mere fact that a certificate of deposit is jointly held does not alter the character of the asset. In this case, the wife purchased the certificate of deposit and put husband's name on the certificate of deposit in order to use the funds as collateral to buy inventory for husband's business. At trial, the wife traced the funds to purchase the certificate of deposit back to her separate property. The husband did not dispute that the certificate of deposit was purchased with his wife's separate property. The wife also testified that it was her intention, once the loan was repaid, to recover her separate funds. As a result, the court concluded that there was no presumption of a gift.

d. Stock. The law on the gift of stock is clearly stated in Carrington v. Commissioner of Internal Revenue, 476 F.2d 704, 709 (5th Cir. 1973). In Carrington, the Fifth Circuit said: "a gift of stock between competent parties requires donative intent, actual delivery, and relinquishment of dominion and control by the donor." Id., *see also* Grimsley, 632 S.W.2d 174. However, physical delivery of the stock certificates and possession thereof is not the only method by which a donor may make a gift of corporate stock to a donee. What will constitute delivery depends on the nature of the corpus and the circumstances of the case. Webb v. Webb, 184 S.W.2d 153 (Tex. Civ. App. - Eastland 1944, writ ref'd). The testimony of a wife that the husband purchased stock for her and placed it in her name, verified by the custodian of records of the corporation who testified that stock was issued in her name, has been held to support a finding that the stock was a gift to the wife by the husband. Mortenson v. Trammell, 604 S.W.2d 269 (Tex.App.–Corpus Christi, writ ref'd n.r.e.); *See also* Grost v. Grost, 561 S.W.2d 223 (Tex.Civ.App.–Tyler 1977, writ dism'd) (wife transferred separate property stock certificate to husband, court held presumption arose).

In Grost, the wife's aunt transferred 1,000 shares of stock to husband and wife. The aunt filed a gift tax return reflecting a gift tax exclusion one-half to husband and one-half to wife. The court held in a later divorce suit that the testimony that aunt intended to give the entire 1,000 shares of stock to wife and did not intend to give any part thereof to husband was admissible to show a gift of the stock only to the wife. Id.

e. Life Insurance. In Daubert v. United States, 533 F.Supp. 66 (W.D.Tex. 1981), the executors of a decedent's estate sought to have the deceased spouse's community interest in the proceeds of a $75,000 life insurance policy excluded from his taxable estate. The executors alleged that the husband made a gift of his community interest to his wife at the time the policy was purchased by buying it in her name as owner. The court held that to effect a gift of the policy, the donor must "perform an affirmative act which would clearly reflect an intention to make a gift of community interest." Id. The federal court, imposing a very strict standard of proof, supported this conclusion by reference to the husband's continued control of the policy and the argument that designation of the wife as the policy owner did not constitute a "clear and conscious choice" reflecting donative intent.

f. Gifts From Parents or Grandparents. When a person conveys property to a natural object of the grantor's bounty, such as a parent to a child or a grandparent to a grandchild, it creates a rebuttable presumption that the property conveyed is a gift. The person claiming the property was not a gift must prove lack of donative intent by clear and convincing evidence. Kyles v. Kyles, 832 S.W.2d 194, 197 (Tex. Civ. App. - Beaumont 1992, no writ).

See also Hall v. Barrett, 126 S.W.2d 1045 (Tex. Civ. App. - Fort Worth 1939, no writ), where the husband's father executed a general warranty deed conveying a tract of land to his two sons. The deed recited: "for and in consideration of the sum of Ten and 00/100 Dollars to me in hand paid by H. O. Hall and C. E. Hall and the future consideration of the love and affection that I have and bear toward my two sons . . . and for the further consideration that the said (sons) - are to care for me in sickness and in health and provide such funds as shall be necessary to provide me with the necessities of life, such as food, clothing and such medical attention as I may need during my natural life." Id. In concluding that the land was the son's separate property, the court held:

> Much ado is made of the recited consideration of "Ten Dollars" paid to the grantor. All of us know that this is the usual and customary formal recitation used in deeds of gift. No one attempted to prove that these grantees actually paid the grantor such sum. We see nothing in the contention.

Id.

However, in Alexander v. Alexander, 373 S.W.2d 800 (Tex. Civ. App. - Corpus Christi 1963, no

writ), the court held that deeds conveying property to the husband as separate property from his parents, and which contained the recital "for love and affection," were not conclusive as to the true character of the transaction, and are subject to be overcome by parol testimony of community payments.

g. Wedding Gifts. The controlling factor in establishing whether a wedding gift is the separate property of one spouse or the other is the intent of the donor. If the donor intended to make a gift to both spouses, each spouse would have an undivided one-half interest in the wedding gift as their separate property. There is, however, a presumption that a parent intended to make a gift to their child if the parent delivers possession, conveys title, or purchases property in the name of the child. Woodworth v. Cortez, 660 S.W.2d 561 (Tex. Civ. App. - San Antonio 1983, writ ref'd n.r.e.).

h. Other.

(1) Gift of money. McFadden v. McFadden, 213 S.W.2d 71 (Tex. Civ. App. - Amarillo 1948, mand. overr .);
(2) Proceeds of donated checks. Lindley v. Lindley, 201 S.W.2d 108 (Tex. Civ. App. - Fort Worth 1947, writ ref'd n.r.e.);
(3) Cashier's check from a relative. Caldwell v. Dabney, 208 S.W.2d 127 (Tex. Civ. App. - Austin 1948, writ ref'd n.r.e.);
(4) Property deeded "in consideration of love and affection." Lowe v. Ragland, 297 S.W.2d 668 (Tex. 1957); and
(5) Property deeded in consideration of "$10.00, love and affection, and care to be furnished." Hall, 126 S.W.2d 1045.

i. Interspousal Gifts. The legal definitions of separate property and community property are given controlling effect in transactions between the spouses affecting property they have already acquired. If the husband and wife wish to convert their separate property into community property, or vice versa, they must do it in such a way that the transaction can be fitted into the legal definitions. *But see* TFC §§ 4.001-.010 (premarital agreements); §§ 4.101-.106 (marital property agreements); and §§ 4.201-.206 (agreements to convert separate property into community property).

It has long been the law that one spouse may make a valid gift of his or her separate property to the other spouse. Bohn v. Bohn, 455 S.W.2d 401 (Tex. Civ. App. - Houston [1st Dist.] 1970, writ dism'd); Grost, 561 S.W.2d 223. One spouse can convert community property into the separate property of the other spouse by a gift to that spouse. King v. Bruce, 201 S.W.2d 803 (Tex. 1947); Hilley, 342 S.W.2d 565. If a spouse conveys his interest in a parcel of jointly managed community property to the other spouse, the *entire* parcel becomes the separate property of the receiving spouse. Morrison v. Morrison, 913 S.W.2d 689 (Tex. App. - Texarkana 1995, writ denied).

If one spouse makes a gift of property to the other spouse, the gift is presumed to include all income and property which may arise from that property. TFC §3.005.

j. Attempted Gifts to the Community. An attempted gift to the community by a spouse has been held to be entirely ineffective. *See* Tittle v. Tittle, 220 S.W.2d 637 (Tex. 1949), (deed from husband to wife and husband reciting purpose of converting separate property into community property ineffective); *see also* Hilley, 342 S.W.2d 565. In Higgins, 458 S.W.2d 498, the court held as a matter of law that there was not, nor could there be, a gift to the community. The court quoted an earlier opinion: "There is no warrant in law or logic for the proposition that the separate property of either spouse may be the subject of a gift to the community estate . . ." Id.

Under this analysis, if a third person attempts to make a gift to the community, each spouse will acquire an undivided one-half interest as separate property, and not as a community property interest. Bradley v. Love, 60 Tex. 472 (1883); Roctan v Williams & Co., 63 Tex. 123 (Tex. 1885); Kamel v. Kamel, 721 S.W.2d 450 (Tex. Civ. App. - Tyler 1986, no writ); McLemore v. McLemore, 641 S.W.2d 395 (Tex. Civ. App. -Tyler 1982, no writ).

However, some older court decisions refer inappropriately to "a gift to the community." In Graham, 488 S.W.2d 390 (*citing* Norris and several opinions of the Court) stated:

> (T)hat property is community which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property, or as a gift to the community.

Id. (*emphasis added*).

3. Property Acquired by Devise or Descent. Whether by devise or decent, legal title vests in beneficiaries upon the death of the decedent. Texas Probate Code §37. Johnson v. McLanglin, 840 S.W.2d. 668 (Tex. Civ. App. - Austin 1992, no writ). It is important to understand that, under the Johnson v. McGloghlin case, title vests immediately at death,

not when the property is actually conveyed to the beneficiary by the estate. For example, if a spouse is entitled to inherit a certificate of deposit, then that spouse inherits that certificate of deposit at death. However, any income earned on that certificate of deposit during the time that it is held by the estate until it is actually conveyed out by the estate would presumptively be community property. Therefore, the practitioner should be careful when dealing with this particular type of inheritance. It is often necessary to trace the income off the separate property during the time it is held by the estate until such time as it is actually conveyed and transferred by the estate to the intended beneficiary.

Any interest devised to a spouse, whether a fee or a lesser interest will belong to that spouse as separate property. *See* Sullivan v. Skinner, 66 S.W. 680 (Tex. Civ. App. 1902, writ ref'd). In Sullivan, the wife was willed property "for the term of her natural life, with full power to receive for her sole and separate use, and no other, the rents and profits of the same, and on her death the same to belong to any child or children of the wife." The rents and profits were held to be her separate property because they were specifically made a part of the devised interest under the terms of the will. If they have not been specifically mentioned in the will, the "rents and profits" would probably have been community property. Id. (*emphasis added*)

When character as separate property attaches, it is immaterial that part of the unpaid purchase price is thereafter paid from community funds. Property acquired by devise and descent does not become community through the use of community funds to discharge a lien or make improvements. Henry v. Reinle, 245 S.W.2d 743 (Tex. Civ. App. - Waco 1952, writ ref'd n.r.e.).

An expectancy has been held to be a present existing right. Barre v. Daggett, 153 S.W. 120 (Tex. 1913); Martin v. Martin, 222 S.W. 291 (Tex. Civ. App. - Texarkana 1920, writ ref'd). Property received in consideration of the assignment and release of the heir's expectancy is in the nature of property acquired by descent and is therefore the separate property of the spouse receiving it. In Barre, 153 S.W. 120, the court stated:

> The status of the expectancy, as a separate or community right and interest, would be determined, we think, by the character of the right in which it had its origin. Without question the expectancy here, if and when it shall fall into possession, would follow, under the laws of descent and distribution, from the fact that Mrs. Barre was in the relation of child. So, in measuring the legal rights of Mrs. Barre, the expectancy, or contingent interest, in controversy, should be, it is not doubted, treated and regarded as a separate, and not community, right and interest of Mrs. Barre, and controlled as to ownership and sale, by the laws governing in such respects.

Id.

4. Recovery for Personal Injuries. The recovery for personal injuries sustained by a spouse during marriage, except for recovery for loss of earning capacity during marriage, is the separate property of the injured spouse. TFC §3.001(3).

a. To a Spouse. Recovery for personal injuries to the body of a spouse, including disfigurement and pain and suffering, past and future is the separate property of the injured party. *See* Graham, 488 S.W.2d 390; Pedernales Electric Cooperative, Inc. v. Schultz, 583 S.W.2d 882, 886 (Tex. Civ. App. - Waco 1979, writ ref'd n.r.e.);

Recovery for medical and related expenses incurred during the marriage is community property. The reasoning being that it is the burden of the community to pay these expenses. Graham, 488 S.W.2d 390; Osborn v. Osborn, 961 S.W.2d 408 (Tex. Civ. App. - Houston [1st Dist.] 1997, writ denied).

Recovery for lost wages, past and future, is community property. The earning capacity, as such, would presumably be translated to earnings during the marriage which would be community property. Graham, 488 S.W.2d 390; Osborn, 961 S.W.2d 408.

Many times when there is a settlement from a personal injury lawsuit during the marriage, there is no distinction made in the settlement as to what portion of the judgment is attributable to personal injuries for a spouse, pain and suffering, medical expenses incurred during the marriage, future medical expenses to be incurred after divorce, lost earnings during the marriage, future lost earnings after the divorce, loss of consortium, or punitive damages. When a spouse receives a settlement from a lawsuit during the marriage, some of which may be community property, it is the spouse's burden to demonstrate what portion of the settlement is his or her separate property. If a party does not prove what amount, if any, of the proceeds from a personal injury settlement was for separate property or community property, it must be conclusively presumed that the entire proceeds are community property. *See* Kyles v. Kyles, 832 S.W.2d 194 (Tex. Civ. App. - Beaumont

1992, no writ); *see also*, Cottone v. Cottone, 122 S.W.3d 211 (Tex.App. – Houston [1st Dist.] 2003, no pet.)

The most recent authority involving the necessity for allocating/tracing damages recovered in a personal injury suit comes from a memorandum opinion out of the Amarillo Court of Appeals in the case of Franklin v. Franklin, No. 07-04-0515, 2006 Lexis 5240 or 2006 W.L. 1680875 (Tex. App. June 19, 2006).

On appeal, the primary issue was the characterization of an annuity issued as a part of a settlement of the husband's personal injury claim during marriage.

During the marriage, the husband, Robert, suffered a serious heart condition necessitating a valve replacement surgery and was one of 29 Fen/Phen plaintiffs in a personal injury suit filed during the marriage. The personal injury suit was subsequently settled and Robert received a series of payments as part of the settlement. Initially, he received a payment of $523,203.43, and was also provided an annuity that gave him guaranteed payments of $5,000.00 for five years, increasing to $7,838.00 for the balance of his life but for 25 years certain, six additional payments ranging from $20,000.00 and $50,000.00 and semi-annual payments of $10,000.00 and $12,500.00 for the benefit of the parties' children through their college years. Total approximate amount of the guaranteed annuity payments of Robert's part of the settlement were $3,141,400.00.

At trial, the evidence was that the initial payment was placed in a joint money market account and the monthly annuity payments were placed in another joint account at the same bank. Funds from both accounts were used to purchase, remodel and furnish a home, pay off debts and purchase vehicles for the family. They were also used to pay living and medical expenses of Robert.

The trial court found that the annuity was community property because it consisted of commingled funds, and that Robert failed to trace it as his separate property by clear and convincing evidence. As a result, the trial court awarded Robert 60% of the annuity and his wife, Tamela, 40% of the annuity.

On appeal, Robert challenged the characterization of the annuity as community property. He also challenged the fact that the burden of proof was on him to establish the annuity as his separate property.

After discussing the burden of proof with respect to claims of separate property, the court stated that:

"Robert's second issue turns on differing views of Family Code Section 3.001(3). As we perceive Robert's position, he believes that the statute required him only to show the property at issue consisted of a recovery for personal injuries. On meeting that burden, the burden to show what portion of the recovery was for lost earning capacity, medical expenses shifted to Tamela. Tamela contends that Section 3.001(3) requires Robert to bear the burden to identify what amount of the recovery was for his pain and suffering, what amount was for lost earning capacity during marriage, and medical expenses. The court held that this case was different from the Osborn v. Osborn, 961 S.W.2d 408 (Tex. App. - Houston [1st Dist.] 1997, pet. den'd.) for the reason that Osborn dealt with a potential recovery for personal injuries and, in this case, there had been an actual recovery and payment of damages during the marriage. (Emphasis added).

Unlike the potential recovery in Osborn, the trial court was dealing with an asset acquired during marriage from the settlement of a law suit in which both Robert's separate estate claim and the community property claims were asserted and settled. The trial court here properly placed on Robert the burden to show that the annuity he claimed as separate property was obtained as a result of his personal injuries and was not compensation for lost earning capacity during marriage or for medical expenses.

It is clear the annuity in dispute here was issued as a result of his recovery for personal injuries. Therefore, Robert does not contend that the language documents addressed the allocation of settlement among the various damage claims that he asserted in the law suit. As a result, the record does not reflect by clear and convincing evidence the allocation of Robert's settlement among the various elements of damages that he asserted. Therefore, the trial court did not err in finding that Robert did not overcome the presumption that the remaining payments due under the annuity were community property.

See also Licata v. Licata, 11 S.W.3d 269 (Tex. App. - Houston [14th Dist.] 1999, no pet.)

b. To a Child. Pecuniary loss, loss of companionship and mental pain and anguish awarded for the death of a child are separate property of the spouse. Contributory negligence of the other spouse cannot bar recovery by the innocent spouse, Johnson v. Holly Farms of Texas, Inc., 731 S.W.2d 641, 646 (Tex. Civ. App. - Amarillo 1987, no writ). Enochs v. Brown, 872 S.W.2d 312, 322 (Tex. Civ. App. - Austin 1994, no writ); Williams v. Steves Industries, Inc., 678 S.W.2d 205, 210 (Tex. Civ. App. - Austin 1984), aff'd, 669 S.W.2d 570 (Tex. 1985).

c. Intangible Damages. Intangible damages such as disfigurement, pain and suffering, past and future, are the separate property of the injured party. Graham, 488 S.W.2d 390. Compensation to the victim of a tort for the victim's personal well-being belongs to the injured party as separate property. Id. Intangible damages have been characterized as separate property as follows:

(1) Wrongful Death Damages. Holly Farms, 731 S.W.2d at 646. The pecuniary loss, loss of companionship, and mental pain and anguish awarded for the death of a child are separate property of a spouse and the contributory negligence of other spouse cannot bar recovery by the innocent spouse;
(2) Physical Pain. Graham, 488 S.W.2d at 395-396;
(3) Mental Anguish. Franco v. Graham, 470 S.W.2d 429, 438 (Tex. Civ. App. - Corpus Christi 1971), *reformed,* 488 S.W.2d 390 (1972); Kirkpatrick v. Horst, 472 S.W.2d 295, 304 (Tex. Civ. App. - Texarkana 1971), rev'd on other grounds, 484 S.W.2d 587 (Tex. 1972);
(4) Emotional Distress. Tidelands Automobile Club v. Walters, 699 S.W.2d at 939, 945 (Tex. App. Beaumont 1985, writ ref'd);
(5) Loss of Consortium. Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex.1978);
(6) Loss of Companionship of a Child. Enochs, 872 S.W.2d 382; Williams, 678 S.W.2d 205;
(7) Disfigurement. Houston Transit Co. v. Felder, 208 S.W.2d 880, 883-884 (Tex. 1948); Pedernales Electric Cooperative. Inc. v. Schultz, 583 S.W.2d 882, 886 (Tex.Civ.App.-Waco 1979, writ ref'd n.r.e.);
(8) Loss of Part of Body. Houston Transit Co., 208 S.W.2d at 883-884; and
(9) Loss of Mental and Intellectual Function. Western Union Telegraph Co. v. Tweed, 138 S.W. 1155, 1166 (Tex.Civ.App.-Dallas 1911), aff'd, 107 Tex. 247, 166 S.W.2d 696 (1914).

d. Tangible or Economic Damage. During the marriage, recoveries from tangible or economic damages in Texas are community property and include:

(1) Medical Expenses During Marriage. Graham, 488 S.W.2d 390; Osborn, 961 S.W.2d 408;
(2) Loss of Services of Other Spouse During Marriage. Whittlesey v. Miller, 572 S.W.2d 665, 666 (Tex. 1978); and
(3) Loss of Earning Capacity During the Marriage. *Texas Family Code §* 3.001(3); Osborn, 961 S.W.2d 408; Dawson v. Garcia, 666 S.W.2d 254, 266 (Tex.App.-Dallas 1984, no writ). *See Domestic Tort Liability and Characterization of Damages,* University of Texas School of Law, Texas Marital Property Institute - 1997, Ted Terry, Kirsten Proctor, and James LaRue.

5. Punitive Damages. Recovery for punitive damages by a spouse during a marriage is community property. Punitive damages must be distinguished from compensatory damages. Punitive damages are damages, other than compensatory damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future. Restatement (2d) of Torts, § 908. Punitive damages do not come within the definition of separate property, based on Rosenbaum v. Texas Building, and Mortgage Company, 167 S.W.2d 506 (Tex. 1943) and based on the United States Supreme Court Opinion in O'Gilvie v. United States, 519 U.S. 79 (1996).

D. Presumption of Separate Property (Including Significant and Separate Property Recitals).

1. When Presumption Arises. Generally property possessed by either husband or wife during, or on, dissolution of marriage is presumed to be community property, and it makes no difference whether the conveyance is in form to the husband, to the wife, or to both. However, a presumption of separate property arises when (1) one spouse is grantor and the other spouse is grantee; (2) one spouse

furnishes separate property consideration and title is taken in the name of the other spouse; or (3) the instrument of conveyance contains a "separate property recital" or a "significant recital."

a. Separate Property Recital Defined. A recital in the instrument of conveyance is considered to be a "separate property recital" if it states that the consideration is paid from the separate funds of a spouse, or if it states that the property is conveyed to a spouse as his or her separate property.

b. Conveyance Containing No Separate Property Recital.

(1) Third Party Grantor - Normal Community Property Presumption. When the deed is from a third party as grantor to either or both spouses, as grantee, and the conveyance does not contain a separate property recital, the normal community property presumption can be rebutted by parol evidence that the consideration was paid from the separate funds of one of the spouses. Cooper, 513 S.W.2d 200; *see also* Binford v. Snyder 189 S.W.2d 471 (Tex. 1945) (trespass to try title suit where deed from grantor to grantee recited $100 consideration, grantee was allowed to show by parol evidence no money was paid and purpose was to reinvest grantee with title held by grantor as Trustee.)

(2) Wife as Grantee. Van v. Webb, 215 S.W.2d 151 (Tex. 1948); Patterson v. Metzing, 424 S.W.2d 255 (Tex. Civ. App. - Corpus Christi 1967, no writ); Skinner v. Vaughan, 150 S.W.2d 260 (Tex. Civ. App. - El Paso 1941, writ dism'd jdgmt. cor.).

(3) Husband as Grantee. Alexander v. Alexander, 373 S.W.2d 800 (Tex. Civ. App. - Corpus Christi 1963, no writ); Bridges, 662 S.W.2d 116.

(4) Both Spouses Named as Grantees. Where it is shown that the conveyance was a gift and both husband and wife are named as grantees, the gift of the property vests in each spouse an undivided one-half interest as separate property. White, 179 S.W.2d 503; Von Hutchins v. Pope, 351 S.W.2d 642 (Tex. Civ. App. - Houston 1961, writ ref'd n.r.e.); Connor v. Boyd, 176 S.W.2d 212 (Tex. Civ. App. - Waco 1943, writ dism'd w.o.m.).

(5) Spouse as Grantor - Presumption of Gift. When the conveyance is from the husband to the wife as grantee, and contains no separate property recital, the normal community property presumption is replaced by the presumption that the husband is making a gift to the wife, in the absence of parol evidence to rebut the presumption of gift. Dalton v. Pruett, 483 S.W.2d 926 (Tex. Civ. App. - Texarkana 1972, no writ); Babb v. McGee, 507 S.W.2d 821 (Tex. Civ. App. - Dallas 1974, writ ref'd n.r.e.); Carriere v. Bodungen, 500 S.W.2d 692 (Tex. Civ. App. -Corpus Christi 1973, no writ).

See Raymond v. Raymond, 190 S.W.3d 77 (Tex. App. - Houston [1st Dist.] 2005, no pet.); Powell v. Jackson, 320 S.W.2d 20 (Tex. Civ. App. - Amarillo 1958, writ ref'd n.r.e.) (presumption of gift arises when one spouse conveys separate property to the other spouse.); *see also* Purser, 604 S.W.2d 411; Galvan v. Galvan, 534 S.W.2d 398 (Tex. Civ. App. - Austin 1976, writ dism'd); Whorrall, 691 S.W.2d 32.

But see McKay v. McKay, 189 S.W. 520 (Tex. Civ. App. -Amarillo 1916, writ ref'd), (deed by husband to wife was void where part of the consideration was resumption of husband's marital rights); Tanton v. Tanton, 209 S.W. 429 (Tex. Civ. App. - El Paso 1919, no writ) (deed from husband to wife invalid, where consideration was wife resuming marital relation).

2. Spouse Furnishes Separate Property Consideration – Presumption of Gift. Where one spouse uses separate property consideration to pay for property, acquired during the marriage and takes title to the property in the name of the other spouse or both spouses jointly, the presumption is that a gift is intended. Cockerham, 527 S.W.2d 162; Peterson, 595 S.W.2d 889; Hampshire, 485 S.W.2d 314; Carriere, 500 S.W.2d 692; Van Zandt v. Van Zandt, 451 S.W.2d 322 (Tex. Civ. App. -Houston [1st Dist.] 1970, writ dism'd).

In Peterson, the court held that, when a husband uses his separate property to pay for land acquired during the marriage and takes title to the land in the name of husband and wife, it is presumed he intended the interest placed in the wife to be a gift; however, the presumption is rebuttable and parol evidence is admissible to show that a gift was not intended. Peterson, 595 S.W.2d 889.

See the case of Pace v. Pace, 160 S.W.3d 706 (Tex. App. - Dallas 2005, writ denied), where the wife purchased the parties' marital residence using her

separate property funds. However, the purchase statement identified both the husband and wife as the purchasers, both parties signed the settlement statement, and the warranty deed identified both the husband and wife as the grantees.

In upholding the trial court's ruling that the property constituted the separate property of the wife, the appellate court ruled that because she was able to identify and trace the consideration paid for the house from her separate property, it constituted her separate property.

In analyzing this case, the appellate court states the correct law that when a spouse purchases real property during the marriage with her separate property, but takes title to the property in the name of both spouses, it is presumed to have made a gift to the other spouse of a one-half interest in the property. However, the appellate court appears to simply ignore the law in this respect in affirming the trial court's ruling that the house constituted the wife's separate property.

a. Conveyance Containing Separate Property Recital. The presumption in favor of the community as to land acquired in the name of either spouse during the marriage is replaced by a presumption in favor of the separate estate of a spouse where the deed of acquisition recites either that the land is conveyed to the spouse as his or her separate property, or that the consideration is from his or her separate estate, or includes both types of recitation. Henry S. Miller Co., 452 S.W.2d 99; *see also* Magee v. Young, 198 S.W.2d 883 (Tex. 1946); Little v. Linder, 651 S.W.2d 895 (Tex. Civ. App. -Tyler 1983, writ ref'd n.r.e.). Under these circumstances the party contesting the separate character must produce evidence rebutting the separate property presumption. Trawick v. Trawick, 671 S.W.2d 105 (Tex. Civ. App. - El Paso 1984, no writ).

Where the deed recites that the consideration paid, and to be paid shall be out of the separate property or funds or estate of a spouse, it is immaterial that a promissory note is executed for a portion of the purchase price. The property is separate in character. Smith v. Buss, 144 S.W.2d 529 (Tex. 1940); *see also* Henry S. Miller Co., 452 S.W.2d 99, (deed recited consideration of $1.00 and vendor's lien notes of $8,000 paid and to be paid from wife's separate estate).

3. When Separate Property Presumption is Rebuttable. Generally a presumption created by the form of conveyance is rebuttable. In some cases, the intentions of the parties are controlling, and intentions may be judged by the facts surrounding the case. Furthermore, depending upon circumstances, parole evidence is usually admissible to rebut the presumption of a gift. However, as noted below, in certain circumstances, courts will not allow parole evidence to rebut the presumption of a gift unless there is an allegation of accident, fraud or mistake.

In Cockerham, 527 S.W.2d 162, the Supreme Court considered the separate or community ownership of land where the deed was taken in name of both the husband and the wife in a partition suit involving an interest in property owned by the husband before marriage. Wife's trustee in bankruptcy intervened contending that, if husband had a separate property interest, he made a gift of an undivided one-half of such separate property interest to his wife when title was taken in both names. The Supreme Court upheld the trial court's implied finding that the presumption that the husband intended a gift to the wife was sufficient. Id.

In Carter, 736 S.W.2d 775, the husband signed an earnest money contract and paid the earnest money prior to marriage. The closing took place after marriage, and the deed was made to both spouses. Husband testified that he did not intend to make a gift of a one-half interest in the house to wife and that he did not request that both names be placed on the deed. Rather, he merely accepted and signed the papers prepared by the savings and loan company, and he had recently moved to Texas from Michigan and was unfamiliar with Texas community property laws. The court held there was no evidence of a gift and any such presumption was rebutted by the evidence. Id.

In Dawson v. Dawson, 767 S.W.2d 949 (Tex. App. - Beaumont 1989, no writ) the husband had begun the purchase of property under a "contract for deed" prior to marriage. The contract was completed and a warranty deed received during marriage in the name of both husband and wife. The court held:

> Both parties testified Mr. Dawson had purchased the property under a contract for deed prior to the marriage. This determined the character of the property as separate. Where there is no evidence of gift, the fact that the deed is in both names does not change the character of the property.

Id. at 951.

In Peterson, 595 S.W.2d 889, the husband purchased a house with separate property funds 28 days after marriage. On the day he was notified the

sale was ready to close, he phoned wife to advise her of the closing. Husband testified that it was at that point that he learned that his wife would not move into the house with him unless her name appeared on the deed, and testified that:

> . . . I was real shocked. I didn't know what to do. I had just been married. I really didn't want to stir up any trouble at that early [stage] of a marriage . . . so I called . . . and asked **. . .** if we could get her name added to the deed right away . . . .

Id.

The wife's name was subsequently added to the deed and the sale was consummated. Husband testified that he did not intend to make a gift to wife of any interest in the house, but that he added her name to make her happy and to assure her that "she had a place to live the rest of her life," and "then at her death, it would be passed on to my children." The court found that the presumption of gift created by the taking of title in the name of husband and wife was rebutted by evidence establishing no intent to make a gift. Id. (*emphasis added*)

Another enunciation to the rule that extrinsic evidence may be used to determine the character of property as community or separate is found in Galvan, 534 S.W.2d 398. In divorce proceedings, the husband claimed certain real estate as his separate property. The facts were: (a) Deed from husband's parents was to husband and wife "in consideration of love and affection;" (b) Wife claimed an undivided one-half interest as her separate property; © Husband introduced parol evidence claiming land was his separate property as a gift from his parents to him; and (d) Wife argued that husband's evidence in opposition to the deed violated the parol evidence rule and that in absence of fraud, accident or mistake, deed may not be challenged. Id. The court made a thorough review of the parol evidence rule as applied to show the true character of property and held that parol evidence was admissible to show the intention in the making of a gift (*emphasis added*):

> Parole evidence was admissible in this case to show either that the husband, if he furnished valuable consideration, did or did not intend to make a gift to his wife; or that the grantors did not intend to make a gift to the wife, even though she was one of the named grantees.

Id.

Following an established line of cases, the court further stated:

> It is elementary that whether the evidence offered to rebut the presumption of a gift established that there was no gift to the wife and that the land was the separate property of the husband, was for the determination of the Court as the trier of the facts.

4. When Presumption is Irrebuttable. When offered by a party to the transaction, or by one in privity with a party, parol evidence is not admissible to rebut a separate property recital, in the absence of allegations entitling the party to equitable relief. Messer v. Johnson, 422 S.W.2d 908 (Tex. 1968); Lindsay, 254 S.W.2d 777; Hodge v. Ellis, 277 S.W.2d 900 (Tex. 1955); Kahn, 58 S.W. 825.

In Henry S. Miller Co., 452 S.W.2d 426, the court held that extrinsic evidence offered to contradict the express recitals in the deed that the property was to be the separate property of wife was inadmissible, stating:

> Under this record, Miller was unable to introduce extrinsic evidence (e.g., payment by the community and subjective intention of the parties) which would establish a resulting trust, and in turn, contradict the express recitals in the deed to the effect that this was the separate property of Nancy Sheaf, without first tendering competent evidence that there has been fraud, accident, and mistake in the insertion of the recitals in the deed.

Id.

a. Spouse as Grantor. As previously indicated, in the case of Raymond v. Raymond, 190 S.W.3d 77 (Tex. App. - Houston [1st Dist.], 2005 no pet.) the appellate court ruled that because Mr. Raymond owned property before marriage as his separate property, and he subsequently voluntarily conveyed an interest in the property to his wife during the marriage, and further because Frank was the only grantee named on the deed when he acquired the property but after marriage he executed a separate deed conveying to his wife an undivided interest in the property, and Frank was the only grantor in that deed and Brenda was the only grantee, this created an irrebuttable presumption that Frank made a gift of one-half interest in the real property to his wife. As a

result, subject to an allegation of fraud, accident or mistake, Frank was prohibited from introducing parole evidence to contradict the express terms of an unambiguous deed. The non-grantee spouse is a party to the deed if he is a grantor.

In McKivett v. McKivett, 70 S.W.2d 694 (Tex. 1934) the husband conveyed community property to the wife by deeds reciting the payment by the wife of $10.00 and other good and valuable consideration out of her separate property funds, and the assumption of certain notes, and further that the property was conveyed to her for her own use and benefit. After the husband's death, his child by a former marriage sued wife and attempted to introduce evidence tending to prove that the deeds were executed because of fear that the Internal Revenue Service would fix a lien upon the property to secure a sum claimed to be due from husband. The court held:

> The evidence offered in this case is of such character as to render the deed ineffective. It would prove that the beneficial title did not rest in the wife for her separate use, as the deed declared, but that it remained in the community . . . [The deeds] belong to the class of particular and contractual recitals which the parties may not deny. The deeds in express terms declare the particular purpose or use for which the property is conveyed; that is that it shall belong separately to the wife. Parol evidence should not be admitted to prove that it was conveyed for a different purpose or use.

Id. at 695.

In Kahn, 58 S.W. 825, the husband conveyed community property to the wife by deed containing separate property recitals substantially the same as those in the deeds in McKivett. The court held to be inadmissible parol evidence offered by the husband that the purpose of the conveyance was "to keep peace in the family" and that he did not intend by the deed to make the real estate the wife's separate property. The reason given for the decision was that the deed on its face clearly expressed the intent to convey the property to the wife for her separate use, and that this intent so expressed in the writing could not be contradicted by parol evidence. In discussing the recital in the deed that the conveyance was for the wife's separate use and benefit, Judge Williams said:

> The statement in the deed from Kahn to his wife is more than the mere statement of a fact. Under the decisions referred to, its legal effect is to show the character of the right to be created by this deed, and is as much a contractual recital as any in the instrument, and belong to that class of particular and contractual recitals which, in deeds, estop the parties from denying them.

Id.

In Letcher v. Letcher, 421 S.W.2d 162 (Tex. Civ. App. - San Antonio 1967, writ dism'd), the husband conveyed community property to wife by deed which noted $10.00 and other valuable consideration paid by wife "out of her own property and estate", and "to her sole and separate use and benefit" all of the husband's undivided right, title, and interest in the property. Upon divorce, husband attempted to introduce evidence that he made the conveyance in an effort to protect the property from judgment creditors. The court held:

> As a matter of law, the [husband] is precluded from showing any agreement, understanding, or interest contrary to the unequivocal language in the deed.

Id.

b. Spouse Joins in Conveyance. In Messer, 422 S.W.2d 908, the Supreme Court examined the application of the parol evidence rule in cases in which a spouse joins in the conveyance. The court stated:

> In this instance the deed declared in several places that the property was conveyed to the grantee as her separate property and to her sole and separate use. The ordinary and accepted meaning of these terms is that the grantee should take and hold the land for her own benefit. It also appears that John E. Johnson went out of his way to sign the deed when there was no reason for his doing so except to evidence an intention to make a gift to his wife. It is our opinion that in these circumstances the husband should not be heard to say that he did not intend to make his wife the beneficial owner of the land as the deed declared. We adhere, therefore, to the general rule that where an inter vivos written transfer of property stipulates that the transferee is to take the property for his own benefit, extrinsic evidence is not

> admissible, in the absence of equitable grounds for reformation or recession, to show that he was intended to hold the property in trust. There is no allegation or evidence here of fraud, duress or mistake, and we hold that Pearl Johnson was the legal and equitable owner of the land as her separate property at the-time of her death.

Id.

c. Spouse Signs Executory Contract. In Lindsay v. Clayman, 254 S.W.2d 777 (Tex. 1952), husband joined with wife in an installment sale contract for certain lots "for and in consideration of the sum of $950 to be paid by Mrs. Frances M. Lindsay out of her separate funds . . . as her separate property and for her own separate use and estate". Id. The contract further provided that upon payment of the purchase price "to promptly execute and deliver to the said Frances M. Lindsay a general warranty deed conveying such property to her as separate property . . . " Subsequently, the seller executed and delivered the deed which recited payment out of wife's separate funds and conveyed to wife "as her separate property and for her own separate use and estate." Husband was not a party to the deed. The court held:

> [w]here the evidence shows the third party seeking to introduce evidence to vary the recitals in the deeds is in privity with the parties to the deed, the parole evidence rule also applies to him. [Husband] was a party to the contract and in privity with the parties to the deed conveying the lots to his wife. Since the deed states the nature of the estate conferred upon the wife and the consideration being contractual, parole evidence is not admissible to contradict or vary the deed in the absence of allegation of fraud, accident or mistake.

Id.

In Loeb v. Wilhite, 224 S.W.2d 343 (Tex. Civ. App. - Dallas 1949, writ ref'd n.r.e.), the husband caused a deed to be made to his wife conveying certain property to her for consideration recited to have been paid out of her separate funds and her assumption of an outstanding indebtedness. The deed conveyed the property to the wife as her separate property. It was sought to show that the property was paid for by community funds, and that a resulting trust arose in favor of plaintiff, a daughter by a former marriage, to an undivided one half interest. Evidence was introduced, over the objection of the surviving widow (who had since married Loeb) as to a prior agreement between husband and wife that she should take the property in her own name and as her separate estate for the protection of the community. In reversing and rendering the case in favor of the wife, the court of appeals held such evidence inadmissible in the absence of any allegations of fraud, accident or mistake. Id.

d. Spouse Signs Promissory Note or Deed of Trust. A spouse is in privity with a party if he signs the promissory note or a deed of trust executed as a part of the transaction. *See* Hodge v. Ellis, 277 S.W.2d 900 (Tex. 1955), where husband signed the note and deed of trust securing purchase money loan. The deed recited conveyance to wife "as her separate property." The court held:

> Since he was undoubtedly a party to the transaction, we may thus hold the Wilson property separate property on the theory of implied gift from the [husband] as a matter of law, considering the recitals in the deed that the premises were conveyed as separate property, for separate property considerations, whatever be the actual character of the consideration and despite that the note may have bound the community . . . or we may say with almost equal certainty that the [husband] was cut off by the parol evidence rule from showing the consideration or nature of the estate conveyed, should these be at variance with the mentioned recitals . . . [T]hat the note itself did not speak of separate funds . . . and was not referred to in the deed, does not change the result. It was all one transaction and the deed recited *from her separate estate.*

Id.

e. Spouse Participates in Transaction. In Little, 651 S.W.2d 895, the wife was the named grantee in the deed, the deed recited the consideration paid out of her money, her husband participated in the transaction in withdrawing the funds for the payment and "saw to their being mailed." The court concluded that the property was wife's separate property. The court also noted that, after receipt of the deed to wife as her separate property, "the husband with full knowledge of its contents acquiesced in conveyance to his wife without seeking a correction (if he deemed

same to be incorrect) and that he joined with the wife in various instruments (deeds, mineral leases, and easements) relating to the property, all without asserting a community interest in the property." Id.

Furthermore, it has been held that a spouse is a party to the transaction even if he is merely present when the deed recitals are drafted. In Long v. Knox, 291 S.W.2d 292 (Tex. 1956), the husband was present during the transaction when the wife took mineral leases as her separate property. The court held:

> Title to the oil and gas leases . . . vested in Mrs. Knox as her separate property as a matter of law and this is true even though the consideration was found by the jury to have been paid out of community funds.

Id. *See also* Coggin v. Coggin, 204 S.W.2d 47 (Tex. Civ. App. - Amarillo 1947, no writ).

E. Effect of Remarriage (Same Parties). The remarriage of divorced parties does not affect the status or character of the property. The property divided in the prior divorce remains the separate property of the respective spouses after remarriage. Spencer v. Spencer, 589 S.W.2d 174 (Tex. Civ. App. - El Paso 1979, no writ); McDaniel v. Thompson, 195 S.W.2d 202 (Tex. Civ. App. - San Antonio 1946, writ ref'd).

See also Marshall v. Marshall, 735 S.W.2d 587 (Tex. Civ. App. - Dallas 1987, writ ref'd n.r.e.); Sorrels v. Sorrels, 592 S.W.2d 692 (Tex. Civ. App. - Amarillo 1979, writ ref'd n.r.e.); (court upheld alimony agreement made in first divorce after parties remarried).

IV. CHARACTERIZATION OF PARTICULAR INTERESTS

A. Acquisition by Adverse Possession. When the adverse possession is without "color of title" the character of the title as separate or community is determined as of the date upon which the running of the statutory period is completed. Brown v. Foster Lumber Co., 178 S.W. 787 (Tex. Civ. App. - Galveston 1915, writ ref'd).

B. Assumption of Debt. A grantor may make a gift of encumbered property and a conveyance may be a gift even if the grantee assumes an obligation to extinguish the encumbrance. Kiel v. Brinkman, 668 S.W.2d 926 (Tex. App. - Houston [14th Dist.] 1984, no writ); *see also* Taylor v. Sanford, 193 S.W. 661 (Tex. 1917); Van v. Webb, 237 S.W.2d 827 (Tex. Civ. App. - Amarillo 1951, writ ref'd n.r.e.).

However, in Ellebracht v. Ellebracht, 735 S.W.2d 658 (Tex. App. - Austin 1987, no writ), the husband's mother deeded him one-half of her ranch in consideration of his assumption of a $30,000 mortgage. The deed, naming only the husband as grantee, did not limit the conveyance to the husband as his separate property, nor did the deed recite from whose estate the mortgage debt was to be paid. The court classified the ranch as community property, finding that the conveyance was a "sale" and not a "gift". Id. Interestingly, the husband failed to argue that the ranch was of mixed character - part separate by gift, part community by purchase. *See* Id.

See also Hall v. Barrett, 126 S.W.2d. 1045 (Tex. Civ. App.- Fort Worth 1939, no writ).

See also discussion below relating to credit transactions.

C. Business Interests. Characterization of business interests as separate or community is not affected by the form of the business entity. The rules regarding inception of title apply regardless of the form of the business entity. However, the burden of proof to clearly trace and establish the identity of separate property may be significantly affected by the form of business interest.

The characterization of the profits derived from the operation of the business may be complicated by the form of the business entity. For example, undistributed profits of a separate property corporation remain corporate property and investment and reinvestment of the profits prior to distribution remain corporate property. Profits from the operation of a sole proprietorship, or profits distributed from a corporation or partnership, are community property. A detailed discussion follows:

1. Sole Proprietorship. A sole proprietorship consists of a business and all of its assets. The property of a sole proprietorship is characterized based on the inception of title rule. The property held by the sole proprietorship, capable of characterization, includes business equipment, furniture, machinery, inventory, goods, and supplies. *See* Zeptner v. Zeptner, 111 S.W.3d 727 (Tex. App.–Fort Worth 2003, no pet.); *See* Butler v. Butler, 975 S.W.2d 768 (Tex. App.–Corpus Christi 1998, no pet.).

The value of the inventory of a business owned before marriage remains the separate property of the spouse upon dissolution of the marriage. *See* Schmidt v. Huppman, 11 S.W. 75 (Tex. 1889), where at the

death of wife, husband filed an inventory and appraisement deducting the value of the inventory from the business at the date of the marriage. The heirs contested this conclusion, and the Supreme Court held that the value of the inventory at the date of the marriage was separate property of the husband. The court pointed out the following:

> While the specific articles that made up the original stock (inventory) had been sold, and their places supplied by others from time to time as the exigencies of the business required, the property was in fact the same, a stock of merchandise, and we think that there was not such a charge in the property as would divest it of its separate character, to the extent of the goods owned by appellant at the time of the marriage.

Id. The rule in Schmidt, was followed in Blumer v. Kallison, 297 S.W.2d 898 (Tex. Civ. App. - San Antonio 1956, writ ref 'd n.r.e.) and in Schecter v. Schecter, 579 S.W.2d 502 (Tex. Civ. App. - Dallas 1978, no writ).

Profits earned by a spouse from the operation of a mercantile business are part of the community estate, even though the business is owned by the spouse as separate property. In the Matter of the Marriage of York, 613 S.W.2d 764; Schecter, 579 S.W.2d 502; Blumer v. Kallison, 297 S.W.2d 898 (Tex. Civ. App. - San Antonio 1956, writ ref'd n.r.e.); Logan v. Logan, 112 S.W.2d 515 (Tex. Civ. App. - Amarillo 1937, writ dism'd); Gifford v. Gabbard, 305 S.W.2d 668 (Tex. Civ. App. - El Paso 1957, no writ); Brittain v. O'Banion, 56 S.W.2d 249 (Tex. Civ. App. - Beaumont 1933, writ dism'd); Hudspeth v. Hudspeth, 198 S.W.2d 768 (Tex. Civ. App. - Amarillo 1946, writ dism'd n.r.e.); Moss v. Gibbs, 370 S.W.2d 452 (Tex. 1963).

2. Partnerships. The Texas version of the Uniform Partnership Act became effective January 1, 1962, was codified in Art. 6132b, Tex. Rev. Civ. Stat. Ann. (Vernon) and recodified in 2005[2]. In 1994, the Texas Revised Partnership Act, Art. 6132b, Tex. Rev. Civ. Stat. Ann. (Vernon) (the sections are numbered differently from the Uniform Act) came into effect and governed all new partnerships created after January 1, 1994, while the Uniform Partnership Act continued to govern those partnerships created prior to 1994 (unless otherwise agreed by the partnership). The Texas Uniform Partnership Act expired on January 1, 1999, and now, all partnerships, regardless of when formed, are governed by the Revised Partnership Act.

The Texas Uniform Partnership Act ("Uniform Act") and the Texas Revised Partnership Act ("Revised Act") modify prior Texas law significantly. Under both Acts, the legal concept of a partnership is that of an *entity* rather than that of a status or *aggregate* theory. The Uniform Act provided the extent of community property rights of a partner's spouse in sec. 28-A as follows:

a. A partner's rights in specific partnership property are not community property;
b. A partner's interest in the partnership may be community property; and
c. A partner's right to participate in the management is not community property.

The Revised Act provides essentially the same concepts organized in a different manner. Section 2.04 of the Revised Act reads, "Partnership property is not property of the partners. Neither the partner nor a partner's spouse has an interest in partnership property." Id. Section 5.01 of the Revised Act provides as follows: "A partner is not a co-owner of partnership property and does not have an interest that can be transferred, either voluntarily or involuntarily, in partnership property." Id. The comments to Section 5.01 of the Revised Act state that "a corollary of this section is that a partner's spouse has no community property right in partnership property, the same as in TUPA §28A(l)." Id.

With regard to the ownership of the partnership property, the Revised Act makes a significant change from the Uniform Act. In the Uniform Act, the partners were treated as "tenants in partnership". The Revised Act specifically states that the partners are not co-owners of the partnership property. Art. 6132b § 2.04. The comments to § 2.04 specifically state that the Revised Act abolished the Uniform Act's concept of "tenants in partnership" Id.

The Revised Act §5.02(a) states "A partner's partnership interest is personal property for all

[2]The general partnership laws were recodified and are now located in Chapters 151, 152 and 154 of the Texas Business Organization Code, as amended. The provisions of such chapters and the provisions of Title 1, to the extent applicable to general partnerships, may be cited as the "Texas General Partnership Law" as provided in Section 1.008(f) et seq of the Texas Business Organization Code. Therefore, all references in this article to the Texas Revised Partnership Act should be adjusted to reflect the newly named Texas General Partnership Law.

purposes. A partner's partnership interest may be community property under applicable law." Id. The comments to this section clarify that a partner's right to management of the partnership is not community property. Id.

The Revised Act clearly treats interests in partnership property and interests in the partnership differently. Neither a partner nor his spouse has any interest in the property of the partnership. However, the interest in the partnership can be community or separate. The interest in the partnership is not related to specific property of the partnership in roughly the same way stock in a corporation is not related to specific property of the corporation. Under the entity theory of partnership, partnership property is owned by the partnership, not the individual partners. Partnership property is, therefore, neither separate nor community in character.

Neither the Uniform Act nor the Revised Act attempts to define the extent to which the partner's "interest in the partnership" is community or separate property. Under appropriate circumstances it can be community property. These matters are left to determination: (1) by reference to the basic entity nature of partnerships under the Revised Act; and (2) to Texas tracing and community property concepts.

a. Partnership Interest.. The only partnership property right the partner has which is subject to a community or separate property characterization is his interest in the partnership, that is, his right to receive his share of the partnership profits and surplus. Harris v. Harris, 765 S.W.2d 798 (Tex. App. - Houston [14th Dist] 1989, writ denied); Marshall v. Marshall, 735 S.W.2d 587 (Tex. App.-Dallas 1987, writ ref'd n.r.e.).

Where the "interest in the partnership" is acquired before marriage, the interest is separate property. The same is true where the interest is acquired by gift or by inheritance. This is simply the application of the well established doctrine of inception of title. Welder, 44 S.W. 281; Harris, 765 S.W.2d 798.

Where the “interest in the partnership” is acquired during the marriage, the interest can be characterized as community property. Gibson v. Gibson, 190 S.W.3d 821 (Tex. App.–Fort Worth 2006, no pet.).

In Harris, the same husband and wife were twice married and twice divorced. Husband was awarded the partnership interest in his law partnership in the first divorce. However, during the second marriage of the parties, the partners changed and a second partnership agreement was executed. Subsequently, husband sold his interest in the partnership under a buy-out agreement entered into among the partners of husband's law partnership. The court held:

> The second agreement, *which was* executed during their marriage, altered and controlled the terms of appellee's withdrawal from the firm. However, appellee's partner status in Andrews and Kurth was established when that association of attorneys, then known as Andrews, Kurth, Campbell and Jones, first executed their partnership agreement in 1972. He remained a partner at all relevant times thereafter. The partnership itself was never dissolved. Appellee's partnership interest upon his withdrawal from the firm was, therefore, the same partnership interest that he possessed in 1972 and which was adjudged his separate property in a prior divorce.
>
> There was no evidence presented to show that a "new" or "additional" interest had been acquired during the parties' marriage. Furthermore, while it may be possible in some cases to show that an increase in the value of a separate property asset was based on some community property factor, such was not shown by any evidence in this case. No such reimbursement theory was developed at trial.
>
> Apparently, appellant believes that if the system of valuation of appellee's partnership interest changed during the marriage, by virtue of the amendments to the original partnership agreement, any increase in the sum due to him at buy-out would presumptively be community property. We do not agree with this reasoning.
>
> While the value of appellee's separate property interest may have fluctuated from time to time, there was no evidence that any "additional" interest was acquired during the parties' marriage. As in the case of stock splits and increases, analogous to this situation involving "units" of a partnership, mutations and increases in separate property remain separate property.

Harris, 765 S.W.2d at 803.

During the second marriage, the husband in Harris executed a new "Reserve Capital Agreement", an agreement providing for the distribution of proceeds from a 30% contingent fee agreement with the maternal heirs of Howard Hughes (entered into between marriages). The court held:

> Whether the contingent fee contract was the property of a separate partnership among the partners alleged to have been created specifically for the management of the Hughes case or not, the parties to the contract-were the Hughes heirs and the Andrews and Kurth partnership. There is no evidence in the record that the fee contract was owned by the several partners individually. Under the entity theory of partnership, the undivided interest owned by individual partners in specific partnership property is not community property. Only the partner's interest in the partnership may be characterized as community property. Therefore, as partnership property, the fee contract is not subject to classification as either community or separate in nature.

Id. at 803-804.

The court in Harris then considered the question of any increase in the amounts due to husband as a result of his work on the Hughes case:

> In keeping with the principles applicable to stock splits, an increase in the value, of a separate property interest resulting from fortuitous circumstances and unrelated to any expenditure of community effort will not entitle the community estate to reimbursement. Note, *Community Property Rights and the Business Partnership*, 57 Tex.L.Rev. 1018,1035-1036. However, a significant line of decisions holds that the community is entitled to reimbursement for time, toil and talent spent by one spouse for the benefit and enhancement of his or her separate property interests. Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984); Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982); In Re Marriage of York, supra. While the law contemplates that a spouse may expend a reasonable amount of talent or labor in the management and preservation of his separate property without impressing a community character upon it, a showing that appellee's energy was spent in such a way that increased his future right to share in the separate fee without adequate compensation to the community, may have entitled the community to reimbursement for that expenditure of community time. Vallone at 459. The burden of pleading and proof at trial is on the party asserting a right to reimbursement. Id. In the instant case, the only evidence introduced relevant to this reimbursement issue was appellee's testimony that his income from the Hughes fee was unrelated to the amount or extent of his work on the case. (*emphasis added*)

Id. at 805.

b. Profits Distributed. Distributions of the partner's share of profits and surplus (income) received during marriage are community property even if the partner's interest in the partnership is separate property. Harris, 765 S.W.2d 798; Marshall, 735 S.W.2d 587. Such income simply falls into the classic category of "rents, revenues, and income" from separate property. *See generally* Arnold v. Leonard, 273 S.W. 799 (Tex. 1925).

Marshall deals with the characterization of distributions from a separate property partnership. Marshall is of particular significance because the distributions were related to income received by the partnership from oil and gas interests, which otherwise would have clearly been the separate property of the husband. The wife claimed that $542,000 distributed to the husband during marriage was salary and profits, and therefore community property because they were "acquired" during the marriage. The husband claimed the distributions were only partly salary, but mostly consisted of return of capital from his separate property investment. Id. The court carefully reviewed the effect of the Texas Uniform Partnership Act, and stated:

> With the passage of the Uniform Partnership Act in 1961, Texas discarded the aggregate theory and adopted the entity theory of partnership. Under the UPA, partnership property is owned by the partnership itself and not by the individual partners. In the absence of fraud, such property is neither community nor separate property of the individual partners. A partner's partnership interest, the right to receive his share of the profits and surpluses from the business, is the only property right a partner has that is

> subject to a community or separate property characterization. Further, if the partner receives his share of profits during marriage, those profits are community property, regardless of whether the partner's interest in the partnership is separate or community in nature.
>
> [A] withdrawal from a partnership capital account is not a return of capital in the sense that it may be characterized as a mutation of a partner's separate property contribution to the partnership and thereby remain separate. Such characterization is contrary to the UPA and implies that the partner retains an ownership interest in his capital contribution. He does not; the partnership entity becomes the owner, and the partner's contributions become property which cannot be characterized as either separate or community property of the individual partners. Tex. Rev. Civ. Stat. Ann., art. 6121b, secs. 8, 25 & 28-A(l) (Vernon 1970); Thus, there can be no mutation of a partner's separate contribution; that rule is inapplicable in determining the characterization of a partnership distribution from a partner's capital account. (*emphasis added*)
>
> In this case, all monies disbursed by the partnership were made from current income. The partnership agreement provides that "any and all distributions . . . of any kind or character over and above the salary here provided . . . shall be charged against any such distributee's share of the profits of the business." Under these facts, we hold that all of the partnership distributions that Woody received were either salary under the partnership agreement or distributions of profits of the partnership. (*emphasis added*)

Id. at 593-595.

c. Undistributed Profit. When profits have been earned by the partnership but retained for the reasonable needs of the business, present or reasonably anticipated, the profits remain a part of the "partnership property" (whether in the form of cash in the bank, increased inventory, or otherwise). Jones v. Jones, 699 S.W.2d 583 (Tex. App. - Texarkana 1985, no writ); McKnight v. McKnight, 543 S.W.2d 863 (Tex. 1976). (Emphasis added)

When profits are not distributed and are accumulated by the partnership beyond the reasonable needs of the business and in fraud of the non-partner spouse or community or is transferred to the partnership in fraud of the non-partner spouse, it has been suggested that the non-partner spouse may have the same rights and remedies as if the partnership were a corporation, trust, or third person.

In Marriage of Higley, 575 S.W.2d 432 (Tex. Civ. App. - Amarillo 1978, no writ), deals with the characterization of "gross income receipts". Id. In Higley, the wife claimed reimbursement for her "community share" of the gross income receipts in a partnership (in which husband owned an interest as separate property before marriage), during the periods of marriage, which were used to pay partnership indebtedness of $219,005.21. The court of appeals held that gross income receipts do not automatically become community property. Id. The court went on to say that the wife failed to show the indebtedness was paid by the partnership from any (net) profits or surplus accumulated by the partnership during marriage. Id.

d. Partnership Property. As referenced above, the Uniform and Revised Acts specifically provide that a partner does not have an ownership interest in partnership property. Such partnership property is not subject to division by a court in a divorce proceeding. In McKnight, the Supreme Court held that the trial court's award of specific properties of the partnership violated the Texas Uniform Partnership Act. McKnight, 543 S.W.2d 583. The decision in McKnight impliedly overruled the prior Supreme Court decision in Norris, decided under the aggregate theory of partnership property. *See also*, discussion of Harris; Jones; and Roach v. Roach, 672 S.W.2d 524 (Tex. App.Amarillo 1984, no writ).

e. Community Reimbursement. Some questions may arise in situations where the partner-spouse devotes 100% of his time, toil, and talent to the partnership business, but receives only modest distributions and the bulk of the profits are accumulated in the partnership entity. In such cases the same rules of reimbursement should arguably apply as with the corporate entity, and the community estate's right to claim reimbursement for the time, toil and efforts expended to enhance the separate estate, other than that reasonably necessary to manage and preserve the separate estate for which the community did not receive adequate compensation. *See* Harris,

765 S.W.2d at 805; *see generally* Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984).

f. Alter Ego. Similarly, the alter ego rules for piercing the corporate veil should apply to the partnership entity in the same manner as they apply to the corporate entity in respect to the shareholder spouse's conduct. *See generally,* Bell v. Bell, 513 S.W.2d 20 (Tex. 1974); Spruill v. Spruill, 624 S.W.2d 694 (Tex. App. - El Paso 1981, writ dism'd). *See* discussion under Corporations below.

But see: Lifshutz v. Lifshutz, 61 S.W.3d 511 (Tex. App. - San Antonio 2001, review den.), which held that the doctrine of alter ego does not apply to partnerships as a result of the Revised Act. Under the Revised Act, it specifically provides that "a partner's spouse has no community property right in partnership property."

3. Joint Ventures. Changes in Partnership law have recently clarified many problems originally faced in determining what type of entity is in existence at the time of divorce. Joint ventures, though few and far between, still exist in Texas. Characterization of a business interest in a joint venture is determined by inception of title, similar to partnership interests. *See* Thompson v. Thompson, 500 S.W.2d 203 (Tex. App.–Dallas, 1973, no writ).

4. Corporations. The inception of title doctrine is applied to a corporation as of the date of incorporation or other acquisition of the stock. Corporations organized during marriage and capitalized with traceable separate property of one spouse are characterized as the separate property of that spouse. *See* Holloway v. Hollow, 671 S.W.2d 51 (Tex. Civ. App.--Dallas 1983, writ dism'd) (husband traced separate funds into his initial subscription to stock).

In Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982), Husband and wife were married in 1966. During the first years of their marriage, husband worked in a restaurant owned and operated by his father as a sole proprietorship. In January 1969, the assets of the restaurant were transferred to husband from his father as a gift. Husband operated the restaurant as a sole proprietorship until its incorporation in August 1969. The initial capitalization consisted of $19,663 in assets. Included in the initial capital was the used restaurant equipment given to husband by his father, valued at $9,365 (or slightly over 47% of the initial contribution). The trial court found the business to be worth $1,000,000. Finding that 47% of its initial capitalization was traceable to husband's separate estate, the trial court set aside that proportionate share of the corporate stock as husband's separate property. The Court of Appeals, 618 S.W.2d 820, affirmed the trial court's finding that 47% of the corporation was husband's separate property. The Supreme Court reversed the judgment of the Court of Appeals on other grounds and affirmed the judgment of the trial court. *See* Vallone, 644 S.W.2d 455.

In Hunt v. Hunt, 952 S.W.2d 564 (Tex. App.- Eastland 1997, no writ), the husband and wife were married for a short period of time. During the marriage, Hunt's Hashknife Helicopter, Inc., was formed. The corporation owned two helicopters. Prior to the marriage and the formation of the corporation the helicopters were owned by a partnership consisting of the husband and his father. Upon his father's death, the husband received the helicopters and thereafter "created a corporation with the helicopters." Id. Therefore, the helicopters were the husband's separate property. In upholding the trial court's decision that the corporation was the husband's separate property, the appellate court stated that there was no evidence provided by wife to indicate that community assets were used or that community debts were incurred in the formation of the corporation. Id.

"When a corporation is funded with separate property, the corporation is separate property." Allen v. Allen, 704 S.W.2d 600 (Tex. App.- Fort Worth 1986, no writ). In Allen, "Marlene's Beauty Salon" was a sole proprietorship owned and operated by wife for about 17 years. A corporate charter was applied for under the name of "Marlene's Beauty Salon and Cuttery, Inc." almost eight months after the marriage of husband and wife. The corporation required an initial capitalization of $1,000. Id. There was no evidence to show that this money was funded from anything other than the community estate. All of the physical assets of the sole proprietorship "Marlene's Beauty Salon" were retained in wife's name and rented by her to the corporation. Wife continued to operate the beauty salon in the same location it had been in for the previous six years although under the new corporate name. The management, employees, and clientele of the salon remained substantially the same following the incorporation. Wife testified that her purpose in incorporating was to avoid having to purchase malpractice insurance. Wife claimed that the corporation's inception of title was in the sole proprietorship because it was an incorporation of an "ongoing business" and therefore should be characterized as wife's separate property. Id. The court held:

> Appellant has not cited any authority for this "ongoing business" theory and we have not found any legal authority supporting this claim. Under Texas law, a corporation does not exist until the issuance of a certificate of incorporation. TEX. BUS. CORP. ACT ANN. art. 3.04 (Vernon 1980). It is undisputed that Marlene's Beauty Salon and Cuttery, Inc. was not incorporated until after the parties were married. We hold there can be no title to a corporation until it actually exists; consequently, the inception of title doctrine can only be applied to a corporation as of the date of incorporation.

Id. at 605.

In Allen, it was also shown that wife did not contribute any tangible assets to the corporation. The corporation rented all business property, equipment, and furniture from wife. The only contribution of "separate property" that wife seemed to claim was that the corporation continued to do business in the same location, with the same employees, and the same clientele. Wife claimed that she contributed "goodwill" to the corporation. The court stated:

> Although it is well established that goodwill is a property right which may be sold or transferred, appellant failed to meet her burden of clearly tracing this intangible asset as a contribution of her separate property to the corporation. While it is clear that the corporation took over the activities of appellant's sole proprietorship, there was no evidence presented at trial concerning the value of the goodwill contributed by the appellant at the time of incorporation. (*emphasis added*)

Id. at 604-605.

In Marriage of York, 613 S.W.2d 764 (Tex. Civ. App. - Amarillo 1981, no writ), the husband and wife entered into a written, statutory partition agreement whereby husband acquired the undivided one-half interest in York Tire Company, a partnership with his brother, as his separate property. Husband then purchased his brother's one-half interest in York Tire Company with a $15,000 note. He paid the purchase money note with cash and earnings from York Tire Company.

Thereafter, husband formed York Tire Company, Inc., a corporation. The assets of York Tire Company and two service stations were exchanged for 100 shares of stock in the corporation. The two service stations were the community property of the parties. At the time of the exchange, husband made a valuation of the assets exchanged for the 100 shares of stock. By this valuation, the combined value of the assets of York Tire Company and the two service stations was $77,911.53. The value of the assets of the two service stations was $17,098.40 and the value of the assets of York Tire Company was $60,813.13. Husband's valuation of the assets of York Tire Company is as follows: (1) "equipment 12-31-72" was valued at $9,609.52; (2) "Profit 1-1-73 to 6-30-73" was valued at $12,761.41; (3) leased equipment was valued at $23,442.00; (4) "Phillips Jobber" was valued at $15,000. Id. Using husband's valuations, the court held:

> The "equity", Leased Equipment, and "Phillips Jobber" assets were owned ½ by the community estate and ½ by Mr. York's separate estate. We reach this conclusion because Mr. York owned ½ of York Tire Company by virtue of the 2 January 1971 partition agreement, and the community estate owned ½ of the company by virtue of the community acquisition of Tommy York's ½ interest in the company. Moreover, the evidence fails to show that any post-partition increase in value of these assets is attributable or traceable to any post-partition, community-owned profits from the business. The total value of these assets was $48,051.72, and Mr. York's separate estate interest in such was $24,025.86.

Id. at 769-770.

a. Increase in Value. The mere increase in the value of stock does not affect the character of the stock as separate property. Similarly, an increase in a spouse's separate property, which is an enhancement of its value resulting from fortuitous causes such as natural growth or market fluctuations remains a part of the separate estate. Dillingham v. Dillingham, 434 S.W.2d 459 (Tex. Civ. App.- Fort Worth 1968, writ dism'd). The increase in the value of stock separately owned caused by the accumulation of surplus out of earnings is not regarded as community property. Johnson v. First National Bank of Fort Worth, 306 S.W.2d 927 (Tex. Civ. App. - Fort Worth 1957, no writ). The legal title to stock in a corporation is not affected by the acquisition of additional assets by the corporation or by the fact that, in the absence of fraud, the directors of a corporation

may, in their discretion, invest its earnings in such assets instead of distributing them to the shareholders. Stringfellow v. Sorrells, 18 S.W.2d 689 (Tex. 1891); Cleaver v. Cleaver, 935 S.W.2d 431 (Tex. App.--Tyler 1996, no writ); Western Gulf Petroleum Corp. v. Frazier Jelke & Co., 163 S.W.2d 860 (Tex. Civ. App. -Galveston 1942, writ ref'd w.o.m.); Fain v. Fain, 93 S.W.2d 1226 (Tex. Civ. App. - Fort Worth 1936, writ dism'd).

Where corporate stock owned by a spouse as separate property has increased in value during marriage due, at least in part, to the time and effort of either or both spouses, the stock remains separate property. Texas has adopted the rule that the community estate has a claim for reimbursement for the value of time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits, those items being community property when received. *(emphasis added)* Jensen, 665 S.W.2d 107. The Jensen court further held that a non-owning spouse has the burden to affirmatively plead and prove that he or she is entitled to such reimbursement. Id.; *see also* Trawick v. Trawick, 671 S.W.2d 105 (Tex. App.--El Paso 1984, no writ); Holloway, 671 S.W.2d 51, (as a result of time and effort of husband value of stock in corporation rose from $1,000 to $30,000,000, and value of stock in another corporation rose from $3,000 to $60,000,000).

b. Disregarding the Corporate Entity. Where it is shown that in substance and in fact the corporation is merely a spouse's instrumentality for the conduct of his or her business affairs, the corporation may be considered to be that spouse's "alter ego." Moreover, when there has been a commingling of the community property with the property of the alter ego corporation, the usual rules of tracing apply, such that when the evidence shows that separate and community property have been so commingled as to defy re-segregation and identification, the statutory presumption controls and the entire mass is community. Dillingham v. Dillingham, 434 S.W.2d 459 (Tex. Civ. App. - Fort Worth 1968, writ dism'd); Bell v. Bell, 513 S.W.2d 20 (Tex.1974); Zisblatt v. Zisblatt, 693 S.W.2d 944 (Tex. App. --Fort Worth 1985, writ dism'd); Uranga v. Uranga, 527 S.W.2d 761 (Tex. Civ. App. -San Antonio 1975, writ dism'd); Mea v. Mea, 464 S.W.2d 201 (Tex. Civ. App. -Tyler 1971, no writ).

In Dillingham, the Court of Appeals court upheld the decision of the trial court in finding that the husband's wholly owned corporation, for the purposes of the divorce litigation, was the husband's alter ego and that the increase in the value of the corporation was part of the community estate. Dillingham, 434 S.W.2d 459. The Court cited with approval and adopted the rationale and conclusions contained in the Attorney General of Texas' Opinion # 0-6595 handed down on September 18, 1945. Op. Tex. Att'y Gen. No. 0-6595 (1945). The Attorney General's Opinion concluded that inheritance tax will accrue on one-half of the accumulated surplus of a corporation when all of such corporation's stock was owned prior to, during and after marriage by a surviving spouse who transacted personal business through the corporation. The Attorney General's Opinion states in pertinent part as follows:

> While the recognition of a corporation as an entity separate and distinct from the members who compose it is fundamental, it is a legal fiction and is not a sacrosanct principle inevitably followed when the fiction is opposed to the facts. Practically, it is necessary to disregard the fiction in order to cope with some abuses of the corporate method of conducting business. The larger principles of justice must not be obscured by the corporate veil. A fiction should not prevail over fact.

Id.

The ownership of all of a corporation's stock by one man is not prohibited in Texas, but when a stockholder is the sole owner (or even practically the sole owner) and treats the corporation as his alter ego, the corporate entity should be disregarded if its use is repugnant to broader principles or provisions of law. In Merrell v Timmons, 140 S.W.2d 480, 482 (Tex. Civ. App. - Galveston 1940), aff'd, 158 S.W.2d 278 (Tex. 1941), the appellate court stated:

> . . . It is well settled in such instances that, to prevent injustice, our courts will look through the mere corporate form of things to the reality, and hold one who is in that manner and form merely carrying on transactions for and in behalf of himself personally . . ."

Id.

The appellate court in Zisblatt considered the following language from In Re Chas. K. Horton, Inc.,

22 F. Supp 905(1). Tex. 1938) particularly applicable:

> It must be conceded that a corporation entity will not be ignored because one individual owns all of the stock. Courts exercise great caution in ignoring the artificial entity and such ignoring only comes if and when the proof substantiates the thought, and drives any conclusion from the mind, that the entity is in fact the tool or mere agency of the owner of the stock.

Zisblatt, 693 S.W.2d at 951 (quoting In Re Chas. R. Horton, Inc., 22 F. Supp. 905).

In Continental Supply Co. v. Forest [Forrest] E. Gilmore Co. of Texas, 55 S.W.2d 622 (Tex.Civ.App.--Amarillo 1932, writ dism'd), the court stated:

> Upon ascertainment of the facts, the courts will disregard the fiction of corporate entity where the fiction (1) is used as a means of perpetrating fraud; (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation; (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation; (4) where the corporate fiction is employed to achieve or perpetrate monopoly; (5) where the corporate fiction is used to circumvent a statute; and (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong.

Id.

In the watershed case of Castleberry v. Branscom, 721 S.W.2d 270 (Tex. 1986), the Supreme Court wrote:

> We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result.

Id.

The Supreme Court continued to state:

> The basis used here to disregard the corporate fiction, a sham to perpetrate a fraud, is separate from alter ego. It is sometimes confused with an intentional fraud; however, neither fraud or an intent to defraud need be shown as a prerequisite to disregarding the corporate entity; it is sufficient if recognizing the separate corporate existence would bring about an inequitable result.

Id.

However, Castleberry was subsequently overruled, in part, by Texas Business Corporation Act, article 2.21A (Vernon's Supp. 1998), to the extent that failure to observe corporate formalities and constructive fraud are no longer factors in proving alter ego in a "contract" claim. Nonetheless, the purpose in disregarding the corporate fiction is to prevent use of the corporate entity as a cloak for fraud or illegality or to work an injustice, and that purpose should not be thwarted. Castleberry 721 S.W.2d at 273 (*quoting* Gentry v. Credit Plan Corp. of Houston, 528 S.W.2d 571, 575 (Tex. 1975)).

The Texas Supreme Court has since held that "[w]here a corporate entity is owned or controlled by an individual who operated the company in a manner indistinguishable from his personal affairs and in a manner calculated to mislead those dealing with him to their detriment, the corporate fiction may be disregarded. Mancory, Inc. v. Culpepper, 802 S.W.2d 226, 229 (Tex. 1990). *See also* Sims v. Western Waste Industries, 918 S.W.2d 682 (Tex. App.--Beaumont 1996, writ denied)(not divorce case but discussing alter ego and sham to perpetrate a fraud under new statute).

Eikenhorst v. Eikenhorst, 746 S.W.2d 882 (Tex. App. - Houston [1st Dist.] 1988, no writ), involved a medical professional association. The court (without a finding of alter ego and in a decision that is subject to criticism) awarded the wife $48,009.75 in cash from the corporate bank accounts of the husband's professional association. The husband, a medical doctor, incorporated his medical practice and was the sole shareholder in that professional association. The court held:

> Although the appellant has never contended that the assets of the professional association were anything other than community property, he contends that the Texas Supreme Court's ruling in McKnight v. McKnight, 543 S.W.2d 863 (Tex. 1976), supports his position. In McKnight, the Court held that a divorcing spouse's interest can attach to a husband's interest in a

> partnership only, and not in any specific partnership property. The McKnight ruling is distinguishable because: (1) McKnight involved partnership, with independent third party partners, and this award involves a corporation in which the appellant is the only shareholder; and (2) under Tex.Rev.Civ.Stat.Ann. art. 1528f, sec. 10 (Vernon 1980), shares of professional associations are transferable only to persons who are licensed to practice the same type of profession for which the professional association was formed. Because the appellee could not be awarded shares in a professional association in which she had community interest, we hold that it was not improper for the trial court to award the appellee her community interest from the cash assets of the professional medical association in which her physician husband was the sole shareholder *(emphasis added)*

Id.

c. Subchapter S Corporation. A Subchapter S election under the Internal Revenue Code does not affect the status of the corporation as separate property. In Thomas v. Thomas, 738 S.W.2d 342 (Tex. App. -Houston (1st Dist.) 1987, no writ) the appellate court rejected the argument that the retained earnings of a separate property Subchapter S corporation should be treated as community property because the community had paid income tax on them, and held that retained earnings are a corporate asset. Id. The appellate Court held:

> Subchapter S status does not determine who owns the corporation's earnings. It merely provides an alternate method to tax the corporation's income**. . . .** [W]hile the corporation retained some earnings as 'previously taxed income' of the shareholders, the earnings remained the corporation's exclusive property and never belonged to the [husband] or the marital estate.

Id.

D. Capital Gains. Capital gains distributions from separate property mutual fund shares are separate property. Bakken v. Bakken, 503 S.W.2d. 315 (Tex.Civ.App. - Dallas, 1973, no writ).

E. Cemetery Plot. A plot to which the exclusive right of sepulture is conveyed is presumed to be the separate property of the person named as grantee in the instrument of conveyance. Health & Safety Code, § 711.039(a) (Vernon's Supp. 1999).

F. Children.

1. Earnings of a Child. The earnings of an unemancipated minor, as well as any property that might be purchased with proceeds derived from such earnings, belong to and become a part of the community property of the father and mother of such child. Insurance Co. of Tex. v. Stratton, 287 S.W.2d 320 (Tex. Civ. App. - Waco 1956, writ ref'd n.r.e.).

If the Texas Department of Family and Protective Services has been appointed managing conservator of the child and the child has been placed in a foster home or child-care institution, the child is entitled to keep any money earned during his placement. Tex. Fam. Code § 264.0111 (a) (2010). This money is not characterized as part of the parents' estate, as the earnings are the property of the child.

2. Injury to a Child. The damages recoverable by the parents for injury to, or the death of a child are community property, to the extent that such damages are based on the loss of services of the child, which services belong to the community. Hawkins v. Schroeter, 212 S.W.2d 843 (Tex. Civ. App. - San Antonio 1948, no writ); Folsom Investments, Inc. v. Troutz, 632 S.W.2d 872 (Tex. App. - Fort Worth 1982, writ ref'd n.r.e.).

Recovery by the parents for loss of companionship and society and damages for mental anguish for the death of his or her minor child is separate property. Sanchez v. Schindler, 651 S.W.2d 249(Tex. 1983); Williams v. Stevens Indus., Inc., 678 S.W.2d 205 (Tex.App. - Austin 1984), aff'd, 699 S.W.2d 570 (Tex. 1985).

G. Crops Grown on Separate Land. Crops produced by annual cultivation are distinct in nature from the land on which they are grown and are community property. Whether the crop is growing or matured or already harvested at the time of divorce makes no difference. Cleveland v. Cole, 65 Tex. 402 (1886); Coggin, 204 S.W.2d 47; McGarraugh v. McGarraugh, 177 S.W.2d 296 (Tex. Civ. App.-Amarillo 1943, writ dism'd); Kreisle v. Wilson, 148 S.W. 1132 (Tex. Civ. App. - San Antonio 1912, no writ). Where the crop is undeveloped at time of divorce, the court may appoint a receiver to take charge, develop the crop to harvest, and sell. Beaty v.

Beaty, 186 S.W.2d 88 (Tex. Civ. App. - Eastland 1945, no writ).

H. Damages. In the case of Smith v. Smith, 22 S.W.3d 140 Tex. App. - Houston [14th Dist.] 2000, no writ), the appellate court upheld the trial court's ruling that Mr. Smith's claim for damages relating to his townhouse were his separate property.

In this case, Mr. Smith entered into a contract to buy a townhouse prior to his marriage. The trial court ruled that Mr. Smith was induced to enter into the contract to buy the townhouse as a result of misrepresentations made by the seller. Mr. Smith subsequently filed his lawsuit before the marriage. However, the actual trial and Mr. Smith's ultimate recovery of his damages took place during the marriage.

During the divorce proceedings, Mr. Smith argued that a portion of the damages he recovered constituted his separate property. The trial court, in relying on the inception of title doctrine, ruled that Mr. Smith's right to claim damages relating to the purchase of the townhouse arose before his marriage to Mrs. Smith. Therefore, even though Mr. Smith did not recover his damages until after the marriage, the damages constituted his separate property.

Mrs. Smith argued that Mr. Smith did not have a legally enforceable right to the damages, but instead had a mere possibility of recovery. Therefore, Mrs. Smith contended that the entire gross amount of the damages awarded to and recovered by Mr. Smith constituted community property.

The appellate court ruled that: "For Mr. Smith to establish the damage award as his separate property, his right to the damages was not required to vest completely before marriage. To establish the award as his separate property, Mr. Smith merely had to show that before the marriage he had a right to claim the damages, he pursued that right, and the right to claim the damages later ripened." Smith, 22 S.W.3d at 145. The court further indicated, in order to establish the damage award as his separate property, that Mr. Smith was not required to show that all of the damages vested before marriage. *(emphasis added)* Id. 22 S.W.3d at 145.

I. Debts and Liabilities. It is sometimes necessary to characterize marital property as separate or as community in order to determine whether that property may be reached to satisfy obligations incurred by one or both spouses.

TFC § 3.202 provides the rules of marital property liability and states:

(a) A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law.
(b) Unless both spouses are personally liable as provided by this subchapter, the community property subject to a spouse's sole management, control, and disposition is not subject to:

(1) any liabilities that the other spouse incurred before marriage; or
(2) any nontortious liabilities that the other spouse incurs during marriage.

(c) The 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.
(d) All community property is subject to tortious liability of either spouse incurred during marriage.

Id. (*emphasis added*)

It is well established that debts contracted during marriage are presumed to be on community credit. Cockerham, 527 S.W.2d 162; Broussard v. Tian, 295 S.W.2d 405 (Tex. 1956); Kimsey v. Kimsey, 965 S.W.2d 690 (Tex. App.- El Paso 1998, writ denied); Jones v. Jones, 890 S.W.2d 471 (Tex. App.--Corpus Christi 1994, writ denied); Taylor v. Taylor, 680 S.W.2d 645 (Tex. App. -Beaumont 1984, writ ref'd n.r.e.); Mortenson v. Trammel, 604 S.W.2d 269 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.). The fact that debts are community liabilities does not, without more, necessarily lead to the conclusion that they are joint liabilities. As one commentator notes, "Ordinarily a court terms a debt incurred by a spouse a community debt for the purpose of characterizing property bought on credit or with borrowed money. With that description, however, a court does not thereby impute liability to the noncontracting spouse." McKnight, Annual Survey of Family Law; Husband and Wife, 42 Sw.L.J. 1, 4 (1988); *see also* Latimer v. City Nat'l Bank, 715 S.W.2d 825 (Tex. App. Eastland 1986, no writ).

Texas Family Code § 3.201, and amendments thereto, were intended to clarify certain confusing statements in Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975), which held that both spouses were

liable for debts created by a business operated primarily by one spouse.

Pursuant to TFC Section 3.201(a), a person is personally liable for the acts of the person's spouse only if the spouse acts as an agent for the person. However, under Section 3.201(c), the mere fact that the marriage relationship exists does not make one spouse the agent for the other spouse.

In Jurek v. Couch-Jurek, 269 S.W.3d 364 (Tex. App.–El Paso 2009, no pet.), the parties signed a premarital agreement which characterized debts arising from properties owned prior to marriage as separate property debts. The agreement also provided that the parties would retain all rights, profits and income to separate property, including any property acquired during the marriage, as if no marriage had been consummated between them.

During the marriage, the wife bought more than thirty rental properties, which she took title to solely in her name. She bought the properties on credit from various lenders, none of whom agreed to look only to her separate property for repayment. The trial court characterized these houses as wife's separate property and husband appealed.

The appellate court determined that the wife's intentions did not control the character of the property purchased on credit during the marriage. The community presumption would prevail unless the creditors agreed to look only to wife's separate property for repayment. The fact that wife paid all the installment payments from her separate property did not alter the character of the properties, as they were purchased on community credit.

To determine whether only the contracting spouse is liable or if both the husband and wife are liable, it is necessary to examine the circumstances. *See* Humphrey v. Taylor, 673 S.W.2d 954 (Tex. App.-Tyler 1984, no writ) (where wife took no action, which served to "ratify" the debt of husband, no joint liability); Miller v. City Nat'l Bank, 594 S.W.2d 823 (Tex. Civ. App. - Waco 1980, no writ); and Pope Photo v. Malone, 539 S.W.2d 224 (Tex. Civ. App.-San Antonio 1976, no writ) (wife not liable for husband's debt where she had no knowledge of debt).

When the obligation is a joint obligation in which both spouses are personally liable, characterization is not necessary for the purpose of determining liability of marital property, for the reason that all property of both spouses, separate and community, is liable for the joint obligation.

Even though the court in granting a divorce and making a division of the community property may order one particular spouse to pay the community debt, such order may not limit the rights of a creditor. U.S. CONST. Art. I, § 10, cl. 1; TEX. CONST. Art. I, § 16; Broadway Drug Store of Galveston Inc. v. Trowbridge, 435 S.W.2d 268 (Tex. Civ. App.-Houston [14th Dist.] 1968, no writ). A creditor's rights are in no way affected by the divorce decree. First Nat'l. Bank of Brownwood v. Hickman, 89 S.W.2d 838 (Tex. Civ. App. -Austin 1935, writ ref'd).

A discharge in bankruptcy of the contracting spouse does not have the effect of canceling or releasing the joint liability for a community debt to the extent of the community property set aside to the other spouse by a divorce decree. Swinford v. Allied Finance Company of Casa View, 424 S.W.2d 298 (Tex. Civ. App. - Dallas 1968, writ dism'd), cert. denied. 393 U.S. 923, 89 S.Ct. 253.

In Inwood National Bank of Dallas v. Hoppe, 596 S.W.2d 183 (Tex. Civ. App. - Texarkana 1980, writ ref'd n.r.e), the creditor sued wife to recover the unpaid balance of the principal, accrued interest, and attorney's fees as provided for in a certain promissory note. No security was given to secure the loan, but her former husband and his business partner personally guaranteed the payment of the loan note and submitted their personal financial statements. In the divorce decree the note was to be discharged by the former husband. Subsequently, the former husband was adjudged to be bankrupt and was discharged from any future liability on the note. Id. The court held:

> Being contracted for during marriage, the debt evidenced by the note is presumed to be credit of the community and therefore a community debt.
>
> Appellant, as a creditor of the community, has the right to resort to the entire non-exempt community property, and this right was in no way affected by the divorce decree.[3]
>
> [Wife] was not a party to the bankruptcy proceeding [of husband] and that portion of the community estate awarded to her by the divorce decree was not subject to such proceeding.

Id. at 185.

[3] Section 3.202 of the Texas Family Code limits the ability of a creditor under certain circumstances to reach certain types of property. The Hoppe decision must be read in light of the statutory provisions contained in § 3.202 of the Texas Family Code. *See* discussion above.

In Carlton v. Estate of Estes, 664 S.W.2d. 322 (Tex. 1983), the husband and wife were married at the time a judgment was rendered against husband in a securities fraud suit. At the time and until the death of wife, the community of husband and wife owned a certain piece of property in Jack County, which was subject to their joint management, control and disposition. Petitioner Carlton, as agent for the plaintiff in the securities suit, filed a claim in the probate court to have a preferred debt and specific lien placed on certain property of the estate including the property located in Jack County. The court held:

> [A] spouse's interest in community property subject to joint management, control, and disposition may be reached to satisfy the liabilities of the other spouse without joinder of both spouses in the suit.

Id.

The Texas classification system characterizes community property as either jointly managed community property or as solely managed community property for purposes of determining what property is subject to execution depending on the type of liability. TFC § 3.102. Property that qualifies as solely managed community property is subject to one spouse's sole management and control even though the property counts as part of the community estate. When a spouse borrows money and the lender does not agree to limit payment to that spouse's separate property, then the debt constitutes an obligation of the community estate, i.e. some community property is liable for its satisfaction. The solely managed community property of a spouse is not liable, absent agreement, for the nontortious liabilities that the other spouse incurs during marriage. TFC § 3.202(b)(2); Brooks v. Sherry Lane Nat'l Bank, 788 S.W.2d 874 (Tex. App. - Dallas 1990, no writ).

In Latimer, the court held that one spouse is not personally liable for a note signed only by the other spouse, but the creditor may look to the non-exempt community property to satisfy a 'community' debt, depending on the application of TFC § 3.202 to the facts of the property holdings. Latimer v. City Nat'l Bank of Colorado City, 715 S.W.2d 825 (Tex. App.-Eastland 1986, no writ).

Anderson v. Royce, 624 S.W.2d 621 (Tex. App. - Houston [14th Dist.] 1981, writ ref'd n.r.e), concludes that the spouse who had not signed the note could be held liable "to the extent of the community property received upon partition of the community estate after her divorce." *(emphasis added)*

In Dan Lawson & Associates v. Miller, 742 S.W.2d 528 (Tex. App. --Fort Worth 1987, no writ), the wife hired a firm of investigators to conduct an investigation while her divorce was pending. When the investigative agency sued to collect fees for its services from the husband, the trial court granted husband summary judgment. The court held that under Texas law a debt contracted for during the marriage is presumed to be a community debt[4] unless it can be rebutted by showing the creditor agreed to look solely to one spouse's separate estate. In Miller, the wife contracted for the services prior to the divorce. Whether or not the agency agreed to look only to her estate for its fees was a fact question for the trial court or jury to decide. The raising of such a fact issue precludes the granting of summary judgment. Id.

J. Earnings of Spouses. The personal earnings of a spouse accrued during the marriage become community property. Moss v. Gibbs, 370 S.W.2d 452 (Tex. 1963); Uranga, 527 S.W.2d 761. Whatever is earned from the labor and effort of either spouse is community property. Graham, 488 S.W.2d 390.

A husband may not waive his claim to salary already in place and convert it into dividends, or some form of profit incident to stock ownership, and thereby convert the salary into separate property. Keller v. Keller, 141 S.W.2d 308 (Tex. Comm'n App. 1940, opinion adopted).

In Cunningham v. Cunningham, 183 S.W.2d 985 (Tex. Civ. App. - Dallas 1944, no writ), it was held that an insurance agent's future renewal commissions for insurance policies written by the husband during the marriage but not accruing to him until after divorce were a "mere expectancy". Id.; *see also* Vibrock v. Vibrock, 549 S.W.2d 775 (Tex. Civ. App. - Fort Worth 1977, writ ref'd n.r.e.); *but see* Supreme Court's remarks in refusing writ of error n.r.e. per curiam at 561 S.W.2d 776 (Tex. 1977):

> The disposition of this case by this court indicates neither approval nor disapproval of the language contained in the opinion of the Court of Appeals which suggests that these

[4]Much confusion and chaos has been created by the use of the term "community debt" in some court decisions, which fail to clearly distinguish between characterization of loan proceeds as separate or community, and individual or joint liability of the spouses for the indebtedness. *See* Dunlap v. Williamson, 683 S.W.2d 373 (Tex. 1985).

> renewal commissions are not community property.

Id. (citing Cearley v. Cearley, 544 S.W.2d 661 (Tex.1976)).

In Licata v. Licata, 11 S.W.3d 269 (Tex. App.–Houston [14th Dist.] 1999, pet. denied), the husband was a licensed attorney practicing in Texas. Upon divorce, the trial court awarded his wife a portion of referral fees he received after the marriage from cases he had pending during the marriage. The court concluded that this was not an expectancy interest, as his right to the fees had vested, resulting in the fees being divisible upon divorce.

Monies received by a spouse after marriage for services rendered prior to marriage are separate property. Moore v. Moore, 192 S.W.2d 929 (Tex. Civ. App. - Fort Worth 1946, no writ); Dessommes v. Dessommes, 543 S.W.2d 165 (Tex. Civ. App.-- Texarkana 1976, writ ref'd n.r.e.). Monies earned by a spouse during marriage but received after dissolution of the marriage are community. Busby v. Busby, 457 S.W.2d 551 (Tex. 1970). Monies attributable to earnings after dissolution of marriage are not community property. McBride v. McBride, 256 S.W.2d 250 (Tex. Civ. App. -Austin 1953, no writ).

Bonuses paid to a corporation president after rendition of judgment for divorce, but before entry of judgment, have been held not to be community property. Echols v. Austron, Inc., 529 S.W.2d 840 (Tex. Civ. App. -Austin 1975, writ ref'd n.r.e).

K. Embryos. There is one case in Texas that discusses the characterization of embryos. That case is Roman v. Roman, 193 S.W.3d 40 (Tex. App. - Houston [1st Dist.], 2006 no pet.). While the case presents interesting reading, the Houston court of appeals, in sidestepping the issue of the characterization of embryos ruled , based upon the written contractual agreements between the parties which had specific language whereby the parties agreed that in the event of a divorce that the embryos would be destroyed, that it was error for the trial court to award the embryos to the wife in violation of the written agreement.

L. Employee Benefits. The TFC specifically provides that in a decree of divorce of annulment, the court shall determine the right of both spouses in a pension, retirement plan, annuity, individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant, regardless of whether the person is self-employed, in the nature of compensation or savings. TFC, § 7.003.

1. General. Employee benefits acquired by the employee spouse during marriage are community property. Herring v. Blakeley, 385 S.W.2d 843 (Tex. 1965). Employee benefits earned before marriage are separate property, and such benefits earned after dissolution of the marriage are separate property. *See* Hatteberg v. Hatteberg, 933 S.W.2d 522 (Tex. App.-Houston [1st Dist.] 1994, no writ). The same characterization applies even though none of the funds are available or subject to possession at the time of the divorce. Herring, 385 S.W.2d 843.

It is not necessary that the benefit be either "accrued" (i.e. necessary minimum number of years required for a pension for eligibility has been completed) or "matured" (i.e. denoting that all requirements have been met for immediate collection and enjoyment). Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976). The prospective rights prior to accrual and maturity constitute a contingency interest in property and a community asset subject to consideration along with other property in the division of the estate of the parties under TFC § 7.003.

2. Retirement Accounts. Retirement accounts can be divided into two types: defined benefit plans and defined contribution plans. Defined benefit plans are typically referred to as “pension” plans in which the participant is generally to receive a certain sum per month, based upon, in part, actuarial assumptions. Additionally, formulas have been provided through case law such as Berry v. Berry, 647 S.W.2d 945 (Tex. 1983), Taggart, 552 S.W.2d 442 (Tex. 1971), and Cearley, 544 S.W.2d 661 that provide guidance as to characterization.

Defined contribution plans encompass plans typically known as “401(k), IRA, profit sharing, and SEPs” and often rely on both employee and employer contributions on a periodic basis to provide a fund for retirement.

a. Characterization - Defined Benefit Plans. The approach to characterization of defined benefit plans varies depending upon whether the employee was a member of the plan at the time of marriage and whether the employee is still a member of the plan at the time of the divorce. There are a number of possible combinations of facts that present themselves. The reader is directed to other articles addressing this topic in more detail.

Where the present value of the right is not subject to determination by reason of uncertainties affecting

the vesting or maturation of the benefit, the community interest in a defined benefit plan can be mathematically ascertained by apportioning the benefit between the months in the plan during marriage and the total number of months necessary for accrual and maturity. Taggart v. Taggart, 552 S.W.2d 422 (Tex. 1977). Where the benefit is a contingent interest it has been suggested the apportionment to the nonemployee spouse be made effective if, as, and when the benefits are received by the employee spouse. Cearley, 544 S.W.2d 661; *see also* Miser v. Miser, 475 S.W.2d 597 (Tex. Civ. App.--Dallas 1971, writ dism'd).

The extent of the community interest in a defined benefit plan is now controlled by statute. Historically, the community interest was generally based on the number of months in which the marriage coincides with employment (the numerator) divided by the total number of months of employment (the denominator), Taggart, 552 S.W.2d 422, based upon the value of the community interest at the time of divorce. Berry v. Berry, 647 S.W.2d 945 (Tex. 1983).

In 2005, the Texas Legislature enacted Section 3.007 of the TFC, called "Property Interest in Certain Employee Benefits."

This new section, as it relates to retirement plans, attempts to define and clarify the characterization and tracing rules to be utilized when attempting to characterize defined benefit plans as follows:

§ 3.007. Property Interest in Certain Employee Benefits

> (a) A spouse who is a participant in a defined benefit retirement plan has a separate property interest in the monthly accrued benefit the spouse had a right to receive on normal retirement age, as defined by the plan, as of the date of marriage, regardless of whether the benefit has vested.
>
> (b) The community property interest in a defined benefit plan shall be determined as if the spouse began to participate in the plan on the date of marriage and ended that participation on the date of dissolution or termination of the marriage, regardless of whether the benefit has vested.
>
> . . . .

The language with regard to defined benefit plans is highly problematic in the scenario where a spouse began accruing rights under a defined benefit plan prior to marriage and continued to accrue rights during marriage. Historically, Texas law handled this situation by a purely fractional approach as per the *Taggart* case. Accordingly, if a spouse were married for fifty percent (50%) of the time during which that spouse were accruing benefits under the plan, then fifty per cent (50%) of the accrued rights as of the time of divorce would be community property, and fifty per cent (50%) would be separate property. However, under the statute, the participant in the defined benefit plan, under such facts, would have his or her separate property interest limited to the accrued benefit as of the date of marriage. Since benefits under a defined benefit plan are normally a function of years in the plan times salary, the benefits accrued early in a plan are generally much less than benefits accrued much later in the plan. Thus, the statutory approach would decrease the separate property interest in the hypothetical situation being discussed. Moreover, and because of this same factor, if the statute were literally applied, then the community property interest, plus the separate property interests, as determined under the statute, would be less than the total accrued benefit as of the time of divorce.

b. Characterization - Defined Contribution Plans. The methodologies used to characterize defined benefit plans as described in Berry, Taggart and Cearley are not applicable to defined contribution plans. Smith v. Smith, 22 S.W.3d 140, 149 (Tex. App.--Houston [14th Dist.] 2000, no writ). Many courts have utilized a simplistic approach to valuing the community interest in a defined contribution plan. Specifically, several courts have suggested that one need merely subtract the value of the plan at the time of trial from the value of the plan at the time of marriage. Smith, 22 S.W.3d at 148-49; Pelzig v. Berkebile, 931 S.W.2d 398, 402 (Tex. App. - Corpus Christi, 1996, no writ). As indicated above, other decisions imply that it may be possible to trace assets within a 401-K plan. *See* Hopf v. Hopf, 841 S.W.2d 898 (Tex.App.--Houston, [14th Dist.] 1992, no writ). Iglinsky v. Iglinsky, 735 S.W.2d 536, 539 N.2 (Tex. App.--Tyler 1987, no writ). Still another case utilized an inception of title concept and held that a 401-K plan that was fully funded prior to marriage should be treated as a trust and all income within the plan and increases in the value of the plan are separate property. Lipsey v. Lipsey, 993 S.W.2d 345 (Tex. App. - Fort Worth, 1998, no writ).

Section 3.007 of the TFC, as it relates to retirement plans, attempts to define and clarify the characterization and tracing rules to be utilized when

attempting to characterize defined contribution plans. These new provisions of this section are as follows:

§ 3.007. Property Interest in Certain Employee Benefits

. . . .

(c) The separate property interest of a spouse in a defined contribution retirement plan may be traced using the tracing and characterization principles that apply to a nonretirement asset.

Section 3.007(c) may or may not permit "tracing" under prior case law which allowed a "before and after" method. Nonetheless, Section 3.007(c) makes it clear that it is acceptable to use traditional tracing methodologies when attempting to trace and characterize a defined contribution plan.

3. Employee Stock Options Prior to the 2005 and 2009 Statutory Amendments. Texas law was somewhat unsettled with regard to the characterization of employee stock options under various scenarios. Generally, the arguments centered around whether the court should apply an apportionment standard such as applied in Taggert v. Taggert, 552 S.W.2d 422 (Tex. 1997) with respect to defined benefit plans, or whether the court should adopt a pure inception of title approach. Charriere v. Charriere, 7 S.W.3d 217 (Tex. App.--Dallas 1999, no writ) contains a significant discussion of this issue. In Charriere, the wife's employer granted her certain stock options which she could exercise at any time if she were still employed. The options, however, also included restrictions which rendered the stock valueless. These restrictions expired at the rate of 10% per year. The court ruled that the fact that the value of the options depended upon the wife's post-divorce continued employment did not affect the options' characterization. Id. The court specifically declined to adopt a percentage division approach as applied to defined benefit plans in Taggert. Similarly, in Bodin v. Bodin, 955 S.W.2d 380 (Tex.App.- San Antonio 1997, no writ), the court of appeals held that unvested stock options constitute contingent interests in property and are community property to be divided.

4. 2009 Legislation - Employee Stock Option Plans. The Texas Legislature has *again* changed § 3.007 of the Family Code. SB 866, which is effective September 1, 2009, repealed sections (a), (b) and (f) of § 3.007. It also amended section (d) to read as follows:

(d) A spouse who is a participant in an employer-provided stock option plan or an employer-provided restricted stock plan has a separate property interest in the options or restricted stock granted to the spouse under the plan as follows:

(1) if the option or stock was granted to the spouse before marriage but required continued employment during marriage before the grant could be exercised or the restriction removed, the spouse's separate property interest is equal to the fraction of the option or restricted stock in which:

(A) the numerator is the sum of:

(i) the period from the date the option or stock was granted until the date of marriage; and

(ii) if the option or stock also required continued employment following the date of dissolution of the marriage before the grant could be exercised or the restriction removed, the period from the date of dissolution of the marriage until the date the grant could be exercised or the restriction removed; and

(B) the denominator is the period from the date the option or stock was granted until the date the grant could be exercised or the restriction removed; and

(2) if the option or stock was granted to the spouse during the marriage but required continued employment following the date of dissolution of the marriage before the grant could be exercised or the restriction removed, the spouse's separate property interest is equal to the fraction of the option or restricted stock in which:

(A) the numerator is the period from the date of dissolution of the marriage until the date the grant could be exercised or the restriction removed; and

(B) the denominator is the period from the date the option or stock was granted until the date the grant could be exercised or the restriction removed.

5. Disability Benefits. Disability benefits provided by an employer are community property even though they may be paid after divorce. Simmons v. Simmons, 568 S.W.2d 169 (Tex. Civ. App. - Dallas 1978, writ dism'd); Mathews v. Mathews, 414 S.W.2d 703 (Tex. Civ. App. - Austin 1967, no writ); *See also* Lee, 247 S.W.2d 828; Grost, 561 S.W.2d 223 (death benefits under private pension plan divisible upon divorce).

6. Early Retirement Payments. In Whorrall v. Whorrall, 691 S.W.2d 32 (Tex. App. -

Austin 1985, writ dism'd), the husband received a "special payment", which was "strictly discretionary" and given by the company as an incentive to coax him into early retirement. The court held that to qualify as a retirement benefit capable of being apportioned between a spouse's separate and the community estate, the payment must be an earned property right which accrued by reason of years of service, or must be a form of deferred compensation which is earned during each month of service. Id. The "special payment", which the husband received in addition to his ordinary retirement, from employer, and which, rather than compensating the husband for past services, appeared to have been made as an incentive to the husband to retire early, was properly treated entirely as community property upon divorce.

7. State Statutory Plans. Benefits accruing under the various statutory retirement acts are divisible upon divorce. Collida v. Collida, 546 S.W.2d 708 (Tex. Civ. App. - Beaumont 1977, writ dism'd).

Lack v. Lack, 584 S.W.2d 896 (Tex.Civ.App.-Dallas 1979, writ ref'd n.r.e.), involves a dispute between a widow of a deceased fireman and the fireman's former wife over death benefits payable from the City of Dallas Pension Plan. The divorced wife claimed a pro rata share of the death benefits resulting from the contributions of community funds made to the pension plan during the marriage. The court held:

> Any inchoate interest of a spouse of a participant never ripens into a community property interest until occurrence of the contingency on which that interest depends . . . . Since the right to death benefits can never be established until the death of the participant, such benefits are not property acquired during the marriage and, therefore, are not community property.

Id.; *See also* Duckett v. Board of Trustees City of Houston Firemen's Relief and Ret. Fund, 832 S.W.2d 438 (Tex. App.--Houston [1st Dist.] 1992, writ denied).

Worker's compensation benefits for an injury that accrues during marriage constitute community property. General Ins. Co. of Am. v. Casper, 426 S.W.2d 606 (Tex. Civ. App. - Tyler 1966, no writ); Piro v. Piro, 327 S.W.2d 335 (Tex. Civ. App. - Fort Worth 1959, writ dism'd). In Hicks v. Hicks, 546 S.W.2d 71 (Tex. Civ. App. -Dallas 1977, no writ), the court held:

> Where an injured worker is married at the time of injury and remains married throughout the period of disability, the workmen's compensation award is community property. This is so because compensation awards are intended to compensate an injured worker for his loss of earning capacity, and personal injury recoveries for loss of earning capacity during marriage are community property.

Id.

8. Federal Preemption. To determine whether a federal pension is subject to division either in whole or in part, the court must look at each pension on a statute-by-statute basis and attempt to ascertain the intent of Congress in each particular case. Anthony v. Anthony, 624 S.W.2d 388 (Tex. App. -Austin 1981, writ dism'd).

The following benefits accruing to the service person during marriage have been held to be community property:

a. Military Retirement Pay. Busby, 457 S.W.2d 551; Taggart, 552 S.W.2d 422; Koepke v. Koepke, 732 S.W.2d 299 (Tex. 1987); Harrell v. Harrell, 692 S.W.2d 876 (Tex. 1985).;
b. Military Disability Benefits. United States v. Stelter 567 S.W.2d 797 (Tex. 1978); Schuster v. Schuster 690 S.W.2d 644 (Tex. App. -Austin 1985, no writ);
c. Federal Worker's Compensation. Anthony, 624 S.W.2d 388;
d. Civil Service Retirement Pay. Adams v. Adams, 623 S.W.2d 500 (Tex. App. - Fort Worth 1981, no writ); and
e. Civil Service Disability Benefits. In the Matter of the Marriage of Butler, 543 S.W.2d 147 (Tex. Civ. App. -Texarkana 1976, writ dism'd).

The following benefits have been held not to be subject to division at time of divorce:

f. Fleet Reserve Pay. Sprott v. Sprott, 576 S.W.2d 653 (Tex. Civ. App. - Beaumont 1978, writ dism'd);
g. Military Readjustment Benefits. Perez v. Perez, 587 S.W.2d 671 (Tex. 1979);

h. Railroad Retirement Benefits. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979);

i. Social Security Benefits. Richard v. Richard, 659 S.W.2d 746 (Tex. App. - Tyler 1983, no writ); Allen v. Allen, 363 S.W.2d 312 (Tex. Civ. App. - Houston 1962, no writ); and

j. Veterans Administration Benefits. Ex Parte Johnson, 591 S.W.2d 453 (Tex. 1979). Kamel v. Kamel, 760 S.W.2d 677 (Tex. App.--Tyler 1988, writ denied).

In Rothwell v. Rothwell, 775 S.W.2d 888 (Tex. App. - El Paso 1989, no writ), the court held that the trial court could consider V.A. disability retirement benefits which were payable to the husband in making a just and right division of the community assets, but it could not make any division of those benefits. Id.; *see also* Berry v. Berry, 647 S.W.2d 945 (Tex. 1983).

A spouse or former spouse is empowered by federal law to elect to forego disability retirement pay and elect to receive instead the disability benefits from the Veterans Administration. 38 U.S.C. §3105. The divorce court cannot prohibit the service-person from doing that which the Federal law gives the person the right to do, even though it defeats the force of the divorce decree that had adjudicated community property as it existed at the time of the divorce. Ex Parte Burson, 615 S.W.2d 192 (Tex. 1981).

k. National Service Life Insurance. Wissner v. Wissner, 338 U.S. 655 (1950); and

l. Other. *See* Ex Parte Burson, for a list of federal benefits held not federal preemptions or preempted by supremacy clause. Ex Parte Burson, 615 S.W.2d 192.

M. Engagement Gifts. A gift to a person to whom the donor is engaged to be married, made in contemplation of marriage, although absolute in form, is conditional; and on breach of the marriage engagement by the donee, the property may be recovered by the donor. *See* McLain v. Gillia, 389 S.W.2d 131 (Tex.Civ.App. -Eastland 1965, writ ref'd n.r.e); Shaw v. Christie, 160 S.W.2d 989 (Tex.Civ.App. -Beaumont 1942, no writ); Davis v. Clements, 239 S.W.2d 657 (Tex.Civ.App. -Austin 1951, writ ref'd n.r.e.); Ludeau v. Phoenix Ins. Co., 204 S.W.2d 1008 (Tex.Civ.App. -Galveston 1947, writ ref'd n.r.e.).

But see McClure v. McClure, 870 S.W.2d 358 (Tex.App.-Fort Worth, 1994). In McClure, the donor had given $42,000.00 of his separate property money to the donee spouse to pay off her condo. The woman promptly partially paid the condo and put the rest of the cash into a personal account. The Court stated " When the donee has partially complied with such condition to the acceptance of the donor, the donor cannot withdraw his donation without giving the donee an opportunity to fully comply". Id. at 361.

N. Goodwill. Goodwill is generally understood to mean the advantages that accrue to a business on account of its name, location, reputation and success. Taormina v. Culicchia, 355 S.W.2d 569 (Tex.Civ.App.-El Paso 1962, writ ref'd n.r.e.). Goodwill has been defined as "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill, or influence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices. Finn v. Finn, 658 S.W.2d 735 (Tex.App. -Dallas 1983, writ ref'd n.r.e.).

Personal or professional goodwill, as opposed to the goodwill that may attach to a trade or business, is not property in the estate of the parties and, therefore, is not divisible upon divorce. Nail v. Nail, 486 S.W.2d 761 (Tex. 1972); Rathmell v. Morrison, 732 S.W.2d 6 (Tex. App. -Houston [14th Dist.] 1987, no writ), Guzman v. Guzman, 827 S.W.2d 445 (Tex.Civ.App. - Corpus Christi) writ denied, 843 S.W.2d 486 (Tex. 1992).

Professional goodwill attaches to the person of the professional man or woman as a result of confidence in his or her skill and ability; it does not possess value or constitute an asset separate and apart from the professional's person, or from his individual ability to practice his profession; and it would be extinguished in the event of the professional's death, retirement, or disablement. Rathmell, 732 S.W.2d 6. It is possible that an individual may have accrued professional goodwill and for the business to also have goodwill attributable to it. Goodwill that exists separate and apart from a professional's personal skills, ability, and reputation, is divisible upon divorce. Rathmell, 732 S.W.2d 6; Keith v. Keith, 763 S.W.2d 950 (Tex.App. - Fort Worth 1989, no writ). Similarly, it has been held that an individual's ability to practice his profession does not qualify as property subject to division by the court. Ulmer v. Ulmer, 717

S.W.2d 665 (Tex.App. -Texarkana 1986, no writ)(a janitorial service); *See also* Salinas v. Rafati, 948 S.W.2d 286 (Tex. 1997, no writ).

Goodwill of a professional corporation, as distinct from personal goodwill, is a part of the property to be taken into consideration on divorce. Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex.Civ.App. - Fort Worth 1978, writ dism'd). In Geesbreght, the Fort Worth court distinguished the holding in Nail from an ownership interest in the professional corporation in which the husband owned a 50 percent interest. Id. The corporation employed ten full-time and 50 to 100 part-time physicians to fulfill its obligations to furnish emergency services at eight different hospital locations.

Similarly, in determining the value of stock in a professional association, the value of goodwill is considered in determining the value of an interest in a medical association. *See* Trick v. Trick, 587 S.W.2d 771 (Tex.Civ.App. - El Paso 1979, writ dism'd). (husband was medical doctor owning one-fifth of stock in San Antonio Orthopedic Group, P.A.); See also Trevino v. Trevino, 555 S.W.2d 792 (Tex.Civ.App. -Corpus Christi 1977, no writ), (stock in doctor's professional association was community).

In Austin v. Austin, 619 S.W.2d 290 (Tex.Civ.App. -Austin 1981, no writ) the trial court divided the proceeds from the sale of husband's CPA practice. The sale contract included goodwill and a non-competition clause. The court of civil appeals affirmed and stated:

> Once a professional practice is sold, the goodwill is no longer attached to the person of the professional man or woman. The seller's action will no longer have significant effect on the goodwill. The value of the goodwill is fixed and it is now property that may be divided as community property.

Id.

In Finn v. Finn, 658 S.W.2d 735 (Tex. App. - Dallas 1983, writ ref'd n.r.e.), the court announced a two-pronged test to determine whether the goodwill attached to a professional practice is subject to division upon divorce. Id. First, goodwill must be determined to exist independently of the personal ability of the professional spouse. Second, if such goodwill is found to exist, then it must be determined whether the goodwill has a commercial value in which the community estate is entitled to share. Id.

In Eikenhorst v. Eikenhorst, 746 S.W.2d 882 (Tex.App. -Houston 1988, no writ), the husband, a medical doctor, incorporated his medical practice and was the sole shareholder in that professional association. He was also a partner in two partnerships in which each doctor owned 50%. The court mistakenly characterized the professional association and the partnership entities as separate property, but awarded wife community enhancement to husband's separate property, finding that husband's separate property had been increased by "goodwill" in the amount of $150,000. *See* Id.

The court held:

> The Texas Supreme Court has held that the goodwill of a medical practice that may have accrued at the time of divorce was not property of the estate of the parties.

Id.

The Court, however, qualified its ruling by stating:

> [I]t is to be understood that in resolving the question at hand we are not concerned with goodwill as an asset incident to the sale of a professional practice or that may exist in a professional partnership or corporation apart from the person of an individual member, or that may be an element of damage by reason of tortious conduct.
>
> The appellee introduced evidence through an expert that the two medical partnerships had approximately $280,000 in goodwill. This goodwill was derived from the contracts that the two partnerships had with four local hospitals, and the present monopoly these partnerships have in providing radiological services to the local community. There was evidence that the partnerships themselves had the contracts with the local hospitals, not the individual partners. This evidence is sufficient to support the trial court's finding that the two partnership entities did have goodwill of a commercial value in which the community estate of the parties to this litigation was entitled to share.

Id.

In Hirsch v. Hirsch, 770 S.W.2d 924 (Tex.App. - El Paso 1989, no writ), the court noted: "Where the entity is a one person professional corporation conducting business in that person's name, it would be difficult to get past the first prong of the test." Id.; *see*

also Simpson v. Simpson, 679 S.W.2d 39 (Tex.App. - Dallas 1984, no writ) (husband's professional corporation had no goodwill apart from goodwill belonging to individual physicians who owned the corporation).

O. Covenant Not to Compete. The proceeds of a covenant not to compete are the separate property of the contracting spouse. Dillon v. Anderson, 358 S.W.2d 694 (Tex.Civ.App. -Dallas 1962, writ ref'd n.r.e.).

P. Improvements on Separate Property. The use of community funds to improve the separate property of a spouse does not change the status of the property into community and does not result in any ownership interest in the property improved. Dakan v. Dakan, 83 S.W.2d 620 (Tex. 1935, no writ); Welder, 44 S.W. 281; Carter, 736 S.W.2d 775; *see also* Leighton v. Leighton, 921 S.W.2d 365 (Tex. App. - Houston [1st, Dist.] 1996, no writ), (once separate property character attaches to real estate, character does not change because community funds are spent to improve the property). In addition, the character of property does not change because both spouses sign a note or because the names of both spouses are on the deed of trust. Id. A deed of trust creates a lien of property, but it does not transfer title. A deed of trust does not pass legal title, but only equitable title. Id.

The general presumption that property acquired during marriage is community property does not apply to fixtures and improvements on a spouse's separate property. Welder, 44 S.W.2d 281.

Under the law of fixtures, whatever is attached to the land becomes part of the land and improvements to the realty take the character of the land, regardless of the character of the funds or credit used to make the improvements. Fenlon v. Jaffe, 553 S.W.2d 522 (Tex. Civ. App. - Tyler 1977, writ ref'd n.r.e) The test for fixtures is as follows:

1. Has there been a real or constructive annexation of the personalty to the realty;
2. Was there a fitness or adaptation of the item to the uses or purposes of the realty; and
3. Was it the intention of the party annexing the personalty that it would become a permanent accession to the realty?

Capital Aggregates, Inc. v. Walker, 488 S.W.2d 830 (Tex. Civ. App. - Austin 1969, writ ref'd n.r.e.) and Lindsay v. Clayman, 254 S.W.2d 777 (Tex. 1952).

Generally, money used for the purchase of property is presumed to be community funds. Cooke v. Cordray, 333 S.W.2d 461 (Tex.Civ.App. - Beaumont 1960, no writ). An important exception to the application of the community property presumption exists where improvements are made on separate realty. In such a situation, the presumption is that the improvements were made with separate funds and the spouse claiming reimbursement is charged with the burden of proving the amount spent was from community funds. Younger v. Younger, 315 S.W.2d 449 (Tex.Civ.App. - Waco 1958, no writ); Edsall v. Edsall, 240 S.W.2d 424 (Tex. Civ. App. - Eastland 1951, no writ); King v. King, 218 S.W. 1093 (Tex.Civ.App. -writ dism'd); Jenkins v. Robinson, 169 S.W.2d 250 (Tex.Civ.App. -Austin 1943, no writ); Lane v. Kittrel, 166 S.W.2d 763 (Tex Civ. App. - Amarillo 1942, no writ); Norris, 260 S.W.2d 676.

A reimbursement claim arises when one estate provided monies for the improvement to property of another estate. On September 1, 2009, claims for economic contribution were eliminated by act of the Texas legislature. *See* TFC § 3.402.

Q. Insurance and Insurance Proceeds.

1. Insurance on the Person.

a. Life Insurance. A policy of life insurance issued to a spouse before marriage is separate property, subject to a claim for reimbursement to the community for the amount of premiums paid from community finds during marriage. McCurdy v. McCurdy, 372 S.W.2d 381 (Tex.Civ.App. -Waco 1963, writ ref'd); Pritchard v. Snow, 530 S.W.2d 889 (Tex.Civ.App. -Houston [1st Dist.] 1975, writ ref'd n.r.e.), Camp v. Camp, 972 S.W.2d 906 (Tex.App. -Corpus Christi 1998, pet. denied) (Husband prior to marriage obtained term life insurance policy and named his mother as beneficiary. The Court found policy to be the separate property of the husband and affirmed summary judgment against wife who claimed that failure by husband to designate her as the beneficiary constituted fraud against estate).

A policy of life insurance issued to a spouse during marriage is community property. Brown v. Lee, 371 S.W.2d 694 (Tex. 1963). A policy purchased with community funds is an unmatured chose-in-action owned by the community which matures at the death of the insured. Prudential Ins. Co. of Am. v. Burke, 614 S.W.2d 847 (Tex. App. -Texarkana 1981, aff'd per curiam, 621 S.W.2d 596 (Tex. 1981).

Life insurance premiums paid by the insured spouse's employer are part of the compensation for services. The insurance is deemed to be purchased out of earnings and therefore is community property.

Givens v. Girard Life Ins. Co. of Am., 480 S.W.2d 421 (Tex.Civ.App. -Dallas 1972, writ ref'd n.r.e.); Estate of Korzekwa v. Prudential Ins. Co., 669 S.W.2d 775 (Tex.App. -San Antonio 1984, writ dism'd).

Ordinarily, the proceeds of life insurance purchased with community funds are community property. The proceeds of life insurance policies purchased during the marriage on the life of a third person with one of the spouses named as the beneficiary are community property. Dent v. Dent, 689 S.W.2d 521 (Tex.App. -Fort Worth 1985, no writ).

But where a spouse is merely the beneficiary of a policy upon the life of a third person, the proceeds constitute a gift to the beneficiary-spouse. Prudential Ins. Co. of Am., 614 S.W.2d 847.

It is well settled that the cash surrender value of life insurance policies acquired during marriage constitutes community property and as such is generally regarded as the proper basis for settlement of the rights of the parties on termination of the marriage. Womack v. Womack, 172 S.W.2d 307 (Tex. 1943); Berdoll v. Berdoll, 145 S.W.2d 227 (Tex. Civ. App. - Austin 1940, writ dism'd); Locke v. Locke, 143 S.W.2d 637 (Tex. Civ. App. - Beaumont 1940, no writ).

In situations in which all of the premiums on a life insurance policy are paid in one lump sum with community funds during the marriage, the full amount of the insurance coverage constitutes contingent property accruing on the death of the insured. Cox v. Cox, 304 S.W.2d 175 (Tex. Civ. App. - Texarkana 1957, no writ). Where the policies do not provide for a cash surrender value and amount to nothing more than a mere contract between the insured and the insurer whereby the insured promises to pay a stipulated premium for a stipulated period of time and in consideration of the payment of a stipulated sum upon death (term insurance), the insurance contract, as such, has no value. Grost, 561 S.W.2d 223.

b. National Service Life Insurance. In Wissner v. Wissner, 338 U.S. 655 (1950), the Supreme Court concluded that community property law conflicted with certain provisions of the National Service Life Insurance Act and that the insurance proceeds are not subject to division upon divorce. Id.; *see also* Ridgway v. Ridgway, 454 U.S. 46, (1981); *but see* Towne v. Towne, 707 S.W.2d 745 (Tex.App. - Fort Worth 1986, no writ) (court upheld constructive trust to enforce property settlement agreement that wife would own husband's National Service Life Insurance policy, holding: "The federal interest in allowing a soldier to choose his beneficiary was not meant to shield fraud.").

c. Disability and Workers' Compensation Insurance. The 79th legislature enacted, effective September 1, 2005, §3.008 TFC regarding "Property Interests In Certain Insurance Proceeds."

Pursuant to these provisions, the Texas Legislature adopted the "replacement" theory in dealing with insurance proceeds involving casualty losses to property and proceeds involving disabled workers relating to disability insurance payments and workers' compensation payments.

§3.008(b) TFC, provides:

> "If a person becomes disable or is injured, any disability insurance payment or workers' compensation payment is community property to the extent it is intended to replace earnings lost while the disabled or injured person is married. To the extent that any insurance payment of workers' compensation payment is intended to replace earnings while the disabled or injured person is not married, the recovery is the separate property of the disabled or injured spouse."

Disability insurance carried by a spouse at the time of divorce is a property right and belongs to the community estate. Mathews v. Mathews, 414 S.W.2d 703 (Tex.Civ.App. -Austin 1967, no writ). *See Also*: Newsom v. Petrilli, 919 S.W.2d 481 (Tex.App. - Austin 1996, no writ)(finding that disability benefits were community property divisible upon divorce).

2. Insurance on Property. As indicated above, the Texas Legislation passed §3.008 involving property interests in insurance proceeds. Specifically, §3.008(a) provides as follows:

> "Insurance proceeds paid or payable that arise from a casualty loss to property during marriage are characterized in the same manner as the property to which the claim is attributable." (*emphasis added*)

Therefore, if a casualty loss to property is suffered during marriage, and that property constitutes the separate property of one of the spouses, the insurance proceeds received due to the loss will also be the separate property of the spouse. The payment of the insurance premium with community property will not affect the characterization of the underlying

property or the insurance proceeds received therefrom. Again, this new legislation is intended to usurp the "payment of premiums" and "inception of title" theories concerning insurance payments, and substitute in its stead the "replacement" theory.

R. Intellectual Property. Intellectual property has been defined as "a set of legal rights to an expressed idea - it is property that results from the fruits of mental labor." Alsenz v. Alsenz, 101 S.W.3d 648 (Tex. App. - Houston [1st Dist.] 2003, pet. denied)

Examples of intellectual property are patents, copyrights and trademarks. A patent has been defined as "the grant of a property right from the government to exclude others from making, using or selling one's invention and includes the right to license others to make, use or sell it. Like other intellectual property, ... the value of a patent stems from the income that can be generated from that right." Alsenz at 653.

Generally, the inception of a patent could occur at one of three stages: (1) when the concept is sufficiently developed to generate a plan to build the invention; (2) when the invention is actually built; or (3) on the effective date of the patent. Alsenz. Nevertheless, patents which are taken out during the marriage are community property and the income generated from those patents is also community property. Alsenz, *supra*; Sheshtawy v. Sheshtawy, 150 S.W.3d 772 (Tex. App. - San Antonio 2004, no writ)

In the Alsenz case, the court found that the patents issued in that particular case had all been issued prior to marriage, or that one of the other two steps in order to determine the inception of a patent had also occurred prior to marriage. However, the issue in Alsenz was the characterization of the income from patents that the court had determined were separate property. The court ruled that all income from patents, including income classified as royalty income, constituted community property. Alsenz at 654.

S. Interest Income. Interest income, which accrues during marriage on notes or funds belonging to the separate estate of a spouse constitutes community property. Mortenson v. Trammell, 604 S.W.2d 269 (Tex.Civ.App. -Corpus Christi 1980, writ ref'd n.r.e.); Amarillo Nat'l Bank v. Liston, 464 S.W.2d 395 (Tex.Civ.App. -Amarillo 1970, writ ref'd n.r.e.); Lesage v. Gateley, 287 S.W.2d 193 (Tex.Civ.App. -Waco 1956, writ dism' d).

1. Interest Payments from One Spouse to the Other. A problem arises where the spouses enter into an agreement under which one spouse promises to pay interest on money loaned upon the separate estate of the other spouse. Sparks v. Taylor, 90 S.W. 485 (Tex. 1906); Padgett v. Padgett, 487 S.W.2d 850 (Tex. Civ. App. - Eastland 1972, writ ref'd n.r.e.); Coggin v. Coggin, 204 S.W.2d 47 (Tex.Civ.App. -Amarillo 1947, no writ).

In Hall v. Hall, 52 Tex. 294 (1879), the court held that the note given to the wife by the husband in consideration of a loan to him of the wife's separate property was a valid and binding contract and that the giving of the note, under which the husband expressly promised to pay both the principal and interest, was a declaration by him of his intention that the principal and interest would be the wife's separate property. Consequently, both the principal and interest was held to be the wife's separate property. Id.; *see also* Hamilton-Brown Shoe Co. v. Whitaker, 23 S.W. 520 (Tex.Civ.App. 1893, no writ); Martin Brown Co. v. Perrill, 13 S.W. 975 (Tex. 1890); Swearingen v. Reed, 21 S.W. 383 (Tex. Civ. App. - 1893, no writ); Engleman v. Deal, 37 S.W. 652 (Tex.Civ.App. 1896, w-rit ref'd); Padgett, 487 S.W.2d 850;

In Caldwell v. Dabney, 208 S.W.2d 127 (Tex.Civ.App. -Austin 1948, writ ref'd n.r.e.), however, a wife was denied recovery of interest where the wife made a loan to the husband from her separate estate, and the husband died before repaying the loan. The appellate court held:

> Interest paid or accrued on a note belonging to the separate estate of the wife would be community. If the [wife] is permitted to recover interest it would be for the benefit of the community estate, the result of which would be that the community would be enriched by the same amount it became indebted. Each would offset the other.

Id.; *see also* Letcher v. Letcher, 421 S.W.2d 162 (Tex.Civ.App. -San Antonio 1967, writ dism'd) (where necessary for protection of property rights, either spouse may sue other); Cruse v. Archer, 153 S.W.2d 679 (Tex. Civ. App. - Waco 1941, no writ); Frame v. Frame, 36 S.W.2d 152 (Tex. 1931).

T. Livestock. Livestock bred and raised during marriage, whether or not the herd is community or separate, becomes community property. Gutierrez v. Gutierrez, 791 S.W.2d 659 (Tex.App. - San Antonio 1990, no writ); Amarillo Nat'l Bank, 464 S.W.2d 395; Blum v. Light, 16 S.W. 1090 (Tex.

1891); Stringfellow v. Sorrells, 18 S.W. 689 (Tex. 1891); Wagnon v. Wagnon, 16 S.W.2d 366 (Tex. Civ. App. - Austin 1929, writ ref'd); *See also* Bobbitt v. Bass, 713 S.W.2d 217 (Tex.App. -El Paso 1986, writ dism'd w.o.j.).

No cases have been found supporting the proposition that the individual spouse is entitled to restitution from the herd on hand at dissolution of marriage for the number of head originally owned by the separate estate. However, the principle is recognized by provisions of the Texas Trust Act applicable to the problem in allocating benefits between the income beneficiary and the remainderman. (V.A.C.S. Art. 7425(b)-32). A similar principle has been applied in cases involving the operation of a separate mercantile business. There it has been held that, while the specific articles that made up the original stock had been sold, and replaced by others from time to time, the property was in fact the same, a stock of merchandise, and such change did not divest it of its separate character, to the extent of goods owned at the time of the marriage. Schmidt v. Huppman, 11 S.W. 175 (Tex. 1889); Schecter, 579 S.W.2d 502; Blumer v. Kallison, 297 S.W.2d 898 (Tex.Civ.App. -San Antonio 1956, writ ref'd n.r.e.).

But See; Moss v. Gibbs, 370 S.W.2d 452 (Tex. 1963) (wife did not adequately trace and identify proceeds from cattle operation). Smoak v. Smoak, 525 S.W.2d 888 (Tex.Civ.App. -Texarkana 1975, writ dism'd) (evidence supported conclusion that production and sale of cattle was on commercial basis and that original separate property head of cattle and proceeds were commingled with community assets of like nature); United States Fid. and Guar. Co. v. Milk Producers Ass'n of San Antonio, 383 S.W.2d 181 (Tex.Civ.App. -San Antonio 1964, writ ref'd n.r.e.) (revenues from sale of milk from dairy herd originally acquired as wife's separate property was community).

U. Loans. Money borrowed during marriage is presumed to be community property. Uranga, 527 S.W.2d 761; Goodridge v. Goodridge, 591 S.W.2d 571 (Tex.Civ.App. -Dallas 1979, writ dism'd), but this presumption 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 of the debt. Mortenson, 605 S.W.2d 645. An assumption of existing indebtedness as part of the purchase price of property is a use of community credit and the property acquired on the credit of the community is community property. Goodridge, 591 S.W.2d 571; *see also* Carter v. Grabbel, 341 S.W.2d 458 (Tex.App.Civ. -Austin 1969, writ ref'd n.r.e.). The same rules and exceptions for determining the characterization for the proceeds of a loan are discussed under the topic "Credit Purchases" below.

The use of community credit or the pledge of community assets as guaranty for a loan to a business owned by a spouse as his or her separate property does not destroy the business's separate property status. United States Fid. and Guar. Co., 383 S.W.2d 181; Faulkner v. Faulkner, 582 S.W.2d 639 (Tex.Civ.App. -Dallas 1979, no writ); Welder v. Welder, 794 S.W.2d 420.

V. Loss of Consortium. Either spouse has a cause of action for loss of consortium that may arise as a result of an injury caused to the other spouse by a third party tortfeasor's negligence. Recovery for loss of consortium is the separate property of the deprived spouse. Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978); Osborn v. Osborn, 961 S.W.2d 408 (Tex. App. -- Houston [1st Dist.] 1997, writ denied).

Recovery for loss of companionship of children is separate property. Williams v. Stevens Industries Inc., 678 S.W.2d 205 (Tex.App. -Austin 1984), *aff'd* 699 S.W.2d 570 (Tex. 1985).

W. Lottery Prizes and Gambling Winnings. A prize drawn on a lottery ticket purchased during marriage with separate funds is community property. In Dixon v. Sanderson, 10 S.W. 535 (Tex. 1888), the wife, with $1.00 which she had before her marriage, bought a ticket in the Louisiana State Lottery and won a prize of $15,000.00. The court held that the prize came as the fortuitous result of a contract based on valuable consideration paid, and was but a profit constituting the community property of the husband and wife. Id; *see also;* Stanley v. Riney, 970 S.W.2d 636 (Tex.App. -Tyler 1998, no writ) (wife purchased winning lottery ticket, then slipped agreed order for annulment by husband, and later argued that the decree covered the lottery winnings under "personal effects", and therefore, the lottery winnings were wife's separate property. The Court disagreed).

X. Mineral Interests. Generally the word "land" includes everything from the top of the ground to the center of the earth. County Sch. Tr. of Upshur County v. Free, 154 S.W.2d 935 (Tex.Civ.App. - Texarkana 1941, writ dism'd w.o.m.). Minerals in place, timber, sand, gravel, and stones are a part of the realty, and thus are impressed with the same character as the surface estate. Norris, 260 S.W.2d 676; Welder v. Commissioner, 148 F.2d 583 (5th Cir.).

Production and sale of minerals is equivalent to a piecemeal sale of the corpus, and funds acquired

through a sale of the separate corpus will remain separate property. Norris, 260 S.W.2d 676. The law is settled that minerals "in place" may be severed from the surface; that when so severed they constitute a distinct estate; that title to the surface estate may be in one person and title to the mineral estate in another person; and that the mineral estate so severed constitutes "real property." Character of the severed mineral estate is determined by the time and circumstances of its acquisition according to the usual rules for determining the character of property. County Sch. Te. of Upshur County, 154 S.W.2d 935.

1. Leasehold Interest. It is well established in Texas that the lessee in the usual oil and gas lease obtains a determinable fee on the oil and gas in place, and thus an interest in realty. The lessee's determinable fee interest will last only so long as oil and gas is produced, and will become exhausted in time. Therefore, income from the production and sale of separate leasehold interests remain separate property. Norris, 260 S.W.2d 676.

Community funds expended in developing and equipping the lease do not change the character of the oil and gas in place from separate property to community property. Cone v. Cone, 266 S.W.2d 480 (Tex.Civ.App. -Amarillo 1953, writ dism'd).

However, when the acquisition and development of oil and gas interests are engaged in as a business, the profits therefrom are community. The fact that separate funds may have been used in the development or operation of such oil and gas interests does not change the separate or community status of the property but only, if properly proved, entitles the separate estate to assert a reimbursement claim. In re Marriage of Read, 634 S.W.2d 343 (Tex.App. - Amarillo 1982, writ dism'd).

2. Working Interest. The character of income from a working interest in an oil and gas lease as separate or community is determined according to the time and circumstances of acquisition, and, therefore, are subject to the usual rules for determining the character of the property. Cone, 266 S.W.2d 480. Where the working interest is acquired during marriage, the community's acquired rights are fixed and determined at the time of the acquisition of the agreement and cannot be nullified by the use of separate funds to develop the lease. In re Marriage of Read, 634 S.W.2d 343.

3. Interest Located in Foreign State. Mineral interests "in place" are real property. Oil and gas becomes moveable personal property upon its production and severance. When the spouses are domiciled in Texas, the personal moveable property, and all income, profits, fruits, and benefits arising from oil and gas property located in another state, will fall as separate or community as the laws of Texas dictate. Tirado v. Tirado, 357 S.W.2d 468 (Tex.Civ.App. -Texarkana 1962, writ dism'd).

4. Royalty Interest. When royalty is paid for oil and gas production from the separate property of a spouse, such royalty payment is separate property. The theory is that the payment is for the extraction or sale of the minerals that comprise the separate estate. Norris, 260 S.W.2d 676.

5. Bonus Payments. The usual bonus payment has been held to be money paid for the sale of minerals. Therefore, bonus payments made with respect to an oil and gas lease on separate property, are separate. Lessing v. Russek, 234 S.W.2d 891 (Tex.Civ.App. -Austin 1950, writ ref'd n.r.e.); Texas Co. v. Parks, 247 S.W.2d 179 (Tex.Civ.App. - Fort Worth 1952, writ ref'd n.r.e.).

6. Delay Rentals. Rental payments derived from oil and gas leases on separate property constitute personal property and belong to the community estate. Delay rentals on oil and gas leases are rents, which accrued by a mere lapse of time and do not depend on the finding or production of oil and gas and do not exhaust any substance from the land. McGarraugh v. McGarraugh, 177 S.W.2d 296 (Tex.Civ.App. -Amarillo 1943, writ dism'd); Texas Co., 247 S.W.2d 179; citing to Commissioner of Internal Revenue v. Wilson, 5 Cir., 76 F.2d 766.

Y. Rents, Revenues, and Income from Separate Property. Rents, revenues, and income from separate property are community property. Arnold v. Leonard, 272 S.W.2d 799 (Tex. 1925); Taylor v. Taylor, 680 S.W.2d 645 (Tex.App. - Beaumont 1984, writ ref'd n.r.e.); Dobrowolski v. Wyman, 397 S.W.2d 930 (Tex. Civ. App.- San Antonio 1965, no writ); Coggin, 204 S.W.2d 47; Lindley, 201 S.W.2d 108; Uranga, 527 S.W.2d 761; Moss v. Gibbs, 370 S.W.2d 452 (Tex.App. -Tyler 1983, no writ). Where the husband had patented multiple inventions prior to marriage, royalties received during the marriage from the inventions patented before the marriage are revenue from separate property, and are community property. Alsenz v. Alsenz, 101 S.W.3d 648 (Tex.App. – Houston [1st Dist.] 2003, pet. denied).

Z. Social Security Benefits. Social Security benefits are not community property for purposes of division upon divorce. Texas community property law is preempted by the terms of the Social Security Act. (42 U.S.C.A. Sec. 407). Richards v. Richards, 659 S.W.2d 746 (Tex.App. -Tyler 1983, no writ); Allen v. Allen, 363 S.W.2d 312 (Tex.Civ.App. -Houston 1962, no writ).

AA. Stocks and Dividends. The increase in value of separate stock remains separate property. Hilton v. Hilton, 678 S.W.2d 645 (Tex.App. -Houston [14th Dist.) 1984, no writ); Bakken, 503 S.W.2d 315.

1. Cash Dividends. Dividends on separately owned stock paid in cash or property are community property. Amarillo Nat'l Bank, 464 S.W.2d 395; Fain, 935 S.W.2d 1226; Duncan v. United States, 247 F.2d 845 (5th Cir. 1957).

2. Stock Dividends. Stock dividends are separate property if the stock ownership out of which the dividends are derived is separate property. Duncan, 247 F.2d 845; Tirado, 357 S.W.2d 468; Wohlenberg v. Wohlenberg, 485 S.W.2d 342 (Tex.Civ.App. -El Paso 1972, no writ).

3. Stock Splits. Stock splits belong to the estate of the original stock. If the stock splits are of separate property, such stock splits become separate property. If the stock splits are associated with community property stocks, they belong to the community. Tirado, 357 S.W.2d 468; Wohlenberg, 485 S.W.2d 342; Johnson v. First Nat'l Bank of Fort Worth, 306 S.W.2d 927 (Tex.Civ.App. -Fort Worth 1957, no writ).

4. Liquidating Dividends. Property or funds received in liquidation upon dissolution of a corporation belong to the estate of the original stock. If the original stock was separate, the liquidating dividend remains separate. Wells v. Hiskett, 288 S.W.2d 257 (Tex.Civ.App. -Texarkana 1956, writ ref'd n.r.e.).

5. Mergers. Shares of stock acquired as a result of a merger are a mutation of property. Where the original stock was separate property, the shares acquired as a result of the merger are separate property. Horlock v. Horlock, 533 S.W.2d 52 (Tex.Civ.App. -Houston [14th Dist.] 1975, writ dism'd) .

6. Mutual Funds. Cash dividends received on mutual fund shares owned as separate property are community property. Bakken, 503 S.W.2d 315.

7. Capital Gain Distributions. *See above*.

AB. Community Toil, Talent and Industry. A spouse has the right to spend a reasonable amount of time, effort, and talent in caring for, preserving, making productive, and selling his or her separate property. Norris, 260 S.W.2d 676. However, it is equally well established that any property or rights acquired by one of the spouses after marriage by toil, talent, industry, or other productive faculty is community. Logan v. Logan, 112 S.W.2d 515 (Tex.Civ.App. -Amarillo 1937, writ dism'd); DeBlane v. Hugh Lynch & Co., 23 Tex. 25 (1859). Property acquired by the efforts of a spouse, is regarded as acquired by "onerous title" and belongs to the community. Graham, 488 S.W.2d 390; Norris, 260 S.W.2d 676.

As a general rule, profits derived by a spouse through trade, speculation, investment, or venture, whether with community funds or with separate funds, belong to the community estate. For example, profits derived from the investment by a spouse of separate property in a commercial business constitutes community property. Schmidt, 11 S.W. 175; Blumer, 297 S.W.2d 898; Schecter, 579 S.W.2d 502; Meshwert v. Meshwert, 543 S.W.2d 877 (Tex.Civ.App. -Beaumont 1976, writ ref'd n.r.e.). In In re Marriage of Read, the husband was engaged in exploration and production of oil and gas as his business and profession. In Re Marriage of Read, 634 S.W.2d 343. The court held:

> [W]hen the acquisition and development of oil and gas interests are engaged in as a business, the profits therefrom are community. (*citation omitted*). The fact that separate funds may have been used in the development or operation of such oil and gas interests does not change the separate or community status of the property but only, if properly proved, entitles the separate estate to reimbursement.

Id.

A problem arises in determining whether a spouse is merely exercising reasonable control and management of the separate estate or whether he is engaging in a "business". A spouse has a right to spend a reasonable amount of time, effort, and talent

in caring for, preserving, making productive, and selling his or her separate property. Norris, 260 S.W.2d 676. It is also well settled that the spouse's separate property may undergo changes and mutations, be sold and the proceeds invested, resold and reinvested, and yet preserve its separate character of the funds. McKinley v. McKinley, 496 S.W.2d 540 (Tex. 1973); Tarver, 394 S.W.2d 780. At the other extreme, it is equally clear that when a spouse invests his separate property in a business, and in the course of business buys goods and resells them at a profit, the revenue from the business is community. Schecter, 579 S.W.2d 502; Meshwert, 543 S.W.2d 877; Moss, 370 S.W.2d 452. The cases have laid down no clear, workable test for distinguishing between capital gains and ordinary income. To the extent that profits are attributable to the personal efforts or labor of a spouse, the community estate should have a just claim to them. Graham, 488 S.W.2d 390; Lee, 247 S.W. 828; Norris, 260 S.W.2d 676.

When separate property has increased in value during marriage due, at least in part, to the time and effort of either or both spouses, the property remains separate property. Texas has adopted the rule that the community estate will be entitled to assert a claim for reimbursement for the value of the time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort. Jensen, 665 S.W.2d 107.

AC. Trust Income. Whether trust income is separate or community property remains an unsettled question in the Texas courts. Pre- 1925 Texas Supreme Court opinions hold that the income from a trust is separate property. *See* McLeod v. Board, 30 Tex. 239 (1867); McGee v. White, 23 Tex. 180 (1859); Gamble v. Dabney, 20 Tex. 69 (1857); Shelby v. Burtis, 18 Tex. 644 (1857); Hutchinson v. Mitchell, 39 Tex. 488 (1873); Martin Brown Co., 13 S.W. 975; Shepflin v. Small, 23 S.W. 432 (Tex.Civ.App. -1893, no writ); Monday v. Vance, 32 S.W. 559 (Tex.Civ.App. -1895, no writ); and Sullivan v. Skinner, 66 S.W. 680 (Tex.Civ.App. -1902, writ ref'd).

McClelland v. McClelland, 37 S.W. 350 (Tex.Civ.App. -1896, writ dism'd) apparently was the first Texas case involving trust income in a divorce of the beneficiary and spouse. McClelland involved a suit for divorce and a determination of property rights. The wife alleged that her husband was the sole heir to a large estate held in trust and that the income accrued therefrom during marriage amounted to $120,000 at the commencement of the suit. She contended that the income was community property, notwithstanding the fact that the property had been devised by the husband's father in trust for the husband. The trustee had, under the terms of the will, the discretion to accumulate all of the income from the trust property with the exception of a small support payment. The court of civil appeals held that the wife was not entitled to any income actually distributed by the trustee to the husband "because these amounts were his separate property, devised to him by the will, in which the wife had no community interest." Id. Further, the court held that since the husband could not demand distribution of the accumulated income, the wife could not assert a claim that the husband did not have. Id.

Subsequently, in 1925, the Texas Supreme Court announced in Arnold, 272 S.W. 799, that neither the legislature nor spouses can expand the constitutional definition of separate property. Since the constitution states that separate property is that received by gift, bequeath, or inheritance, the court reasoned that all other property must be community property. Id. After Arnold it has been argued that income from a separate property trust must be community property.

In Mercantile Nat'l Bank at Dallas v. Wilson, 279 S.W.2d 650 (Tex.Civ.App. -Dallas 1955, writ ref'd n.r.e.), the Dallas Court of Civil Appeals stated, in what may be dictum, that undistributed trust income is community property from the date of the beneficiary's marriage. *See* Id.

On the other hand, trust income that a married beneficiary does not receive, and to which he has no claim other than an expectancy interest in the corpus, has been held to constitute separate property. Cleaver v. George Staton Co., Inc., 908 S.W.2d 468, 470 (Tex. App--Tyler 1995, writ denied), Ridgell v. Ridgell, 960 S.W.2d 144 (Tex.App. -Corpus Christi 1997, no writ). Currie v. Currie, 518 S.W.2d 386 (Tex.Civ.App. -San Antonio 1974, writ dism'd), holds that undistributed trust income is not community property in a case where trust income was added to the corpus and all distributions were made according to the trustee's "uncontrolled discretion." Id.; *see also* Young v. Young, 609 S.W.2d 758 (Tex. 1980).

In Re Marriage of Long, 542 S.W.2d 712 (Tex.Civ.App.-Texarkana 1976, no writ), dealt with a trust, which provided that the income of the trust was to be either distributed or accumulated at the discretion of the trustee until the beneficiary (husband) reached twenty-five, at which time fifty percent of the trust corpus was to be distributed to him. When husband reached thirty, the balance of the trust was to be distributed to him. Husband and his

wife separated before husband reached twenty-five, but the divorce proceeding was not commenced until a later time. When husband reached twenty-five, he "decided to leave his half interest in the trust though he was entitled to withdraw approximately $85,000." The court held that the income accumulated by the trustee prior to the time husband reached twenty-five was husband's separate property and the income accumulated in the portion of the trust not distributed until husband reached thirty was his separate property. Only the income earned after husband reached twenty-five was community property, and therefore subject to distribution in the divorce proceeding. Id. The court stated:

> Unlike the situation in Currie, *supra*, the beneficiary in the case before us was entitled to a present possessory interest in one-half of the trust corpus and the income from that one-half. In the Mercantile Bank, *supra*, case, undistributed income was in the hands of the trustees but the beneficiary had a present possessory interest in the funds. In the Mercantile Bank case we concluded that the income on the trust corpus should have been labeled community property.

See also Ridgell, supra, which held that income received by a married beneficiary on trust corpus to which the beneficiary is entitled or becomes entitled is community property.

In Re Marriage of Burns, 573 S.W.2d 555 (Tex.Civ.App. -Texarkana 1978, writ dism'd), involved the wife's claim that undistributed trust income held for husband's benefit was community property. Husband was the beneficiary of six trusts, three of which had been established by his parents and grandparents. Husband had established the other three trusts. Five of the trusts came into existence prior to the marriage. Husband established the sixth trust after the marriage with separate property. The three trusts established by husband's ancestors were spendthrift trusts. Five of the six trusts were discretionary pay trusts in which "the trustee or trustees could either withhold or distribute the income and/or corpus at their sole discretion." Id. The remaining trust required that its income be accumulated until May 28, 1982, when the entire corpus and accumulated income was to be distributed to husband.

The Burns court held that the undistributed trust income in each of the trusts was neither separate nor community property. The court relied on (then) Sec. 5.01(b) of the Tex.Fam.Code, which provides that "(c)ommunity property consists of the property, other than separate property, acquired by either spouse during marriage". Id. The court concluded that husband had not "acquired" the trust income during marriage as required by the statute inasmuch as it had not been distributed and he did not "have a present or past right to require its distribution so as to compel a finding that there was a constructive acquisition". Id. (*emphasis added*)

Additional confusion results from a series of 5th Circuit tax cases, which hold that Texas permits income from separate property to remain separate when the donor clearly indicates that the income was to be separate, but in other cases income from a trust is community property. *See* Commissioner v. Wilson, 76 F.2d 766 (5th Cir. 1935); Commissioner v. Sims, 148 F.2d 574 (5th Cir.1935); McFadden v. Commissioner, 148 F.2d 570 (5th Cir. 1945); Commissioner v. Porter, 148 F.2d 566 (5th Cir. 1945).

In Wilmington Trust Co. v. United States, 4 C1.Ct.6 (1983), aff'd 753 F.2d 1055 (1985), Mr. and Mrs. Asche were domiciled in Texas at the time of Mr. Asche's death, as they had been for the preceding 48 years. Mrs. Asche was the beneficiary of seven trusts. All of the trusts were created during her marriage to Mr. Asche. Each trust was established solely by gift, either inter-vivos or testamentary, and was irrevocable. Mrs. Asche's parents were the grantors of six trusts, and Mr. Asche was the grantor of the seventh trust. Mrs. Asche was not a grantor to any of the trusts. Under each of the seven trusts, Mrs. Asche was entitled to receive from the trustee or trustees mandatory distributions of the net income, but she was not entitled to distributions of principal. Upon Mrs. Asche's death, the corpus of each trust passes to, or for the benefit of, one or more of her issue. Id.

The sole question to be decided in Wilmington was whether the income from the seven trusts during the marriage of Mr. and Mrs. Asche constituted Mrs. Asche's separate property or was the community property of Mr. and Mrs. Asche. Id.

The Claims Court stated:

> The decisions by the Texas Supreme Court and by Texas intermediate appellate courts, holding that income to a married person from a trust created as a gift for the benefit of such person, constituted the separate property of the beneficiary, and not community property, involved situations where the married beneficiary of a trust did not have any right to take over the corpus of the trust itself. On the other hand, if the trust

> instrument gives the married beneficiary the right, after the passage of years, to take over the corpus of the trust (or part of it), then it is held that, irrespective of whether the beneficiary exercises such right at the permitted time, income thereafter from the corpus (or pertinent part) ceases to be separate property and, instead, becomes community property of the husband and wife.

Id.

The Court reviewed the decisions in Commissioner v. Wilson, and Commissioner v. Porter, and stated:

> It appears that the Fifth Circuit, in the two decisions previously mentioned, failed to analyze properly the community property law of Texas, as it has been developed by the Texas courts.

Id.

Recently, in Sharma v. Routh,, 302 S.W.3d 355 (Tex. App.–Houston [14th Dist.] 2009, no pet.), the courts addressed the issue of characterizing trust income, again. The Houston Court of Appeals determined that income distributions are community property if the beneficiary, who may also be the trustee, has a present possessory right to the corpus of the trust. This rule is applicable even if the beneficiary chooses not to exercise his right. This right is equivalent to ownership during the marriage. *See* Dickinson v. Dickinson, 324 S.W.3d 653 (Tex. App.–Fort Worth 2010, no pet.).

Texas law relating to characterization of trusts and trust income remains unsettled.

AD. Wedding Gifts. Disputes over the division of wedding gifts are common in divorce cases, especially where the marriage is of short duration. There are no special rules which govern such gifts. The general rules concerning gifts apply to wedding gifts. *See* discussion Infra.

V. EFFECT OF CHANGES IN FORM OF SEPARATE PROPERTY.

A. Mutations and Changes.

1. In General. Once determined, the character of separate property will not be altered by the sale, exchange, or substitution of the property. Gleich v. Bongio, 99 S.W.2d 881 (Tex. 1937); Coggin, 204 S.W.2d 47; Love v. Robertson, 7 Tex 6 (1851). 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." Norris, 260 S.W.2d 676; Horlock, 533 S.W.2d 52.

Funds acquired through a sale of separate property, if traced, will remain separate property. Even frequent changes in the form of the separate estate do not change its legal status, since separate character is not affected by any number of changes and mutations in form. Farrow v. Farrow, 238 S.W.2d 255 (Tex. Civ. App. - Austin 1951, no writ); Coggin, 204 S.W.2d 47. The tracing requirement is satisfied in certain instances where the spouse is able to trace the original separate property into the particular assets on hand at the time of dissolution of marriage. The spouse must both trace and clearly identify the property as his or her separate estate. Tarver, 394 S.W.2d 780; McKinley, 496 S.W.2d 540; *see also* Newland v. Newland, 529 S.W.2d W5 (Tex. Civ. App. - Fort Worth 1975, writ dism'd).

In the absence of an agreement to the contrary, property purchased with separate funds, or taken in exchange for separate property, becomes the separate property of the spouse whose money purchases or where property is given in exchange.

2. Mixed Title. It is well established that where property is purchased partly with community funds and partly with separate funds of one of the spouses, such facts create a tenancy-in-common between the community and separate estates, with each estate owning an interest in the proportion that it supplied the consideration. Love v. Robertson, 7 TX. 6; Gleich, 99 S.W.2d 881; Carter v. Grabble, 341 S.W.2d 458 (Tex. Civ. App. - Austin, 1969, writ ref'd n.r.e.); Caldwell, 208 S.W.2d 127; Baize v. Baize, 460 S.W.2d 255 (Tex. Civ. App. - Eastland 1970, no writ); Bell v. Bell, 593 S.W.2d 424 (Tex. Civ. App. - Houston [14th Dist.] 1980, no writ); Cook v. Cook 679 S.W.2d 581 (Tex. App. - San Antonio 1984, no writ).

It is also possible that the husband and wife may purchase property with separate funds of each and thereby become joint owners. Estapa v. Saldana, 218 S.W.2d 222 (Tex. Civ. App. - San Antonio 1948, writ ref'd n.r.e.).

Where the property is taken in the name of only one spouse, there is a resulting trust in favor of the other spouse for the proportion that the other spouse's contribution bears to the total price. Wimberly v. Kneeland, 293 S.W.2d 526 (Tex. Civ. App. - Galveston 1956, writ ref'd n.r.e.). However, the trust

must result, if at all, at the very time a deed is taken and the legal title vested in the grantee. No agreement before or after the deed is taken, and no payments made after title is vested, will create a resulting trust, unless the payments are made pursuant to an enforceable agreement upon the part of the beneficiary existing at the time the deed is executed. Wright v. Wright, 132 S.W.2d 847 (Tex. 1939); Bybee v. Bybee, 644 S.W.2d 218 (Tex. App. - Fort Worth 1982, no writ); Leighton v. Leighton, 921 S.W.2d 565 (Tex. App. Houston [1st Dist.] 1996, no writ).

Where a man and woman live together in a meretricious relationship, the property acquired by them will be owned jointly in proportion to the amount that each party contributes to its acquisition. If they thereafter marry, the property would not be community property, but would remain as the separate property of the husband and wife respectively according to their proportionate interests. Only property acquired during marriage is community property. Aspersa v. Aspersa , 382 S.W.2d 162 (Tex. Civ. App. - Corpus Christi 1964, no writ); Davis v. Davis, 521 S.W.2d 603 (Tex. 1975).

If the deed or instrument of transfer does not disclose what interest each is to receive, in the absence of evidence to the contrary, it will be presumed that each acquired a one-half interest in the property. John Hancock Mut. Life Ins. Co. v. Bennett, 128 S.W.2d 791 (Tex. Comm. App. 1939, opinion adopted).

Under Texas law, where one spouse of a prior marriage enters into a second marriage relationship with an innocent party, who has no knowledge of the pre-existing and unterminated marriage, the properties acquired during the second putative marriage relationship by the putative spouses, are half owned by the second, putative spouse, and the other one-half of those properties are owned by the twice-married spouse. Caruso v. Lucius, 448 S.W.2d 711 (Tex. Civ. App. - Austin 1969, writ ref'd n.r.e.); Davis v. Davis, 521 S.W.2d 603; Padon v. Padon, 760 S.W.2d 354 (Tex. App. - San Antonio 1984, no writ); Parker v. Parker, 5th Cir., 1915, 222 F. 186, cert. den. 239 U.S. 643, 36 S.Ct. 1964;

VI. IDENTIFYING AND TRACING SEPARATE PROPERTY.

A. In General.

As previously indicated, the nature of property as separate or community is determined by the time and circumstances of its acquisition. Evans v. Evans, 14 S.W.3d 343 (Tex. App. - Houston [14th Dist.] 2000, no writ)

Tracing has been defined as a process which "involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property." Zagorski v. Zagorski, 116 S.W.3d 309 (Tex. App. - Houston [14th Dist.] 2003, pet. denied) Hillard v. Hillard, 725 S.W.2d 722, 723 (Tex. App. - Dallas 1985, no writ.)

The most common reasons for tracing are:

1. to establish the separate character of funds or assets owned at the time of marriage which have mutated during the marriage;
2. to establish the separate character of an asset acquired during marriage from separate funds or assets;
3. to support a reimbursement claim by demonstrating the use of funds or assets by one marital estate to benefit another marital estate;
4. to defeat a reimbursement claim from one marital estate to another by demonstrating that the benefit was paid by the estate receiving the benefit; and Characterization is a matter of the application of marital property law, presumptions and tracing. The beginning point in the characterization and tracing of property is the statutory presumption that property possessed by either spouse during or on dissolution of marriage is community property. TFC Sec. 3.002. This presumption may be overcome by identifying and tracing the property claimed as separate to a separate source of funds or credit used in its purchase. McKinley, 796 S.W.2d 540.

B. Burden of Proof.

The Supreme Court has clearly held that a spouse, or one claiming through a spouse, has the burden to trace and clearly identify property claimed as separate property. McKinley, 496 S.W.2d 540; Tarver, 394 S.W.2d 780; and Cooper v. Texas Gulf Indus. Inc., 513 S.W.2d 200. In Cockerham, the Supreme Court held:

> In order to overcome this [community] presumption, the party asserting separate ownership must clearly trace the original separate property into the particular assets on hand during the marriage.

Cockerham, 527 S.W.2d 162.

As a general rule, mere testimony that property was purchased with separate funds, without any tracing, is insufficient to overcome or rebut the

community property presumption. Zagorski, 116 S.W.3d 316; Osorno v. Osorno, 76 S.W.3d 509 (Tex. App. - Houston [14th Dist.] 2002, no writ) (where the husband failed to provide deposit slips or bank records in his attempt to trace allegedly separate property); Robles v. Robles, 965 S.W.2d 605, 614 (Tex. App. - Houston [1st Dist.] 1998, pet. denied).

In Robles, the court held that uncorroborated testimony of an interested party does not conclusively establish a fact, even when uncontradicted. Robles, 965 S.W.2d 616.

See also: Ganesan v. Vallabhaneli, 96 S.W.3d 345 (Tex. App. - Austin 2002, pet. denied) which held that the husband's testimony, which was limited to naming the institutions holding his accounts but did not include testimony and/or exhibits which provided "account numbers, statements of accounts, dates of transfers, amounts transferred in or out, sources of funds, or any semblance of asset tracing" was insufficient to overcome the community property presumption.

In the case of Zagorski v. Zagorski, *supra*, the wife challenged the factual sufficiency of the tracing evidence and the court's subsequent conclusion that certain funds contained in a foreign bank account constituted the separate property of Mr. Zagorski. The court, in discussing the challenge to the evidence admitted by Mr. Zagorski, stated that in considering a factual sufficiency challenge, the court must consider all evidence and must determine whether the trier of fact could reasonably conclude that the existence of the fact is "highly probable."

The court further went on to state that they would sustain the insufficiency evidence issue "only if the fact finder could not have reasonably found the fact was established by clear and convincing evidence. To this end, we must first determine whether the evidence was such that the trial judge could reasonable form a firm belief or conviction about the truth of Tony's claims that the funds in the foreign bank account were his separate property, and second, whether the trial judge could reasonably conclude the fact that Tony had accumulated personal savings of at least $2,057,524.20 prior to the date of the parties' marriage was highly probable." (*emphasis added*)

The court stated that the characterization of property as either community or separate is determined by the inception of title to the property. Smith v. Smith, 22 S.W.3d 140, 145, (Tex. App. - Houston [14th Dist.], 2000, no pet.) Inception of title occurs when a party first has a right of claim to the property by virtue of which title is finally vested. "The major consideration in determining the characterization of property as community or separate is the intention of spouses shown by the circumstances surrounding the inception of title." Zagorski, at 316. (*emphasis added*)

The Zagorski court, after a lengthy discussion of the evidence and testimony, ruled that there was sufficient evidence to sustain the court's finding of separate property. In this case, Mr. Zagorski had three separate witnesses corroborate his testimony regarding the existence of the foreign bank account prior to the marriage and the source of the funds which were contained in the foreign bank account prior to the marriage. This, coupled with the documents admitted into evidence concerning the foreign bank account, was sufficient with which to sustain a separate property finding by the trial court.

C. Degree of Proof.

The degree of proof necessary to establish property as separate property is clear and convincing evidence. TFC Sec. 3.003(b); *see also* McKinley, 496 S.W.2d 540; Whorrall, 691 S.W.2d 32; Allen v. Allen, 704 S.W.2d 600 (Tex. App. - Fort Worth 1986, no writ); Newland, 529 S.W.2d 105.

Clear and convincing evidence is the degree of proof that will produce in the mind of the trier of fact, a firm belief or conviction about the allegation sought to be established. Smith, supra at 144.

D. Methods of Tracing.

There are basic principles for tracing and clearly identifying separate property. Typically, tracing schedules will utilize a "community out first" rule and may also employ other theories, as well. The following theories or principles of tracing have been identified:

1. Community out first rule;
2. Minimum sum balance method;
3. Identical sum inference rule and clearinghouse method;
4. Item or asset tracing;
5. Value tracing;
6. Pro rata approach;
7. Before and after accounting (not a valid method); and
8. Separate out first rule.

The persuasiveness of a particular tracing rule or theory depends upon the facts of the case and the appropriateness of the tracing rule to those facts.

However, please see the discussion in subsection I. below regarding the "separate-out-first presumption."

1. "Community Out First" Rule. Under this rule, withdrawals from a mixed separate and community fund are presumed to be community to the extent that community funds exist. Withdrawals are presumed to be from separate funds only when all community funds have been exhausted. *See* Sibley v. Sibley, 286 S.W.2d 658 (Tex. 1955); Smith v. Smith, 22 S.W.3d at 146-47; Welder v. Welder, 794 S.W.2d at 428-29; Gibson v. Gibson, 614 S.W.2d 487, 489 (Tex. Civ. App. - Tyler 1981, no writ) (court required proponent to prove separate character of funds by community out first theory); Harris, 582 S.W.2d 853. The only requirement for tracing in the application of the community out first presumption is that the party attempting to overcome the community presumption must produce clear evidence of the transactions affecting the commingled account.

Multiple questions arise. When preparing the schedules, it is necessary to record deposits and disbursements in some order should they occur on the same day? Are deposits recorded before disbursements? What about multiple items that clear an account on the same day? Should one use the order they are posted to the account statement? What about using the date the checks are written? Does this method reflect the writer's intent as opposed to when the funds are actually disbursed from an account? Whatever method is used, it should be applied in a consistent manner so as to provide reliable and consistent results.

2. Minimum Sum Balance Method. The minimum sum balance method is useful for funds on account in which a portion can be conclusively proven to be separate property and there have been few, but identifiable, transactions. The party seeking to prove the amount of separate funds traces the account through each transaction to show that the balance of the account never went below the amount proven to be separate property. This theory presumes that only separate property remains after all other withdrawals are made. *See* Zagorski v. Zagorski, 116 S.W.3d 309 (Tex. App. - Houston [14th Dist.] 2003); Padon, 670 S.W.2d 354, 357; Snider v. Snider, 613 S.W.2d 8, 11 (Tex. Civ. App.-Dallas 1981, no writ) (probate suit). In practice, this is a variation of the "community out first" method, since the separate, identifiable funds remain in the account after all other withdrawals are made.

3. Identical Sum Inference and Clearinghouse Methods. The clearinghouse method is useful if a party had an account into which separate funds were temporarily deposited and then withdrawn (and possibly then used to acquire assets that are claimed as separate property). The clearinghouse method assumes that after one or more identifiable sums of separate funds went into the account, identifiable withdrawals were made that are clearly the withdrawals of the separate funds and are therefore separate property themselves. *See* Estate of Hanau v. Hanau, 730 S.W.2d 663 (Tex. 1987); Peterson v. Peterson, 595 S.W.2d 889 (Tex. Civ. App. - Austin 1980, writ dism'd w.o.j.); Latham v. Allison, 560 S.W.2d 481 (Tex. Civ. App. Fort Worth 1978, writ ref'd n.r.e.) (unsuccessful tracing); Beeler v. Beeler, 363 S.W.2d 305 (Tex. Civ. App. - Beaumont 1962, writ dism'd).

The identical sum inference method is similar to the clearinghouse method except that it involves only one deposit, rather than a series of deposits, followed by an identical withdrawal, usually a short time later. *See* McKinley, 496 S.W.2d 540. The identical sum inference method has also been referred to as the "identification of specific transaction method" or a "close in time and amount transaction."

Both theories have their greatest application where a clearly identifiable sum of money, whose character can be clearly identified, is deposited into a bank account and within a short period of time that sum of money is withdrawn to purchase an asset. In that instance, the proponent of separate property can show that an asset on hand, either upon dissolution of marriage or upon death, is separate property if he or she can trace the deposit of clearly identifiable separate property sums into an account and thereafter trace the withdrawal of those same funds to purchase an asset. These theories rebut the "community-out-first" presumption.

Although case law supports the application of these theories to trace separate property through bank accounts, the theories become less applicable when the deposits and withdrawals are not in exact amounts, when the transactions are separated by greater periods of time, and when the separate property proponent fails to clearly show that the money withdrawn from the account is the actual sum used to purchase the asset whose characterization is in question.

But, see the case of Peterson, supra, where the appellate court upheld the trial court's finding of separate property even though the deposit and withdrawal of funds differed by as much as 5.79% ($35,000.00 deposited and $32,973.64 withdrawn)

and the period of time between the deposit and withdrawal was 30 days.

4. Item or Asset Tracing. The party asserting separate ownership must clearly trace the original separate property into the particular assets on hand during the marriage. Cockerham, 527 S.W.2d 162; Tarver, 394 S.W.2d 780; Love, 7 Tex. 6. Any doubt as to the character of property must be resolved in favor of the community. Akin, 649 S.W.2d 700; Contreres v. Contreres, 590 S.W.2d 218 (Tex. Civ. App. - Tyler 1979, no writ).

The requirement for tracing to the origin not only necessitates a showing of how one spouse obtained the property, but also requires evidence which clearly establishes the origin of the asset. Mortenson, 504 S.W.2d 269; Loan v. Barge, 568 S.W.2d 863 (Tex. Civ. App. - Beaumont 1978, writ ref'd n.r.e.); Bile v. Tupa, 549 S.W.2d 217 (Tex. Civ. App. -Corpus Christi 1977, writ ref'd n.r.e.) (heirs of wife failed to trace proceeds from lots owned before marriage into existing assets). It is not sufficient "to show that the separate funds could have been the source of a subsequent deposit of funds." Latham, 560 S.W.2d 481. (*emphasis in original*).

Some cases do appear to depart from strict "item tracing". Blumer v. Kallison, 297 S.W.2d 898 (Tex. Civ. App.-San Antonio 1956, writ ref'd n.r.e.); Barrington v. Barrington, 290 S.W.2d 297 (Tex. Civ. App. -Texarkana 1956, no writ); Sibley, 286 S.W.2d 658; Farrow, 238 S.W.2d 255; Coggin, 204 S.W.2d 47. McKinley, has been referred to as the most liberal tracing case. See McKinley, 496 S.W.2d 540; *see also* Gibson v. Gibson, 614 S.W.2d 487 (Tex. Civ. App. - Tyler 1981, no writ); Holloway, 671 S.W.2d 51 (discussion of varying degrees of particularity required).

5. Value Tracing. Value tracing is commonly accepted as the means by which cash assets are traced, while item tracing is required of other assets. (*emphasis added*). Mortenson v. Trammell, 604 S.W.2d 269 (Tex. Civ. App. - Corpus Christi 1980, writ ref'd n.r.e.) Value tracing necessitates a showing of how one spouse obtained the property and requires evidence which clearly establishes the origin of the asset. The spouse with the burden of tracing is aided by the rule that one dollar has the same value as another, and under the law, there can be no commingling by the mixing of dollars where the number owned by each estate is known. In Re Marriage of Tandy, 532 S.W.2d 714 (Tex. Civ. App. - Amarillo 1976, no writ), involved the wife's contention that a loan payment to the Federal Land Bank made by husband from a commingled bank account was not sufficiently traced from husband's separate funds. The court stated that "One dollar has the same value as another; there can be no commingling of dollars where the number owned by each claimant is known." Id.

Essentially, value tracing, which is used often to trace a cash fund, has been replaced in large part by the "community out first" rule.

6. Pro Rata Approach. Under the pro rata approach, if mixed funds are withdrawn from an account, the withdrawal should be pro rata in proportion to the respective balances of separate and community funds in the account. By using the pro rata approach, it would not be necessary to analyze the character of each withdrawal.

The Fort Worth Court of Appeals used the pro rata approach in an embezzlement case (not a family law case) in which the deceased employee's wife had to prove which funds belonging to her husband (as opposed to his employer) flowed into each asset to which the employer had traced its embezzled funds. The husband had deposited the embezzled funds into an account and used that account to pay incrementally, the premiums of a life insurance policy. When he killed himself, his employer and his wife disputed who owned the policy proceeds. Mariana v. Gen. Am. Life Ins., 898 S.W.2d 397, 400, 403 (Tex.App. Fort Worth 1995, writ denied). The employer contended that the wife failed to meet her burden of proof because she only offered evidence of the proportion of embezzled money to personal money deposited into the account used to pay the insurance premiums. The employer argued that the wife had to prove the ownership proportion of each payment to calculate the ownership of the policy, and absent such proof, the presumption is that all of the commingled funds are held in trust for the employer. Id.

The court of appeals disagreed. The court relied on G & M Motor Co. v. Thomson, 567 P.2d 80, 84 (Okla. 1977), in which the Oklahoma Supreme Court held that the employer of the embezzling employee was entitled to a pro rata share of the life insurance policy proceeds where the wrongfully acquired funds were partially used to pay the premiums. Id. (regarding the use); *see also* Bakken v. Bakken, 503 S.W.2d 315 (pro rata approach applied to determine the character of proceeds from mixed character mutual funds).

This method is seldom seen in practice, except for allocating income or sales proceeds from mixed character assets.

7. Before and After Accounting (Not a Valid Method). The presumption of community is not overcome by proof of the value of property owned by one spouse at the time of marriage and the value of the property possessed upon dissolution of the marriage. Such a "before and after" procedure does not discharge the burden of tracing. Tarver, 394 S.W.2d 780.

The burden of tracing is not overcome by a showing of a decrease in net worth. Meshwert v. Meshwert, 543 S.W.2d 877 (Tex. Civ. App. - Beaumont 1976, writ ref'd n.r.e.), aff'd on other grounds, 549 S.W.2d 383 (Tex. 1977); Stanley v. Stanley, 294 S.W.2d 132 (Tex. Civ. App. - Amarillo 1956, writ ref'd n.r.e.); Waheed v. Waheed 423 S.W.2d 159 (Tex. Civ. App. - Eastland 1967, no writ); McKinley, 496 S.W.2d 540.

In Stanley v. Stanley, the court held that the burden to trace and clearly identify property claimed to be separate property is not met by showing assets on hand at or shortly after the date of marriage and showing all assets on hand at a date shortly before the date of divorce, with the net amount of increase in total assets allegedly representing the value of community property to be divided upon divorce, stating:

> This arithmetical approach is not sufficient to rebut the presumption of the community status in Texas courts.

Stanley v. Stanley, 294 S.W.2d 132; *See also* In Re: Marriage of Greer, 483 S.W.2d 490 (Tex. Civ. App. - Amarillo 1972, writ dism'd) (husband failed in attempt to show value of antenuptial worth and net amount of increase on divorce; community would constitute the difference).

In Trevino v. Trevino, 555 S.W.2d 792 (Tex. Civ. App. - corpus Christi 1977, no writ), a professional association was formed during marriage and husband testified that he never signed a check or any other consideration for the stock in the professional association, but that his bookkeeper might have issued the check. The appellate court held that husband did not meet burden of proving by clear and convincing evidence that the stock was his separate property. Trevino, 555 S.W.2d 792.

In Harris v. Ventura, the court also applied tracing techniques to a transaction involving the husband's separate property. Prior to marriage the husband sold certain land and took in payment, a promissory note with deed of trust lien, to secure its repayment. Subsequently, but still prior to the marriage, the husband assigned the note and lien to a bank. Though the assignment was absolute in form, it was made as collateral for a loan. Thereafter, the husband foreclosed the lien through a trustee's sale. Repurchase of the land was achieved by cancellation of part of the outstanding separate note without any additional or community funds. Hence, the land was the husband's separate property and the proceeds of its later sale were traced to a certificate of deposit and a promissory note that were, therefore, also the husband's separate property. The link in this tracing chain that most concerned the court was the absolute assignment of the note and the lien to the bank. The court was satisfied, however, that the transaction was not meant as anything more than a security device. As such, even if the separate indebtedness had been paid with community funds, the redemption of the security would not change the character of the debt, repayment of which the assignment secured. Harris, 582 S.W.2d 853.

However, in Zagorski v. Zagorski, the husband introduced evidence establishing that prior to marriage he had accumulated personal savings in accounts exceeding $2,057,524.20. During the trial, the husband introduced an exhibit showing that the interest earned on these monies during marriage was less than $115,000.00. Another exhibit showed that approximately $366,000.00 was withdrawn from the account for various marital living expenses. Over wife's objections that the account was co-mingled and the tracing had failed, the appellate court held that the entire balance of the money in the account was separate property. 116 S.W.3d at 320.

However, see the cases that discuss the characterization of defined contribution plans, as well as Texas Family Code Section 3.007(c).

8. Separate Out First Rule.

See the discussion in paragraph I., the case of Smith v. Smith, 22 S.W.3d 140 (Tex. App. - Houston [14th Dist.] no writ), and the case of McKinley v. McKinley, 496 S.W.2d 540 (Texas 1973).

E. Parol Evidence.

It is well settled that the facts which determine the status of the property may be proven as any other fact by any competent evidence, including parol evidence, surrounding circumstances and declarations of the parties. It has been held that a spouse is competent to testify concerning the source of funds in a bank account without producing bank records on the

deposits. Holloway, 671 S.W.2d 51; Harris v. Ventura, 582 S.W.2d 853.

In Holloway, the husband testified that he paid for his initial subscription to certain stock by a check drawn on an account. No salaries or legal earnings, he said, were deposited in this account in the relevant period. All deposits, he said, were made by his wife, and she was instructed to deposit only separate royalty monies in this account. His initial subscription to stock was paid in 1974 by a check drawn on this account, as was his acquisition of additional stock in 1975. The wife argued that husband's self-serving testimony concerning the character of the funds in the account amounted to no more than a scintilla of evidence and should be disregarded because of his failure to establish the separate character of the funds by bank records of deposits and withdrawals. The court held:

> We know of no authority holding that a witness is incompetent to testify concerning the source of funds in a bank account without producing bank records of the deposits.

Holloway, 671 S.W.2d 51.

In Welder v. Welder, 794 S.W.2d 420 (Tex. App. - Corpus Christi 1990, no writ) both husband and his office manager testified that all income from whatever source had consistently been deposited in the couple's joint account, all expenses had been paid from that account, and that the royalty income from husband's separate estate averaged $200,000 a month, while the community estate spent more money on living expenses and community business expenses than the community farming and ranching businesses could support. The court stated:

> This explains the consistent abundance of the husband's separate funds, and the lack of community funds, in the joint account.

Welder v. Welder, 794 S.W.2d 420.

In Harris v. Ventura, a widow claimed certain bank accounts as her separate property, but the only evidence concerning the source of the funds was her testimony that "[s]ome was gifts and some may have been my social security checks, I don't remember." This evidence was insufficient to overcome the presumption of community property. Harris, 582 S.W.2d 853.

In Carter v. Carter, 736 S.W.2d 775 (Tex. Civ. App. - Houston [14th Dist.] 1987, no writ) the husband testified that he signed an earnest money contract on a house and secured it with a $1,000 check written on his separate account prior to the marriage. Although the earnest money contract was not in evidence, the husband introduced a check for $1,000, dated October 19, 1974, (the alleged date the contract was signed) made out to Eagle Title Company. The check appeared to have been cashed on November 7, 1974, one month prior to the marriage. The court found that the contract was signed prior to marriage. The wife argued that the earnest money contract was not admitted into evidence to indicate when the contract was "accepted" by the seller. The court held the date of acceptance by the seller was not relevant. Carter, 736 S.W.2d 775. *(emphasis added)*

In Newland, the court stated:

> "While most of Mr. Newland's testimony was corroborated by bank records, etc., some was not so supported. Mrs. Newland contends that where there is not corroboration there is lacking the requirement of evidence that it be "clear and convincing."
>
> "She cites Duncan v. Duncan, 374 S.W.2d 800 (Eastland, Tex. Civ. App. 1964, no writ history) and West v. Austin National Bank, 427 S.W.2d 906 (San Antonio, Tex. Civ. App. 1968, writ ref. n.r.e.). We do not believe either case supports the contention. In a suit of this nature between a husband and wife the parties are each able to testify upon material agreements, express or implied, but rarely would any third persons be able to corroborate either. The same applies to action of one with no participation of the other. To adopt the rule for which Mrs. Newland contends would be to deny justice in a great number of cases, indeed in nearly all where the facts are within the knowledge of only one spouse. Of course the fact finder would be entitled to disbelieve and refuse to find for the spouse having knowledge and testifying, but in instances where he is believed and the finding made for him a judgment based thereupon should not be disturbed because of a lack of corroboration of his testimony."

Newland, 529 S.W.2d 105.

F. Expert Witness Testimony.

1. In General. It is common practice to engage expert witnesses to provide the primary evidence for tracing the mutations and changes in separate property. In such cases, the expert witness will often prepare trial exhibits consisting of summaries of daily tracing of all deposits, expenditures, and purchases of assets. The expert will often testify to the separate or community nature of property based on these exhibits.

Tex. R. Evid. 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

An excellent discussion of expert witness testimony is found in Welder v. Welder. In Welder, the husband hired a tax accountant to trace the assets and liabilities. The accountant's testimony provided the primary evidence of tracing the oil royalty payments through the joint bank account and to the purchase of the assets in dispute. The wife's accountant challenged the husband's expert's tracing as unreliable considering the state of the couple's financial records and testified based on his own analysis. The court held:

> Based on tracing of separate funds as testified to by the accountants for both parties, we hold that there was legally and factually sufficient evidence for the fact finder to have determined accurately, without surmise or speculation, the interests allocated to husband in the [disputed properties].

Welder v. Welder, 671 S.W.2d 51.

2. Use of Summaries. The expert witness employed to trace the assets and liabilities in connection with a divorce will typically prepare summaries from the records of income, expenditures and purchases of assets for use as exhibits at trial. Again, an excellent discussion of the use of summaries is found in Welder v. Welder, 671 S.W.2d 51.

The trial judge in Welder admitted the exhibits as summaries and allowed the husband's expert to testify from them, over the objections of the wife that the exhibits and any testimony therefrom were hearsay, and that the exhibits did not come within the Tex. R. Evid. 1006 exception as summaries of voluminous records. The wife also complained specifically that it was error for the trial court to admit certain exhibits into evidence because they were hearsay which did not fall within the Rule 1006 exception. The appellate court stated:

> In order to bring a summary within the guidelines of Rule 1006, the party sponsoring the summary must lay the proper predicate for its admission, by demonstrating that the underlying records were voluminous, were made available to the opposing party for inspection and use in cross examination, and were admissible under the Texas Business Records Act (now contained in Tex.R.Evid. 803(6) & 902(10). Aquamarine Associates v. Burton Shipyard, Inc., 659 S.W.2d 820, 821 (Tex. 1983); Black Lake Pipeline Co. v. Union Construction Co., 538 S.W.2d 80, 92 (Tex. 1976); see also Xonu Intercontinental Industries v. Stauffer Chemical Co., 587 S.W.2d 757, 760 (Tex.Civ.App. -Corpus Christi 1979, no writ). In Aquamarine, for instance, the Texas Supreme Court held a summary to be inadmissible hearsay because the underlying business records upon which it was based were never shown to be admissible.

Id. The appellate court also rejected wife's hearsay arguments because another witness had established the status of the documents as business records. Id.

3. Basis of Opinions or Inferences. Tex. R. Evid. 703 provides that the facts or data upon which an expert relies in a particular case need not be admissible in evidence if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *See* Liptak v. Pensabene, 736 S.W.2d 953 (Tex. App. - Tyler 1987, no writ); Sharpe v. Safeway Scaffolds Co. of Houston Inc., 687 S.W.2d 386 (Tex. App. - Houston [14th Dist.] 1985, no writ).

Tex. R. Evid.705 provides that the expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on

direct examination, or be required to disclose on cross-examination, the underlying facts or data.

Concerns have been raised that permitting an expert to testify as to the underlying facts or data would open the floodgates and allow inadmissible hearsay into the record. The Texas Rules of Evidence provide a balancing test and a limiting instruction with regard to the ability of the expert, under direct examination, to testify as to the underlying facts or data which would otherwise be inadmissible. Tex. R. Evid. 705(d).

In Seaside Indus., Inc. v. Cooper, 766 S.W.2d 566 (Tex. App. - Dallas 1989, no writ), the court stated *in dicta* that an accountant expert could testify to the financial status of a party under Rule 703, even if predicated upon his review of inadmissible business records. Id. *See also* Parkview Gen. Hosp., Inc. v. Ashmore, 462 S.W.2d 360 (Tex. Civ. App. - Corpus Christi 1970, writ ref'd n.r.e.); Commercial Standard Ins. Co. v. Cisco Indep. Sch. Dist., 435 S.W.2d 565 (Tex. Civ. App. - Eastland 1968, writ ref'd n.r.e).

4. Statements and Interpretations of Law. Tex. R. Evid. 704 provides that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts. Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, (Tex. 1987); *see also* Louder v. DeLeon, 754 S.W.2d 148 (Tex. 1988); Dieter v. Baker Service Tools, 776 S.W.2d 781 (Tex. App. - Corpus Christi 1989, writ denied). In Birchfield and Louder, the Texas Supreme Court specifically allowed expert testimony about a party's "negligence" directly, rather than requiring such testimony to be confined to lay terms of violation of the standard of care, from which the jury could later infer negligence under the court's charge.

Nevertheless, these cases do not open the way for an expert to testify directly to his understanding of the law, but merely allow him to apply legal terms to his understanding of the factual matters in issue. It is still an elementary principle that witnesses are to give evidence as to facts, and not statements of law. The reason for this distinction is that, because of his special training and experience, the trial judge is better equipped to determine questions of law and instruct the jury accordingly. Withrow v. Shaw, 709 S.W.2d 759 (Tex. App. - Beaumont 1986, writ ref'd n.r.e.); Collins v. Gladden, 466 S.W.2d 629 (Tex. Civ. App.- Beaumont 197 1, writ ref'd n.r.e.).

In Welder v. Welder, the wife complained that the trial court erred in refusing to permit her to cross-examine the husband's accountant on the basis of his use of the presumption in tracing separate property, that community funds are withdrawn first from an account in which separate and community funds are mixed.

During cross-examination, wife's attorney established that the accountant's tracing of funds was largely based on the "community out first" presumption as set forth in Sibley. The wife attempted to impeach the expert by showing that Sibley's "community out first" presumption did not apply. The trial court, however, sustained appellee's objection to this line of questioning and refused to allow the cross examination about the details of individual cases, on the ground that it was the court's function to instruct the jury on the law, and the court would not permit appellant to ask about specific cases or the rationale behind them. The wife, however, complained that the trial court's refusal improperly denied her the opportunity to show by cross-examination the fallacy of the application of the "community out first" presumption. The appellate court held:

> In the present case, it certainly was acceptable for [the accountant] to explain the methods he used to trace appellee's separate funds through the joint account, and to refer to the "community out first" presumption as one of the tools used in this tracing. However, the questions appellant's attorney asked about [the accountant 's] understanding and interpretation of specific case law improperly called for the witness to make statements of law, and it was not error for the trial court to sustain appellee's objection. Any fallacy in the methods used to trace separate funds is a legal matter for the court to determine and not a proper subject for cross-examination.

Welder v. Welder, 671 S.W.2d 51 (*emphasis added*.).

The court in Welder noted, however, that a host of legal problems arise from the application of the Birchfield rule allowing expert testimony on mixed questions of law and fact, not the least of which is the protection of a party's right to cross-examine an expert witness under Texas Rule of Evidence 705. Rule 705 provides that an expert may testify in terms of an

opinion and state the reasons for his opinion without prior disclosure of the underlying facts or data. Nevertheless, Rule 705 also provides that the expert may be required to disclose, on cross-examination, the underlying facts or data. Furthermore, under Texas Rule of Evidence 611(b), a witness may be cross-examined on any matter relevant to any issue in the case. Birchfield allows an expert to testify on a mixed question of law and fact provided that the expert's opinion is based on proper legal concepts. The problem occurs when an opposing party wishes to challenge the propriety of the expert's legal concepts. One is thus confronted with several competing ideals: a proponent's Birchfield right to elicit expert testimony on mixed questions of law and fact; an opponent's 611(b) and 705 right to cross-examine the expert; and the trial court's exercise of discretion when restricting cross-examination to avoid jury confusion.

G. Commingled Funds.

1. In General. The term "commingled" is used in some court decisions to mean that separate and community property have been so intermixed that they cannot be separated and identified. However, the mere fact that separate and community funds are "mixed" or "commingled," as by deposit in the same bank account, does not automatically result in the entire fund becoming community. It is only where the identity of the separate funds cannot be traced that the statutory presumption of community property prevails. The distinction is that the "commingling" must be to such extent "as to defy resegregation and identification." Welder, 671 S.W.2d 51.

When separate property has not been commingled or its identity as such can be traced, the statutory community property presumption is dispelled. Estate of Hanau v. Hanau, 730 S.W.2d 663 (Tex. 1987); Tarver, 394 S.W.2d 280; Harris v. Harris, 765 S.W.2d 798 (Tex. App. -Houston [14th Dist.] 1989, writ denied). As long as separate property can be definitely traced and identified, it remains separate property regardless of the fact that it may undergo mutations and changes. Norris, 260 S.W.2d 676.

2. Tracing Through Bank Accounts. Our courts have found no difficulty in following separate funds through bank accounts. Welder, 671 S.W.2d 51; Sibley, 286 S.W.2d 658. A showing that community and separate funds were deposited in the same account does not divest the separate funds of their identity and establish the entire amount as community when the separate funds may be traced and the trial court is able to determine accurately the interest of each party. Holloway, 671 S.W.2d 51. One dollar has the same value as another and under the law there can be no commingling by the mixing of dollars when the number owned by each claimant is known. Trawick, 671 S.W.2d 105, Farrow, 671 S.W.2d 51.

The process of tracing is shown in Padon v. Padon, 670 S.W.2d 354 (Tex. App. - San Antonio 1984, no writ). The evidence elicited at trial shows that during the marriage of the parties, Mr. Padon's father died leaving Mr. Padon an amount in excess of $160,000.00. On February 25, 1977, $160,490.00 was deposited in Frost National Bank in San Antonio to open an account styled "R. H. Pat Padon or Carolyn Padon." Both parties agreed that Mr. Padon had inherited and deposited $160,490.00 into this account. Both parties agreed that in early 1977, a house was purchased for $89,900.00, which was paid for by check. The March bank statement of the Padons' account shows no additional deposits from the time of the initial $160,490.00 deposit until March 4, 1977. On March 1, 1977, the statement shows a check cleared the account in the amount of $89,900.00. The court held the husband established as a matter of law that the house was his separate property. Id. This case is an excellent example of the minimum sum balance method of tracing as discussed above.

A simple "in and out" or "identical sum" transaction through a community bank account was shown in Holloway. Husband testified that he received the funds to purchase an oil and gas interest from a distribution of his father's estate. He deposited this distribution in a separate property checking account. On June 5, 1980, he purchased the oil and gas interest with a check for $75,000 and gave a check on an account he conceded contained community funds. The husband explained that he used this account because the sellers required immediate payment and his separate account checkbook had been taken by wife, but he knew that the funds in the community account were insufficient to pay the check. He transferred $75,000 from his separate account into the community account. The check and the telephone transfer order were admitted into evidence. The court stated:

> In the instant case, [the husband] put a certain sum in the community account to cover a specific check that was subsequently cashed, a simple "in and out" transaction. The community account served only as an instrumentality for transmitting his separate

> funds. The amount of community funds actually in the account is immaterial.

Holloway, 671 S.W.2d 51.

In Snider v. Snider, 613 S.W.2d 8 (Tex. Civ. App. -Dallas 1981, no writ) the court analyzed transactions through a bank account. On the date of the marriage, the balance in the account was $27,642.45. Upon dissolution of the community by the husband's death, the balance was $35,809.80. The account grew by interest from time to time, as well as by new deposits, and was reduced by withdrawals from time to time. A witness testified that an additional deposit of $10,000.00 of separate funds of the husband was made after the marriage and that the remaining deposits, as well as withdrawals, were made by the community. Subsequent interest earned, deposits, and withdrawals to the date of the husband's death never reduced the account balance to or below $29,642.45. The court held that this record traces and identifies the husband's separate interest in the Mercantile savings account to the extent of $29,642.45. Id.

3. Community Out First Rule. Our courts have developed rules of tracing to distinguish the character of funds which are withdrawn from an account of mixed separate and community funds. Where a joint bank account contains both community and separate funds, it is presumed that the community funds are drawn out first, before separate funds are withdrawn, and where there are sufficient funds at all times to cover the separate property balance in the account at the time of divorce, it is presumed that the balance remains separate property. Sibley, 286 S.W.2d 658; Harris v. Ventura, 582 S.W.2d 853; Horlock, 533 S.W.2d 52; Barrington, 290 S.W.2d 297; Goodridge v. Goodridge, 591 S.W.2d 571 (Tex. Civ. App. - Dallas 1979, writ dism'd); Farrow, 238 S.W.2d 255, Coggin, 204 S.W.2d47; DePuy v. DePuy, 483 S.W.2d 883 (Tex. Civ. App. -Corpus Christi 1972, no writ); Kuehn v. Kuehn, 594 S.W.2d 158 (Tex. Civ. App. - Houston [14th Dist.] 1980, no writ).

In Sibley, the Supreme Court stated:

> The presumption is that where funds are commingled so as to prevent their proper identity as separate or community funds, they must be held to be community funds. However, there are exceptions to the rule or presumption. In divorce proceedings our courts have found no difficulty in following separate funds through bank accounts. (cites omitted) Equity impresses a resulting trust on such funds in favor of the wife and where a trustee draws checks on a fund in which trust funds are mingled with those of the trustee, the trustee is presumed to have checked out his own money first, and is therefore an exception to the general rule. (cites omitted)
>
> The community moneys in joint bank accounts of the parties are therefore presumed to have been drawn out first, before the separate moneys are withdrawn; (cites omitted) and since there are sufficient funds in the bank, at all times material here, to cover appellee's separate estate balance at the time of divorce, such balance will be presumed to be her separate funds.

Sibley, 286 S.W.2d at 659.

In Welder v. Welder, the wife argued that the "community out first" presumption should be limited to situations where one party is acting in a special position of trust with regard to the other's funds, over and above the trust relationship inherent in the very nature of a joint account. The court held:

> Sibley, however, does not limit itself in this way. As in the present case, Sibley determined rights to a joint account held by the parties during marriage and used to pay community expenditures, in which one of the parties had deposited separate funds. The only requirement for tracing and the application of the 'community out first' presumption is that the party attempting to overcome the community presumption produce clear evidence of the transactions affecting the commingled account.

Welder v. Welder, 794 S.W.2d 420.

In Harris v. Ventura, the court analyzed a bank account which consisted of a mixture of husband's separate property, some community property, and certain funds of unexplained origin, and found the burden of tracing was met:

> The testimony with reference to this account is clearly outlined, step by step, beginning with the amount in the account on April 12,

> 1974, and traced each deposit and withdrawal . . .
>
> There was no attempt made to contradict any of the above facts. Appellants have clearly traced and identified the funds in this checking account in the sum of $3,657.88 as deceased's separate property.

Harris v. Ventura, 582 S.W.2d 853.

4. Careful Records Rule. The keeping of detailed books and records indicates a purpose to identify separate from community property. Blumer v. Kallison is an example of the careful records rule. The asset in question was an interest in a partnership. Records were kept only as to the profits realized and the net rents and revenues of the separate property. Community profits were thus readily traceable from an examination of the records. The court held that the wife's interest in the partnership was entirely her separate property, citing Schmidt v. Huppman, 11 S.W. 175 (Tex. 1889). The court held that under the business practices and bookkeeping practices employed, there was no commingling of properties or funds that would prevent the identification of the separate property of the wife:

> The evidence discloses that an attempt was made to keep the books so that at all times the principal investment [separate property] could be identified and calculated separately from the profits or earnings thereon [community property].

Blumer, 297 S.W.2d 898.

In Farrow, the details of the separate sales and purchases made by husband were reflected by deeds, notes, checks, and bank accounts in evidence. The court made an extensive review of the rules governing commingling of separate and community properties and stated:

> These facts, in our opinion, fall far short of those required to enforce a forfeiture of appellee's separate estate under the commingling doctrine.

Farrow, 238 S.W.2d 255.

In Lindsey v. Lindsey, 564 S.W.2d 143 (Tex. Civ. App. - Austin 1978, no writ) the wife was able to show the exact amount of her separate funds owned before marriage. The court noted that "all such funds were deposited in a joint bank account, full records of which were before the trial court." Id.

In Harris v. Ventura, the court noted:

> The testimony with reference to this account is clearly outlined, step by step, beginning with the amount in the account on April 12, 1974, and traced each deposit and withdrawal.

Harris v. Ventura, 582 S.W.2d 853.

In In re Marriage of Tandy, the wife contended that a loan payment to the Federal Loan Bank made by husband from a bank account containing both separate and community properties was not sufficiently traced from husband's separate funds. The court rejected the argument because of the detailed evidence presented. In Re Marriage of Tandy, 532 S.W.2d 714.

In Stanley, wife claimed ownership of various funds in bank accounts and safety deposit box "because I made every dime of it myself." The court found that the wife had failed to meet the burden of tracing the separate funds:

> The testimony reveals that no record was kept of money transferred from the safety deposit box or from one account or business to another except for notations made on two envelopes from May 20, 1948, to June 7, 1951, and none was kept on the envelopes thereafter. The notations kept on the envelopes constituted a crude sort of method that could be explained or partially explained only by appellant. The record reveals that monies in various amounts were placed in and withdrawn from the safety deposit box at various times during the marriage.

Stanley v. Stanley, 294 S.W.2d 132.

In Waheed v. Waheed, the court found the husband's business records were insufficient for tracing. Husband's accountant testified that the business bank account shown on the balance sheet at the end of the marriage came "from the store from the sales within the store," and that he could not determine if this money was profit or capital. He further testified that it was impossible for him to determine if the inventory listed in the report at time

of separation came from profit investment or capital investment. Waheed, 423 S.W.2d 159.

One of the most recent cases that appears to be an example of the careful records rule is the case of Pace v. Pace, 160 S.W.3d 706 (Tex. App. - Dallas 2005, pet. denied). In this case, the wife had inherited a substantial number of assets from her parents prior to marriage, including a number of stocks and bonds. Immediately after her marriage, and because the husband refused to execute a premarital agreement or a post-marital agreement as promised, the wife established a new securities account in which all of the interest and dividend income from the inheritance accounts that she had established prior to marriage was swept into. The wife kept meticulous records with respect to the sweeping of all income from her separate property account into the new community account. The court ruled, without specifically referring to the careful records rule, that all of the funds contained in the account that the wife had established prior to marriage constituted her separate property, and all the funds contained in the new account which she established immediately after marriage constituted community property.

The above cases illustrate the importance of presenting complete records in an organized fashion.

5. "Hopelessly" Commingled. When the evidence shows that separate and community property have been so commingled as to defy resegregation and identification, the statutory presumption of community controls and the entire mass is community. Tarver, 394 S.W.2d 780; Cockerham, 527 S.W.2d 162.

This presumption is based upon trust concepts. Where a trustee mixes trust funds with his own, it is said the whole will be treated as trust property, except so far as the trustee may be able to distinguish what is his own. The statutory presumption of community property controls only where the separate property and the community property have been so commingled that it is impossible to identify the separate property or separate property interest in the commingled whole. Tarver, 394 S.W.2d 780. In Tarver, Chief Justice Calvert wrote:

> **. . .** when the evidence shows that separate and community property have been so commingled as to defy resegregation and identification, the burden [to trace and identify] is not discharged and the statutory presumption that the entire mass is community controls its disposition.

Id. (*emphasis added*). *See also* McKinley, 496 S.W.2d 543.

In Smith v. Smith, 694 S.W.2d 426 (Tex. App. - Tyler 1985, writ ref'd n.r.e.), the surviving son and grandchildren brought an action against surviving wife to recover the proceeds from sale of personal property owned before marriage and certain real estate inherited during marriage. None of such properties were on hand at the time of the decedent's death. The jury's answers established only the market value of the specified items at the time of marriage, and at the time of acquisition during marriage, and the amount of proceeds from sale of the realty. The court held:

> Since [the surviving son] and the grandchildren failed to secure findings that the cash proceeds from the sales of Smith's separate property, properly identified, were on hand or in existence in a specified account in a financial institution at the time of the dissolution by death of Smith's marriage to wife, they were not entitled to recover.

Id.

When title to property is mixed, if the spouse claiming a separate property interest cannot establish and define the percentage that is separate, the whole will be community property. Dessommes v. Dessommes, 543 S.W.2d 165 (Tex. Civ. App. - Texarkana 1976, writ ref'd n.r.e.); *see also* Harris v. Ventura, 582 S.W.2d 853; Farrow, 238 S.W.2d 255; Humble Oil & Ref. Co. v. West, 508 S.W.2d 812 (Tex. 1974); Crenshaw v. Swenson, 611 S.W.2d 886 (Tex. Civ. App. -Austin 1980, writ ref'd n.r.e.).

H. Trust Law and Commingling.

The source of the commingling rule is trust law. If a trustee mixes his personal property with the corpus of the trust so that it can no longer be identified, the trustee's personal property becomes a part of the trust corpus.

1. Important Exception. Sibley clearly set out the general rule and the exception derived from trust law. Sibley, 286 S.W.2d 658. Where funds are commingled so as to prevent their proper identity as separate or community funds, they must be held to be community funds. However, there are limitations upon and exceptions to this rule. First, our courts have found no difficulty in following separate funds through bank accounts. Farrow, 238 S.W.2d 255;

Coggin, 204 S.W.2d 47 (Tex. Civ. App. -Amarillo 1947, no writ). Second, equity impresses a resulting trust on such funds in favor of the innocent party and where a trustee draws checks on a fund in which trust funds are mingled with those of the trustee, the trustee is presumed to have withdrawn his own money first, and is therefore an exception to the general rule.

If the commingler would benefit and the innocent spouse would suffer, then the presumption is against the wrongdoer's interest, regardless of whether that interest is community or his separate property. Under the case law that establishes the "community out first" rule of tracing to overcome commingling, if this rule worked to the financial advantage of the "bad actor" (the spouse who manages the accounts) and to the detriment of the other spouse (the beneficiary under trust law), then the burden of tracing would shift to the managing spouse in order to protect the estate of the other spouse, as recognized in Farrow, 238 S.W.2d 255.

2. Husband or Wife. With the advent of the Texas Equal Rights Amendment, Texas Constitution, Article I, Section 3a (1972),the courts should draw no distinction as to whether the spouse seeking to trace separate property is the husband or wife. Generally, one spouse or the other will be the legal or actual "manager" of most of the assets of the parties' separate and community estates. The "trust theory" as stated in Farrow, and Sibley, as well as the long line of cases that have followed, provide that the spouse who is managing the assets of the marriage will be treated as a "trustee" who will suffer the loss of those assets separately belonging to him, if he mixes them with the "trust assets" that are community assets, and does not meet his burden of tracing. In most cases, this will mean that the managing spouse's separate property estate can be lost through commingling.

The loss of the managing spouse's separate estate to commingling is consistent with the general rule that a "trust relationship" exists between a husband and wife as to property controlled by the managing spouse. Mazique v. Mazique, 742 S.W.2d 805, 807 (Tex.App.-Houston [1st Dist.] 1987, no writ); Carnes v. Meador, 533 S.W.2d 365, 370 (Tex.Civ.App.-Dallas 1975, writ ref'd n.r.e.). The burden is on the managing spouse to prove that a gift or disposition of community funds was not unfair to the rights of the other spouse. Mazique, 742 S.W.2d at 808; Jackson v. Smith, 703 S.W.2d 791, 795 (Tex.App.-Dallas 1979, writ ref'd n.r.e.). "Thus, constructive fraud will usually be presumed unless the managing spouse proves that the disposition of the community funds was not unfair to the other spouse." Mazique, 742 S.W.2d at 808; Carnes, 533 S.W.2d at 370. "Where the managing spouse has received community funds and the time has come to account for such funds, the managing spouse has the burden of accounting for their proper use." Mazique, 742 S.W.2d at 808; Maxwell's Unknown Heirs v. Bolding, 36 S.W.2d 267, 268 (Tex. Civ. App–Waco 1931, no writ).

3. Fiduciary Duty is Owed by Managing Spouse. Many cases have found a fiduciary or trust relationship to exist between spouses when the managing spouse has gifted or squandered the community assets. Reaney v. Reaney, 505 S.W.2d 338 (Tex.Civ.App.-Dallas 1974, no writ) (wife given money judgment against husband for "abuse of his managerial powers," which resulted in dissipation of community assets squandered in gambling and gifts); Pride v. Pride, 318 S.W.2d 715, 718 (Tex.Civ.App.-Dallas 1958, no writ) (money judgment for her cash concealed in hole in floor and not accounted for); Givens v. Girard Life Ins. Co. of Am., 480 S.W.2d 421 425 (Tex.Civ.App. - Dallas 1972, writ ref'd n.r.e.) (wife had no burden to establish fraudulent intent to protect her interest in the community from "abuse of husband's managerial powers.").

Once the trust relationship is established, the managing spouse has the burden to produce records and to show fairness in dealing with the interests of the other spouse. Morrison v. Morrison, 713 S.W.2d 377, 380 (Tex. App.-Dallas 1986, writ dism'd) (burden on husband manager of community assets to produce records to justify expenditures on other women); Spruill v. Spruill, 624 S.W.2d 694, 697 (Tex.App.-El Paso 1981, writ dism'd) (trust relationship exists between husband and wife as to that community property controlled by each spouse; burden of proof upon disposing spouse to show fairness).

If the managing spouse is handling both community property and the other spouse's separate property, then the managing spouse has the burden of producing records and tracing the community portion. If he fails to meet his burden, then under the trust principles announced in Farrow, and Sibley, the interests of the managing spouse in the community are lost and the mixture becomes the other spouse's separate property.

4. Background In Trust Accounting Rules. Farrow, was the first of the modern tracing cases to apply the trust doctrine to the tracing or

commingling of community and separate funds in a marriage. The Farrow Court stated:

> 1. If a man mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own;
> 2. An owner who wrongfully permits the property of another to become so intermingled and confused with his own property as to render impossible the identification of either is under the burden of disclosing such facts as will insure a fair division, and if he fails or refuses to do so, the combined property or its value will be awarded to the injured party;
> 3. But there must be a willful or wrongful invasion of rights in order to induce the merited consequences of forfeiture; and
> 4. If the goods are of the same nature and value and the portion of each owner is known or if a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine or other article of the same kind and quality, then each owner may claim his proportionate part.

Farrow, 238 S.W.2d 255. Under Sibley, the application of the trust doctrine in a divorce case meant that "the trustee (husband) is presumed to have removed his money first." Sibley, 286 S.W.2d 658.

From these general trust principles, a number of separate accounting rules permitting tracing have developed, some of which have a life independent of their source in trust law. The primary concern in tracing cases applying the trust doctrine is to see that a wrongdoer does not prosper by his actions. Most of the cases address situations where a person mixes trust funds with his or her property.

The “community out first” rule of tracing is now firmly established in our Texas jurisprudence. In other words, this rule has taken on a “life of its own” and no longer relies on trust law. Welder v. Welder, 794 S.W.2d 420; DePuy, 483 S.W.2d 883; Horlock, 533 S.W.2d 52; Harris v. Ventura, 582 S.W.2d 853; Snider, 613 S.W.2d 8; Gibson, 614 S.W.2d 487; Kuehn, 594 S.W.2d 158. (However, see discussion below on the "separate out first" presumption.)

The court of appeals in Farrow cited 9 *Tex. Jur. Confusion of Goods,* Sec. 2 for the principle that, "[A]n owner who wrongfully permits the property of another to become so intermingled and confused with his own property as to render impossible the identification of either is under the burden of disclosing such facts as will insure a fair division, and if he fails or refuses to do so, the combined property or its value will be awarded to the injured party." Farrow, 238 S.W.2d at 257.

I. "Separate Out First" Presumption. The above discussion is important when reviewing the case of Smith v. Smith, 22 S.W.3d 140 (Tex. App. - Houston [14th Dist.], no writ).

Again, this case involved the characterization and tracing of certain proceeds received by Mr. Smith as a result of a lawsuit filed by him in connection with the purchase of a townhouse before his marriage based upon misrepresentation made by the seller. Mr. Smith ultimately filed a lawsuit and recovered damages for the misrepresentations. Mr. Smith initiated the lawsuit prior to his marriage. However, the actual lawsuit and recovery of damages occurred during the marriage. During the divorce case, Mrs. Smith asserted that the entire damage award constituted community property on a number of grounds.

Mr. Smith recovered a gross amount of $256,248.91, and upon receipt of the damages, deposited the monies into one of the parties' bank accounts which also contained community property.

The court, as previously discussed, ruled that the damages recovered by Mr. Smith, with the exception of post-judgement interest, constituted Mr. Smith's separate property.

The next argument, however, involved Mr. Smith's attempt to trace the remaining portion of his damage award through an account which also contained community property. At the time of the divorce, the balance in the commingled account contained $100,000.00. Therefore, the question before the trial court was whether the funds spent from the account and the remaining funds on deposit were separate or community property.

The court, after discussing the basic principles regarding separate and community property and the requirements to trace property in a single bank account, stated as follows:

> The only requirement for tracing and the application of the community-out-first presumption is that the party attempting to overcome the community presumption produce clear evidence of the transactions affecting the commingled account." (*emphasis added*)

Welder v. Welder, 794 S.W.2d At 434.

> We assume, without deciding, that the community-out-first presumption is a rebuttal one. Mrs. Smith... cites no evidence to rebut the presumption. (*emphasis added*)
>
> The trial court was entitled to presume that the approximately $60,000.00 spent from the AFCU account came from community funds. After deducting $60,000.00 from the $51,581.49 community funds in the account, the community funds had been depleted.
>
> Mr. Smith discharged his burden at trial by tracing and clearly identifying the funds in the AFCU account he claimed to be his separate property. Once he did this the statutory presumption that the account was a community asset ceased to exist. Mrs. Smith, ... cites no evidence showing she rebutted the presumption that the $60,000.00 in expenditures were community expenditures. Under the evidence cited, the community's portion of the account was depleted and the trial court erred in awarding Mrs. Smith $50,000.00 from this account. (*emphasis added*)

The significance of this case is the fact that the court discusses the "separate out first presumption."

In addition to the application of the minimum sum balance methodology concerning the characterization of the remaining funds on deposit in the account, the court, in footnote 5 of its opinion, stated the following:

> We also note that a blind application of the community-out-first presumption does not uphold the policy reason for the presumption's original application. In Sibley v. Sibley, 286 S.W.2d 657, 659 (Tex. Civ. App. - Dallas 1955, writ dism'd. w.o.j.), the court said that the spouse expending funds was in relationship to the funds as a trustee in relationship to a trust. In Sibley, the question involved the husband's spending funds from an account in which community funds had been commingled with the wife's separate funds. The application of the community out first presumption thus preserved the wife's separate estate. **Here, however, mechanical application of the community out first presumption leads to the husband's preserving his separate estate at the expense of the community. Were we to view the husband as a trustee acting in the best interest of the beneficiary, we would apply not the community out first presumption, but a separate out first presumption**. We would presume that the husband spent his own funds before spending the community funds, thus leaving community funds in the account for possible disbursement to the beneficiary - the wife - upon dissolution of the marriage. The husband would have the burden of rebutting this separate out first presumption. We apply the community out first presumption because it seems to be established law. (*emphasis added*)

As can be seen from this opinion and the court's footnote, it would appear that if an argument had been made that the husband was in fact the trustee or manager acting on behalf of his wife with respect to this particular account, this appellate court would have applied the separate out first presumption; therefore, discarding the community out first presumption and finding that all of the expenditures from the account first came from the husband's separate estate rather than the community estate.

J. Credit Purchases.

1. In General. The character of property as separate or community is fixed at the time it is acquired, whether it is bought with cash or on credit. Smith v. Buss, 144 S.W.2d 529 (Tex. 1940); Hilley, 342 S.W.2d 565; Lindsay, 254 S.W.2d 777.

If the property is community at the time it is acquired, the later use of separate funds to pay the purchase debt will not give the property a separate character. Welder, 44 S.W.2d 281; Colden, 171 S.W.2d 328; Gleich, 99 S.W.2d 881; Contreras v. Contreras, 590 S.W.2d 218 (Tex. Civ. App. - Tyler 1979, no writ); Bradley, 540 S.W.2d 504; Carter, 736 S.W.2d 775.

When property is bought on credit during the marriage, the first step in the analysis is to apply the presumption of community. Money borrowed during marriage is presumed to be community. Cockerham, 527 S.W.2d 162; Uranga, 527 S.W.2d 761. The fact that the debt is secured by community property supports that presumption. Aronson v. Aronson, 590 S.W.2d 189 (Tex. Civ. App. - Dallas 1979, no writ).

If a spouse buys land for a total purchase price of $20,000, using his separate funds to make a down payment of $5,000 and executing vendor's lien note for the balance, in the absence of further evidence, the spouse owns an undivided 1/4 interest in the land as his separate property and the community will own an undivided 3/4 interest. If the balance of the purchase

price is later paid with separate funds, the ownership of the property is not affected, and the later discharge of the purchase money debt with separate funds entitles the spouse only to a claim of reimbursement of separate money from the community. Gleich, 99 S.W.2d 881.

2. Separate Credit. Debt incurred by either spouse during marriage is presumptively community. This presumption is rebuttable. Property acquired by a spouse during marriage upon the separate credit of the spouse is separate property.

a. Agreement Between Creditor and Spouse. It is well established that where it is shown the lender agrees to look solely to the separate estate of one spouse for satisfaction of the debt, such property is the separate property of the contracting spouse. Cockerham, 527 S.W.2d 162, Gleich, 99 S.W.2d 881. The agreement between the borrower and the creditor is one of the primary indicators of the character of the loan to be made. Wierzchula, 623 S.W.2d 730.

In Holloway, the Dallas Court of Appeals stated:

> Despite some judicial expression to the contrary, the law was settled in Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881, 886 (1937), that the intention of the spouses cannot control the separate or community character of property purchased on credit or of funds borrowed during the marriage and that 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 for satisfaction of the indebtedness.

Holloway, 671 S.W.2d 51 (*emphasis added*).

The foregoing language in Holloway has sometimes been cited for the proposition that an agreement between the lender and the borrower is the exclusive manner by which property can be acquired upon separate credit during the marriage. However, as discussed below, some disagreement exists on this point.

The Holloway court examined the evidence of the loan transaction as follows:

> Although there is no direct testimony of an express agreement, we conclude that there is evidence to support such a finding. Pat testified that he opened the "Pat S. Holloway, Separate Property" account with the proceeds of a loan of $10,000 from Republic National Bank. The loan papers were admitted in evidence. They included a promissory note and a security agreement from Pat to the bank, each dated May 10, 1979, and signed "Pat S. Holloway, Separate property." A statement of purpose for the loan on a bank form, also signed, "Pat S. Holloway, Separate property," recites the purpose of the loan to be "Equity in pipeline venture." This statement refers to the collateral specified in the security agreement and is certified by an officer of the bank on May 10, 1979. An affidavit by Pat Holloway, dated May 16, 1979, states that all the securities listed as collateral in the security agreement, valued at more than $40,000 are his separate property, having been acquired before his marriage to Robbie, and that the affidavit is made with knowledge that it will be relied on by the bank in making the loan for his separate account to be secured by the securities listed and in order to induce the bank to make a loan to him for which the community estate shall not be liable. Pat testified that he delivered these papers to the bank at the time of the loan transaction. There is also a deposit slip for $10,000 to the "Pat S. Holloway, Separate property" account, dated May 17, 1979, although no check in this account for the $3,000 paid for the Sterling Pipeline Stock was offered in evidence.

Id. at 57.

The court then held:

> This evidence, in our view, is sufficient for the jury to infer that by accepting these papers on the basis for a loan to "Pat S. Holloway, Separate property," the bank agreed to look solely to Pat's separate property for repayment of the loan and that Pat purchased the stock in Sterling Pipeline with the proceeds of this loan. Consequently, we hold that the evidence supports the finding that this stock is his separate property.

Id.

In Wierzchula, the husband entered into an earnest money contract to purchase a home before marriage. The husband alone made application for a loan and the loan commitment was made to the husband before marriage. The deed was made to husband after marriage (but recited "as a single man") and the husband alone signed the note to secure the vendor's lien and deed of trust. The note did not recite that the lender agreed to look only to the separate property of the husband. The court held the property to be the husband's separate property, first upon the application of the inception-of-title rule to the earnest money contract, and then further stated:

> A second presumption arises that the property was community property as a result of the note being signed after the marriage. A debt acquired by either spouse during marriage is presumptively a community debt. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 882 (1937). This presumption is also rebuttable. Proof that the lender agreed to look only to the separate property of one spouse for the security for the debt will rebut this presumption. The agreement between the borrower and the creditor is one of the primary indicators of the character of the loan to be made.
>
> In our case, prior to marriage, the appellee alone made application for a loan as a single man. The loan commitment was made by the Veteran's Administration to the appellee as a single man. The deed was made to the appellee as a single man and the appellee alone signed the note to secure the vendor's lien and deed of trust. The lender's intention appears to be clear that it was looking only to the appellee to meet the obligation contained in the note.

Wierzchula, 623 S.W.2d at 732.

In Mortenson, it was held that the bank "obviously intended" to seek satisfaction of the debt from the wife alone by requiring her separate property certificate of deposit as collateral for the loan to her. Mortenson, 604 S.W.2d 269.

b. Intention of the Spouses. Some Texas cases hold that the intention of the spouses is a primary consideration affecting the community or separate nature of property acquired with borrowed funds. Other cases, such as those cited above, appear to require an agreement on behalf of the lender to look only to separate property for repayment.

Early Texas Supreme Court cases addressing property acquired on credit spoke of the "intentions of the parties" as the controlling factor in determining whether such property was community or the separate property of one of the spouses. McClintic v. Midland Grocery & Dry Goods Co., 154 S.W. 1157 (Tex. 1913); Sparks v. Taylor, 90 S.W. 485 (Tex. 1906). In Armstrong v. Turbeville, 216 S.W. 1101, 1105 (Tex. Civ. App. - El Paso 1919, writ dism'd), the court relied upon McClintic and Soarks for the proposition that, "[if] the wife borrowed money for the benefit of her separate property, intending to repay it, out of her separate estate, and both she and her husband intended that the borrowed funds 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." Id.; *see also* Edsall, 240 S.W.2d 424.

In Foster v. Christensen, the court held:

> The land, of course, presumptively became the community property of Mr. and Mrs. Newgent when it was conveyed to them jointly with no recital of her separate ownership; but her ownership of the land as her separate property would have been established by proof of the allegations in the answer that the cash payment was made out of her separate funds and 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 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 246.

The mere fact that a debt is repaid with separate funds does not overcome the community presumption. In Broussard v. Tian, 295 S.W.2d 405 (Tex. 1956), the Supreme Court followed the Gleich rule in establishing that the mere fact separate funds are used to pay the purchase money debt will not suffice.

The opinion by the Corpus Christi court in Welder v. Welder, contains an extensive analysis of Texas cases on the status of property acquired on credit. *See* Welder v. Welder, 794 S.W.2d 420. In Welder, the husband acquired a ranch after marriage with two promissory notes, the assumption of debt already existing on the property, and paid cash for existing improvements on the land. The purchase

agreement, the deed and the notes themselves all named the husband as the grantee/debtor. The husband testified that the wife opposed the purchase of the ranch and never showed any interest in it, and that he intended to and did pay for the property out of his separate funds. The husband contended that his intentions to hold the ranch as separate property and pay for it out of his separate funds established the funds and the ranch as his separate property. The wife, however, claimed that the ranch was entirely community property because it was purchased with community debt. Id.

The husband testified concerning his conversations with the wife about acquiring the Welder-Dobie Ranch that the wife was specifically against it, but that, "I told her I was going to buy it, and I think that was essentially all that was ever said." Thereafter, husband alone negotiated the purchase of the ranch, taking the deed in his name and signing the notes in his name alone. The court held:

> [T]he intention of the spouses is the primary consideration affecting the community or separate nature of property acquired with borrowed funds ... These facts together with the ability of husband to pay for the ranch with his separate funds and his actions in the face of her objections to the purchase, his assertion that "I" not we, would purchase the ranch, together with the wife's apparent acquiescence to the assertion, are sufficient to justify the fact finder in determining that both spouses intended for [the ranch] to be held as the husband's separate property. *(emphasis added)*

Id.

However, the wife complained that the trial court erred in submitting an incorrect instruction regarding separate property credit. The charge instructed the jury that:

> Property acquired with separate property monies, property, or separate credit is separate property.
>
> 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.

Id.

The court discussed the case law concerning the unilateral intention of one spouse, as follows:

> Where all or part of the funds used in acquiring the property is borrowed, the lender's knowledge of the spouses' intentions is of significant importance. However, the intention of one spouse alone to repay a loan out of separate funds and hold the property purchased with the proceeds of that loan as separate property has never been controlling.
>
> 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.

Id.

The court held:

> The present jury instruction, suggesting that the unilateral intention of the husband was controlling in determining the separate nature of the funds borrowed, and of the ranch thereby acquired, was clearly a misstatement of the law.

Id.

On the other hand, the appellate court in Edsall suggested that the unilateral intention of one spouse, without an agreement with the lender, is sufficient to establish the character of borrowed funds. *See* Edsall, 240 S.W.2d 424. The Dallas Court of Appeals expressly declined to follow Edsall in Holloway, 671 S.W.2d 51.

Rath v. Rath, 218 S.W.2d 217 (Tex. Civ. App. - Galveston 1949, no writ), involved a similar situation. The husband secured the wife's consent to the use of community cash in the acquisition of a new tract of land for the husband's separate estate, it being agreed at the time of the purchase contract that other land belonging to the husband's separate estate would be sold and the proceeds used to pay the balance of the purchase price and to reimburse the community for community funds used in making the down payment. The court ruled that, under the circumstances, there was no impediment to effectuating the agreement of the spouses that the new acquisition should be the husband's separate property. Id.

See also the case of In Re Marriage of Tandy, 532 S.W.2d 714, 717 (Tex. Civ. App. - Amarillo 1976, no writ) where the appellate court effectively held that the husband's intention with respect to the payment of separate debt with separate funds taken from a commingled account controlled. In Tandy, the parties had a bank account which contained community property proceeds from the sale of grain and proceeds from the sale of separate property real estate owned by Mr. Tandy and his two sons. Mr. Tandy claimed on appeal that because the exact amount of money was known from the sale of real estate that was deposited into the community account and the exact amount of funds withdrawn from that account were also known, that he effectively traced his separate property real estate proceeds. The court held that since the exact amount of money that went into the account from the sale of the real property was known, and the exact amount of money that came of the account was also known, that Mr. Tandy had effectively traced his separate property. A close reading of the case indicates that the appellate court turned and ruled in favor of Mr. Tandy as a result of his intentions with respect to the use of the sale proceeds from his separate property realty.

3. Separate Debt. Logic would dictate that if the courts cannot dispose of a spouse's separate property at the time of divorce, the trial court could not order a spouse, as a part of the property division, to pay the separate debt of the other spouse. However, until recently, there has been no reported Texas case to specifically hold that such is the case. However, in the case of Love v. Love, No. 01-04-00564, 2006 Tex. App. Lexis 7489 (Texas August 24, 2006) the trial court in its division of property ordered the appellant to pay off a premarital student loan debt incurred by the appellee. The appellate court indicated that when the appellee received the student loan proceeds, those proceeds constituted the appellee's (Sophia's) separate property. Thus, there is no doubt the trial court would have erred had it awarded appellant (Albert) part of the student loan proceeds. "We see no reason for treating differently the accompanying obligations. The obligation to pay the loans arose before marriage and should be treated as Sophia's separate debt - separate debt that could not be assigned to the non-incurring spouse. Accordingly, we conclude the trial court erred in assigning Sophia's premarital student loan debt to Albert because that student loan debt constituted Sophia's separate debt."

K. Characterization and Inventories and Appraisements.

It has routinely been held that a party cannot rely on the classification of property as separate property in meeting the clear and convincing evidentiary standard set forth in an Inventory and Appraisement, unless it has been admitted into evidence. Bernard v. Bernard, 133 S.W.3d 782, 789 (Tex. App. - Fort Worth 2004, pet. den'd.); Poulter v. Poulter, 565 S.W.2d 107, 110-111 (Tex. Civ. App. - Tyler 1978, no writ). However, in the case of Russell v. Russell, No. 01-04-00984-CV, 2006 Tex. App. Lexis 869 (February 2, 2006) the Houston court of appeals, in a memorandum opinion, held that even though the Inventory and Appraisement was not admitted into evidence, but was referred to during the trial proceedings, that the appellee was estopped from challenging her characterization of certain property as the appellate's separate property because her Inventory satisfied the requirements for a judicial admission.

VII. DISPROPORTIONATE DIVISION OF COMMUNITY PROPERTY

A. Statutory Law

The statutory authority for a disproportionate division of community property is TFC § 7.001. This brief but important section of the Code provides, in its entirety as follows:

> "7.001 General Rule of Property Division.
>
> In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems *just and right*, having due regard for the rights of each party and any children of the marriage." [emphasis added]

B. Case Law

There is an abundance of case law upholding and supporting disproportionate divisions of community property for a variety of reasons. Following is a list of factors trial courts have used to award a disproportionate division of community property and case law to support these factors.

1. The Landmark Case: Murff v. Murff

In the legendary case of Murff v. Murff, 615 S.W.2d. 696 (Tex. 1981), the Texas Supreme Court

set out the most important factors for a court to consider in making a 'just and right" division of the community property. These 11 factors are as follows:

1. The disparity of incomes or earning capacities of the spouses
2. The spouses' capacities and abilities
3. Benefits which the party not at fault would have derived from a continuation of the marriage
4. Business opportunities of the spouses
5. Education of the spouses
6. Relative physical conditions of the spouses
7. Relative financial conditions of the spouses
8. Differences in the size of each spouse's separate estate
9. The nature of the property to be divided
10. Fault in the break up of the marriage
11. Attorneys fees of the parties

In *Murff*, the Texas Supreme Court explained: "The trial court in a divorce case has the opportunity to observe the parties on the witness stand, determine their credibility, evaluate their needs and potentials, both social and economic. As the trier of fact, the court is empowered to use its legal knowledge and its human understanding and experience. Although many divorce cases have similarities, no two of them are exactly alike. Mathematical precision in dividing property in a divorce is usually not possible. Wide latitude and discretion rests in these trial courts and that discretion should only be disturbed in the case of clear abuse." *Murff*, at 700.

2. Significant Decisions Concerning Disproportionate Division of the Community Estate

In the Interest of K.N.C, 276 S.W.3d 624 (Tex. App.–Dallas 2008, pet. denied)

Husband appealed trial court's decision awarding one hundred percent of community estate to wife. The Dallas Court of Appeals held that the trial court did not abuse its discretion in awarding wife a vehicle acquired during marriage as well as approximately $86,000 from her 401k earnings. The trial court found that during the marriage husband wasted community assets while also benefitting from wife's contribution to mortgage payments on his separate property house. The trial court also determined that husband disposed of two vehicles during the pendency of the divorce that were community property with no benefit received by wife. Finally, the trial court gave proper weight to wife's testimony that husband frequently pawned community property items like televisions, DVD players, lawnmowers, video game consoles, and bicycles.

Wells v. Wells, 251 S.W.3d 834 (Tex. App.–Eastland 2008, no pet.)

Husband appealed trial court's division of community property. The Eastland Court of Appeals held that there was sufficient evidence from which a trial court could conclude that a disproportionate division of the marital estate in favor of wife was just and right. The final decree of divorce contained a recitation that husband threatened to kill wife, that she was the innocent spouse, and that his conduct forced her to leave the family home and land. On appeal, husband argued that the recitation was not supported by the evidence, but husband had, in fact, admitted that he threatened wife, that he had done so intentionally, and that he had done so on multiple occasions. Husband also admitted that on the day the parties separated, he told wife that if she did not get out of the house and off his land, he would kill her. Husband argued that there was no evidence that his threat to kill wife was more than an idle threat. The appellate court declined to address whether or not husband made the threat with the present intention of performing, deferring to the trial court's position to best assess his credibility. In addition to the violent acts committed by husband against wife, the court of appeals held that there was sufficient evidence of fraud on the community to uphold the disproportionate division of the marital estate where the record showed that husband had paid his father and mother over $7,000 in wages for work on the farm, even though both were over 75 years old and at the rate of $7.00 per hour, such payment would have required them to work over 1000 hours over the course of a few months.

Von Hohn v. Von Hohn, 260 S.W. 3d 631 (Tex. App.–Tyler 2008, no pet.)

Husband appealed trial court's decision dividing the marital estate. The Tyler Court of Appeals held that the formula in the partnership agreement was not determinative of the value of the husband's interest in the partnership since divorce was not a "triggering event" specified in the partnership agreement.. Therefore, the trial court did not err when it determined that the proper measure of the value of Husband's community interest in the firm could

include other methods than those set forth in the partnership agreement.

The Court of Appeals further held that because no money had been received by husband's law firm from pending but unsettled cases, revenue from those cases was no more than an expectancy interest, and any money to be received constituted future earnings to which wife was not entitled.

Chafino v. Chafino, 228 S.W.3d 467 (Tex. App.–El Paso 2007, no pet.)

Wife appealed the trial court's division of the marital estate claiming the trial court abused its discretion by failing to award her a greater portion of the community estate. The El Paso Court of Appeals held that wife was not entitled to more than 70% of the community estate. At trial, wife presented evidence of husband's extramarital affairs and his consistent denials thereof. The appellate court held that while husband's conduct both in and out of the courtroom provided the trial court with a reasonable basis for a disproportionate division of the marital estate, wife was not entitled to additional assets to punish her husband for his adultery.

3. Factors to Consider

1. Fraud

In Sprick v. Sprick, 25 S.W.3d 7 (Tex.App.—El Paso 1999, vet. denied), the court held that: (1) there was sufficient evidence that an 81-year-old friend of husband's family, over whose finances husband had power of attorney, made a $118,900 unsecured loan to the community, to support an implied finding that the indebtedness did not constitute a fraud on the community; (2) wife could not overcome the presumption that the loan was on the credit of community; but (3) an award of 76.6% of the net assets of the community property estate to wife was equitable at divorce.

Justice Ann McClure's concurrence in the Sprick case is an excellent explanation on the concept of fraud and is quoted as follows:

> "Creative and inventive theories of recovery abound for economic torts committed against the community estate. These range from waste, depletion of assets, the community opportunity doctrine and its inverse partner, the community jeopardy doctrine [FN3] to the generic tort of fraud, which encompasses a number of varieties such as breach of fiduciary duty, fraudulent conveyance, excessive gifts to children, and community funds expended on paramours, just to name a few. The intermediate courts have not been consistent in their determination of whether an independent economic tort is actionable between spouses for damages to the community estate. It now appears that the Supreme Court has not been entirely consistent either."
>
> "[FN3] The community opportunity doctrine derives from the corporate opportunity doctrine and stands for the proposition that a spouse has an obligation to maximize the community estate by taking advantage of an opportunity to invest in a lucrative venture using community, rather than separate, funds. The community jeopardy doctrine operates in the reverse and suggests that a spouse also has an obligation to protect the community estate from risky pursuits by investing separate, rather than community, funds. As might be expected, whether an investment is potentially lucrative or risky is easier to discern in hindsight and is ordinarily fact specific."

"Fraud as an Economic Tort"

"Fraud in the divorce context, as in other civil litigation, may be actual or constructive. Actual fraud is predicated upon the intent to deceive. The elements are: (1) that a material representation was made; (2) that it was false; (3) that when the speaker made it, he knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the party; *(5)* that the party acted in reliance upon it; and (6) that he suffered thereby. Stone v. Lawyers Title Insurance Corp., 554 S.W.2d 183. 185 (Tex.1977). " Constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964). In other words, intent is irrelevant."

"Because of the confidential relationship between a husband and wife, the marital partnership is fiduciary in nature. Matthews v. Matthews, 725 S.W.2d 275, 279 (Tex.App.--Houston [1st Dist.] 1986. writ ref'd n.r.e.). A breach of this fiduciary duty is frequently termed a "fraud on the community." In re Marriage of Moore, 890 S.W.2d 821, 827 (Tex.App.-- Amarillo 1994. no writ). Generally speaking, the allegation is one of constructive rather than actual fraud:

"Any such conduct in the marital relationship is termed fraud on the community because, although not actually fraudulent, it has all the consequences and legal effects of actual fraud in that such conduct tends to deceive the other spouse or violate confidences that exist as a result of the marriage." Id. at 827.

"Constructive fraud includes actions of one spouse in unfairly disposing of or encumbering the other spouse's interest in community property or unfairly incurring community indebtedness without the other spouse's knowledge or consent. Massey v. Massey, 807 S.W.2d 391, 402 (Tex.App.--Houston [1st Dist.] 1991), *writ denied,* 867 S.W.2d 766 (Tex.l993). In the absence of fraud, a spouse has the right to control and dispose of community property subject to his sole management. [FN4], Id. at 401 citing Mazigue v. Mazigue, 742 S.W.2d 805, 807 (Tex.App.--Houston [1st Dist.] 1987, no writ). Although the managing spouse need not obtain approval or consent for dispositions made of special community property, the fiduciary relationship between husband and wife requires that a spouse's disposition of special community property be "fair" to the other spouse. Massey. 807 S.W.2d at 402. *citing* Horlock v. Horlock, 533 S.W.2d 52. 55 (Tex.Civ.App.--Houston [14th Dist] 1975. writ dism'd). The managing spouse carries the burden of establishing that the disposition of property was fair." Id.

"FN4. During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including personal earnings, revenue from separate property, recoveries for personal injury, and the increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control, and disposition. Tex. Fam. Code Ann. § 3.102(a). Community property subject to a spouse's sole management and control is sometimes referred to as "special community property," particularly in older case law. All other community property is subject to the joint management, control and disposition of the spouses unless the spouses provide otherwise by power of attorney in writing or other agreement. Tex. Fam. Code Ann. § 3.102(c)."

"The Supreme Court has recently reiterated that Texas recognizes the concept of fraud on the community, which it has defined as a wrong committed by one spouse which may be considered by the trial court in its division of the community estate and which may justify a disproportionate division. Schlueter v. Schlueter, 975 S.W.2d 584. 588 (Tex. 1998). It is not, however, an independent tort giving rise to a cause of action between spouses. Id. at 586. Nor may it give rise to a recovery for punitive damages, inasmuch as "recovery of punitive damages requires a finding of an independent tort with accompanying actual damages." Schlueter, 975 S.W.2d at 589. *quoting* Twin City Fire Ins. Co. v. Davis, 904 S.W.2d 663. *665* (Tex. *1995).* Instead, the claim of fraud on the community is a means to an end, seeking either to recover specific assets wrongfully conveyed or to obtain a greater share of the community estate upon divorce as compensation for the loss of community property. Schlueter, 975 S.W.2d at 588. *quoting* Belz v. Belz, 667 S.W.2d 240 247 (Tex.App.--Dallas 1984. writ ref'd n.r.e.). Where the economic tort depletes the community estate so as to leave insufficient property available to the wronged spouse, the courts may impose a money judgment in order to achieve an equitable division. Schlueter, 975 S.W.2d at 588. citing Murff v. Murff, 615 S.W.2d 696, 699 (Tex.l98l). The money judgment serves to recoup the value of the wronged spouse's share of the estate which has been lost through the fraud. Schlueter, 975 S.W.2d at

588, *citing* Mazique v. Mazique, 742 S.W.2d 805, 808 (Tex.App.--Houston [1st Dist.] 1987,. no writ). "Because the amount of the judgment is directly referable to a specific value of lost community property, it will never exceed the total value of the community estate." Schlueter, 975 S.W.2d at 588.

"On the heels of Schlueter the Court was presented with some rather egregious facts in Vickery v. Vickery, 999 S.W.2d 342 1999 Tex. Lexis 52 (Tex.l999)(J. Hecht, dissenting). The underlying court of appeals' opinion was unpublished. The Supreme Court denied the petition for review, with Justice Hecht dissenting from the denial in a published opinion which incorporates as an appendix both the intermediate court's opinion on the merits and Justice Andell's dissent from that court's denial of rehearing en banc. At issue was Mrs. Vickery's recovery in a bill of review proceeding. The jury found Mr. Vickery, himself an attorney, liable for fraud and breach of fiduciary duty and assessed Mrs. Vickery's damages at $6.7 million for loss of marital property and $1.3 million for mental anguish, together with $1 million in punitive damages. The jury also found that Mrs. Vickery's attorney breached her fiduciary duty, resulting in damages of $100,000 in lost marital property and $350,000 in mental anguish damages."

"As Justice Hecht notes in his dissent, "[a]pplying Schlueter would require that the actual and punitive damages awarded Mrs. Vickery against her former husband be reversed and the case remanded to the district court to reconsider what division of the community is just and right. The district court may consider Mr. Vickery's 'dishonesty of purpose or intent to deceive' and 'the heightened culpability of actual fraud' as found by the jury." The fact that the Supreme Court, by denying review, allowed the actual and punitive damages to stand gives me some concern as to what the current state of the law is for economic torts committed against the community estate." Id. At 14.

In determining the division of community property, the court may consider proof of one spouse's dishonesty or intent to deceive, constituting actual fraud, regarding the community assets, Schleuter v. Schleuter. 975 S.W.2d 584 (Tex. 1998), and may also consider evidence of one spouse's constructive fraud in transactions involving community property, taking into account Massey v. Massey. 807 S.W.2d 391 (Tex. App.—Houston [1st Dist.] 1991, writ denied):

i. the size of the property disposed of in relation to the total size of the community property
ii. the adequacy of the remaining estate to support the other spouse
iii. the relationship of the parties involved in the transaction

Unfairly disposing of the other spouse's community property results in a presumption of constructive fraud. Connell v. Connell, 889 S.W.2d 534 (Tex. App. — San Antonio 1994, writ denied). However, the mere fact that a community property business venture lost money because of the acts of one spouse, even if it ended in bankruptcy, does not constitute fraud. Connell v. Connell, 889 S.W.2d 534 (Tex. App. — San Antonio 1994, writ denied); see also Andrews v. Andrews, 677 S.W.2d 171 (Tex. App. — Austin 1984, no writ) (a spouse's good faith, but unwise, investment of community funds resulting in losses to the community estate does not justify an unequal distribution of the remaining community property upon divorce).

A spouse who gives away community property to friends or relatives when divorce is imminent has defrauded the community estate. *Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008). In such cases, a trial court can order the spouse to return the property or take the fraud into account in making a just-and-right division.

In Hong, the trial court did neither. After finding a husband sold community property to third parties without his wife's consent, the trial court ordered the buyers to return the property to the wife but allowed the husband to keep the money they paid for it, and added a judgment against the buyers and their lawyer for more than $1.75 million. Thus, because one spouse defrauded the other, both are better off and the community estate vastly increased. The Court held the courts below erred in allowing one spouse to recover damages without first recovering the community property from the spouse who took it.

a. Basic Facts

The wife Hong met the husband Gyu and they married. Then, it got really interesting. They bought a donut shop in Texas. The wife pressed assault charges that ultimately led to the husband's deportation. In the meantime, the husband sold the donut shop to another couple, who were represented by a lawyer Chu. The husband took the money and paid it to his relatives in Korea.

The wife sued Chu among others for all sorts of torts. The trial court granted a judgment that the donut shop be returned to Hong

b. Analysis

The only direct liability finding against Chu was that he converted Hong's property. Because Chu received nothing but a legal fee that was paid by his own clients, there is no evidence to support this finding.

c. Conversion

Hong conceded Chu got nothing but a legal fee, and did not dispute it was paid by his clients the Kims, which of course is precisely what one would expect.

As Hong parted with no cash in any transaction here, there was simply no evidence that Chu converted anything that belonged to her. Thus, the conversion finding could not support the judgment against Chu.

d. Conspiracy

Jurors found Chu and the other defendants were part of a conspiracy. Conspiracy is a derivative tort requiring an unlawful means or purpose, which may include an underlying tort. Chu did not object when the conspiracy question was submitted without conditioning it on any other tort finding. Thus, it can support the judgment if there was some evidence of a conspiracy to commit any of the three other torts in the charge: fraudulent transfer, conversion, or breach of fiduciary duty.

While the jury found Hong's husband Gyu committed each of these torts, no judgment was entered against him on that basis for a very straightforward reason: such torts do not exist. Ten years ago in Schlueter v. Schlueter, the Texas Supreme Court reaffirmed that under the community-property law of Texas, "there is no independent tort cause of action for wrongful disposition by a spouse of community assets." That is due to "the essential character of the wrong: a deprivation of community assets as opposed to a tort committed against a person or his or her separate property."

As noted in Schlueter, personal injury claims are the separate property of each spouse, and thus can be asserted between spouses as independent torts. But waste, fraudulent transfer, or other damage to community property are claims belonging to the community itself, so they must be included in the trial court's just-and-right division of community property upon divorce. Allowing independent torts between spouses for community damage would thus require fault to be determined twice-once in the tort action, and again in the property division. To avoid that, the just-and-right division is the "sole method" for adjudicating such claims, and "no independent cause of action exists in Texas ... when the wrongful act defrauded the community estate."

In this case, Hong proved her former husband sent the proceeds of community property to his parents. While the trial court could take this into account in making a just-and-right division, Schlueter makes quite clear it could not be pleaded as an independent cause of action, at least against Gyu.

Hong noted correctly that in Schlueter the Court did not decide whether torts against the community estate could be alleged against a third-party. As a general matter, they clearly can; if a third party steals community property, surely either spouse or both can seek recovery in tort for it.

But the question presented here was a narrower one: whether a third party can be held liable in tort when community property is taken by one of the spouses. The Court answered that question in the negative in Cohrs v. Scott. There, a divorcing wife settled all her property claims against her husband, and then sought damages against a third party for helping her husband transfer two cars to a mistress. The Court held that "the fraud having been initiated and carried out mainly by the husband, [the wife] must look primarily to him and his property to right the wrong."

For several reasons, the Court held that remains the proper rule. If one spouse retains the fruits from defrauding the community estate, it is hard to see how the estate as a whole has been damaged, not to mention why someone else should pay for it. While Gyu and the funds were in Korea, there was no evidence Hong could not recover them from him there; indeed, there was no evidence she even tried. The judgment here did not order Gyu to return those funds; instead, Hong ended up with the shop and Gyu ended up with the funds the Kims paid for it. The

Court did not think one spouse should be able to double the community estate by defrauding the other.

Further, if a spouse cannot be liable for tort and punitive damages in a case like this, it is unclear under what theory co-conspirators can. Hong argued that Gyu's fraud against the community estate was still an unlawful act, even though it could only be addressed in the just-and-right property division. But co-conspirators are each responsible for the damage the conspiracy caused; if Gyu's liability is limited to returning the property or adjusting the community division, the liability of co-conspirators should be as well. Moreover, if one spouse can enlarge the community estate by suing the other's relatives, many acrimonious divorce cases will undoubtedly become more so. That may be necessary when relatives have community property in their hands; but when they do not, little is gained by adding third parties if the property can be restored through orders between the former spouses.

The Court was especially reticent to open the door to such claims against an opposing party's attorney. As an attorney, Chu had a fiduciary duty to further the best interests of his clients, the buyers; imposing a second duty to the sellers would inevitably conflict with the first.

Finally, even if a conspiracy action existed despite Schlueter, the evidence in this case would not support it. Chu could only be liable for conspiracy if he agreed to the injury to be accomplished; agreeing to the conduct ultimately resulting in injury is not enough. As there was no evidence Chu's fee depended on keeping the proceeds from Hong, there was no basis for inferring he intended for her to be cheated.

Because Hong had no tort claim against her former husband under Texas community-property law, she had no conspiracy claim against Chu for conspiring in such a tort.

The Court also rejected Hong's "aiding a fiduciary breach" claim and ultimately reversed the judgment

Additionally, the trial court may take into account a spouse's dissipation of the estate. *See* Massey v. Massey, 807 S.W.2d 391 (Tex. App.—Houston [lst Dist.] 1991, writ denied) (based on jury verdict that husband committed constructive fraud, trial court was entitled to award wife equalization for property depleted unfairly from community estate); Reaney v. Reaney, 505 S.W.2d 338, 340 (Tex.Civ.App.—Dallas 1974, no writ) (court took into account the husband's dissipation of approximately $53,000 of community assets when dividing the estate); Pride v. Pride. 318 S.W.2d 715, 718 (Tex.Civ.App.—Dallas 1958, no writ) (trial court rendered a money judgment against the husband for the wife's share of $3,000 he concealed).

In *Hagen v. Hagen*, 282 S.W.3d 899 (Tex. 2009) husband filed a petition for review with the Texas Supreme Court after the San Antonio Court of Appeals reversed the trial court's ruling that the divorce decree did not divided Veterans' Administration (VA) disability benefits. The Texas Supreme Court reversed the judgment of the San Antonio Supreme Court, and affirmed the trial court's decision.

The Texas Supreme Court relied upon the specific language of the divorce decree which provided wife with a percentage of the Army Retirement Pay or Military Retirement pay husband was to receive. The decree did not provide that she receive payments calculated on any other basis, including any part of husband's VA compensation.

In *Mansell v. Mansell*, 490 U.S. 581 (1989), the United States Supreme Court held that under the USFSPA, state courts could treat "disposable retired pay" as community property. However, state courts are barred from treating military retirement pay that has been waived to receive VA disability benefits as property divisible upon divorce.

In his dissent, Justice Brister cited the 1990 opinion in *Berry v. Berry* in which the Texas Supreme Court held that a decree dividing military retirement did, in fact, divide VA disability pay that arose later after the benefits were converted to VA disability pay. Justice Brister referred to the 1982 statute deducting VA disability pay from gross retirement pay, calling the majority's distinction between "gross pay" in *Berry* and "all pay" in the instant case an "anachronism."

Although the trial court could not divide the VA disability pay since it was not "assignable property" and such a division would be barred by*Mansell*, the fact that husband was appointed trustee of the funds for wife's benefit was significant. Justice Brister considered, husband's choice to convert his retirement to VA disability after the divorce a "breach of fiduciary duty as [wife's] trustee." Furthermore, he pointed out that since the disability occurred after the divorce, it rendered the original division neither just nor right "by allowing one party to cut off the other's share of those benefits."

b. Fault/NoFault

1. Generally

Most decisions provide that the court may consider evidence of one spouse's fault contributing to the breakup of the marriage, even in an action in which insupportability is the only ground for divorce pled. The following cases permit fault consideration under such facts. Velasco v. Haberman. 700 S.W.2d 729 (Tex. App. — San Antonio 1985, orig. proceeding); In Re Marriage of Jackson 506 S.W.2d 261 (Tex. Civ. App. — Amarillo 1974, writ dism'd); *See also* Vandiver v. Vandiver. 4 S.W.3d 300 (Tex.App.— Corpus Christi 1999, no pet. h.). The courts however may also decline to consider such evidence. Guttierez, 791 S.W.2d *659* (Tex. App. — San Antonio 1990, no writ); Massey v. Massey. 807 S.W.2d 391 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (court may consider fault, but is not obligated to do so).

When a divorce is granted on the basis of fault, the trial court may, though it need not, consider the fault in breaking up the marriage as a factor in making a property division which favors one spouse. Young v. Young. 609 S.W.2d 758 760-62 (Tex. 1980); Murff v. Muff, 615 S.W.2d 696, 698 (Tex. 1981); Hourigan v. Hourigan 635 S.W.2d 556, 556-57 (Tex. App.—El Paso 1981, no writ).

Provisions of the Texas Family Code allowing evidence of fault do not apply when spouses have a valid prenuptial agreement dictating the terms of the property division. Bufkin v. Bufkin, 259 S.W.3d 343, 353 (Tex. App.–Dallas 2008, pet. denied).

2. Cruel Treatment

The court may also consider a spouse's cruel treatment of the other spouse in dividing the property, even though the court grants the divorce on the no-fault ground of insupportability. Barnard v. Barnard, 133 S.W.3d 782 (Tex.App.—Fort Worth 2004, pet. denied).

In In re Marriage of Rice, 96 S.W.3d 642 (Tex.App.—Texarkana 2003), the court gave an excellent explanation of the present state of the law on cruel treatment and stated the following:

> "Although infrequently used since the introduction of no-fault divorce, a Texas court may still grant a divorce on the ground of cruel treatment. Henry v. Henry, 48 S.W.3d 468. 473 (Tex.App.-Houston [14th Dist.] 2001, no pet.). A spouse's conduct rises to the level of cruel treatment when his or her conduct renders the couple's living together insupportable. Id. (citing Tex.Fam.Code Ann. § 6.002 (Vernon 1998); Finn v. Finn, 185 S.W.2d 579. 582 (Tex.Civ.App.-Dallas 1945. no writ)). "Insupportable" means "incapable of being borne, unendurable, insufferable, intolerable." Id. (citing Cantwell v. Cantwell, 217 S.W.2d 450. 453 (Tex.Civ.App.-E1 Paso 1948. writ dism'd)). Mere disagreements or trifling matters will not justify granting a divorce for cruelty. Shankles v. Shankles, 445 S.W.2d 803. 807 (Tex.Civ.App.-Waco 1969. no writ). If, for instance, the complaining spouse suffers only nervousness or embarrassment, a trial court may not grant the divorce on the ground of cruelty. Golden v. Golden, 238 S.W.2d 619. 621 (Tex.Civ.App.-Waco 1951. no writ). Abuse need not be limited to bodily injury; nonetheless, physical abuse will support granting a divorce on cruelty grounds. Waheed v. Waheed, 423 S.W.2d 159. 160 (Tex.App.-Eastland 1967. no writ); Cote v. Cote, 404 S.W.2d 139. 140 (Tex.App.-San Antonio 1966. writ dism'd); Blackburn v. Blackburn, 163 S.W.2d 251. 255 (Tex.App.Amarillo 1942. no writ). Acts occurring after separation may be used to support a finding of cruelty. Redwine v. Redwine, 198 S.W.2d 472. 473 (Tex.Civ.App.-Amarillo 1946. no writ)." Id. At 648.

3. Physical Abuse

Courts seem especially willing to divide the property unequally when one spouse has physically abused the other. See, for instance, Faram v. Gervitz--Faram, 895 S.W.2d 839 (Tex. App. — Fort Worth 1995, no writ) (72.9% of the community property was awarded to wife, based in part on husband's violent and abusive nature which contributed to the divorce); Finch v. Finch, 825 S.W.2d 218 (Tex. App. — Houston [1st Dist.] 1992, no writ) *(65%* of community assets awarded to wife who testified that her husband had abused her and her daughter).

4. Adultery

In Abernathy v. Fehlis, 911 S.W.2d 845 (Tex.App.—Austin 1995, no writ), the trial court declared in its decree that Daniel's adultery caused the

"breakup" of the marriage and justified a disproportionate division of the parties' community property. Further, in Bell v. Bell, 540 S.W.2d 432 (Tex.Civ.App.—Houston [lst Dist] 1976, no writ), the court found the acts of adultery are not limited to adultery committed before separation.

In Morrison v. Morrison, 713 S.W.2d 377 (Tex. App.— Dallas 1986, dism'd), the court stated that:

> 'Furthermore, the trial court found David at fault in the breakup of the marriage because of his adultery. We presume that the trial court also considered this factor when it divided the community. Gutierrez, 643 S.W.2d at 787. Based on the evidence of Carolyn's right to reimbursement and David's adultery, we hold that the trial court did not abuse its discretion in awarding a disproportionate amount to Carolyn. *See* Murff, 615 S.W.2d at 698." Id. at 379.

c. Length of Marriage

Courts consider the length of the marriage in deciding whether to award a disproportionate division of community property. In the following cases, the courts listed the length of the marriage as one of the factors to be considered: Cappellen v. Cappellen, 888 S.W.2d 539 (Tex.App.—El Paso 1994, writ denied); Vannerson v. Vannerson, (Tex.App.— Houston [1st Dist.] 1993, writ denied); Massey v. Massey, 807 S.W.2d 391 (Tex.App.—Houston [1st Dist.] 1991, writ denied); Cluck v. Cluck, 647 S.W.2d 338 (Tex.App.—San Antonio 1982, writ dism'd); Trevino v. Trevino, *555* S.W.2d 792 (Tex.Civ.App.— Corpus Christi 1977, no writ) (court divided estate equally after three year marriage); Patt v. Patt, 689 S.W.2d 505 (Tex. App. — Houston [1st Dist.] 1985, no writ) (wife who had never worked outside home and possessed no marketable skills awarded family home after long marriage).

d. Disparity of Earning Power The court may consider the disparity of earning power between the spouses, as well as their respective business opportunities, capacities and abilities.

In Rafidi v. Rafidi, 718 S.W.2d 43 (Tex.App.— Dallas 1986, no writ), the evidence showed that Husband was a petroleum engineer with three college degrees. At the time of trial he was fifty-seven years old. There was no evidence of health problems. Wife, on the other hand, had only a high school education. She had difficulty obtaining employment and was handicapped by a finger injury. The Rafidis' teen-aged daughter lived with the Wife along with three adult children. The evidence permits the inference that the husband's earning capability exceeds wife's. An unequal division of the community estate was justified.

In Robbins v. Robbins, 601- S.W.2d 90 (Tex.Civ.App. Houston [lst Dist.] 1980), the court held that it was not an abuse of discretion to award the wife, who had been out of the business world for a substantial period of time, 58% of community property, and to award husband, who had much greater earning capacity than wife, 42% of the community estate. *See also* Vandiver v. Vandiver, 4 S.W.3d 300 (Tex.App.— Corpus Christi 1999, no pet. h.).

In Bokhoven v. Bokhoven, 559 S.W.2d 142 (Tex. Civ. App. - Tyler 1977, no writ), the appellate court, after reviewing the entire record of the trial proceeding, upheld a disproportionate property division stating: "in this particular instance, the trial court's division of community property could be based solely upon the difference in earning capacities of the parties as set out in the findings of fact." Id. at 144.

Although the court may award a larger portion of the community estate to the spouse with less education and employment experience, it need not do so, and may be less likely to do so if the community estate is very large and an equal division would satisfy the less employable spouse's financial needs. Hanson v. Hanson, 672 S.W.2d 274 (Tex.App.—Houston [l4th Dist.] 1984, writ dism'd w.o.j.).

Trial court did not abuse its discretion in awarding husband over 61% of community estate even though wife had not worked outside the home for 17 years and was still unemployed. "Because [husband] would have the sole responsibility for the children, and [wife] would not be required to provide child support or health insurance, we cannot say that the trial court abused its discretion by its division of the marital property." O'Connor v. O'Connor, 245 S.W.3d 511, 518 (Tex. App.–Houston [1 Dist.] 2007, no pet.).

e. Custody of Children

Section 7.001 of the TFC states that the court-ordered division of community property shall have due regard for *any* children of the marriage.

In Young v. Young, 609 S.W.2d 758 (Tex. 1980), the court was presented with the question of whether the reference to "any children" in Section 3.63 of the Code (now section 7.00 1 of the Code)

included adult children. At the time of divorce the Young's had a thirty-two year old adult son who contracted multiple sclerosis as an adult. Physically disabled, this son lived with Mrs. Young. Mr. Young contended that "any children" meant minor children. The Supreme Court construed the statute to include adult children: ". . . .the only word modifying children in section 3.63 is any." [emphasis added]. *See also* McKnight v. McKnight, 535 S.W.2d 658 (Tex. Civ. App.—El Paso) rev'd on other grounds, 543 S.W.2d 863 (Tex. 1976), where the Court held that it was an abuse of discretion to leave husband without sufficient liquid assets to take over the responsibilities assigned to him in fact and by divorce decree; namely the care of two adult children and custody of three minor children.

In Boriack v. Boriack, 541 S.W.2d 237 (Tex. Civ. App.—Corpus Christi 1976, writ dism'd), the husband was awarded custody of all three of the parties' children. Wife complained of an unequal division of property. The Court said the fact that Dr. Boriack was awarded custody in itself would justify an unequal division favoring him" [emphasis added].

In Liddell v. Liddell, 29 S.W.2d 868, 871 (Tex.Civ.App.—San Antonio 1930, no writ), the court of appeals held that one of several factors justifying an unequal division of the property was "the burden of the care and maintenance of the child." *See also* Vandiver v. Vandiver, 4 S.W.3d 300 (Tex.App.—Corpus Christi 1999, no pet. h.).

f. Tax Consequences and Liabilities

Chapter 7 of the TFC has been amended to add the following section:

> Sec. 7.008. CONSIDERATION OF TAXES.
>
> In ordering the division of the estate of the parties in a suit for dissolution of a marriage, the court ***may*** [emphasis added] consider:
>
> (1) whether a specific asset will be subject to taxation; and
> (2) if the asset will be subject to taxation, when the tax will be required to be paid.
>
> This section applies to a suit for dissolution of marriage pending before a trial court on or filed on or after the effective date of the Act, which is September 1, 2005.

This statute seems to codify and expand case law.

Courts have often considered tax consequences stemming from the division of community property. Grossnickle v. Grossnickle, 935 S.W.2d 830 (Tex. App.— Texarkana 1996, writ denied); Baccus v. Baccus, 808 S.W.2d 694 (Tex. App. — Beaumont 1991, no writ). Although the Grossnickle court stated that the trial court is not required to consider the tax ramifications in the division, another court has stated that it is reversible error for the court to refuse to do so, particularly when the tax liability is substantial and one of the parties is without means to pay it. Baccus v. Baccus, 808 S.W.2d 694 (Tex. App. — Beaumont 1991, no writ).

In Grossnickle, the court stated that in dividing community property, "the trial court can appropriately consider existing tax liability for the sale of capital assets that *has been realized* by parties at time of divorce, i.e. existing tax liabilities. Penick, 783 S.W.2d at 197; Robbins v. Robbins, 601 S.W.2d 90. 92 (Tex.Civ.App.—Houston [1st Dist.] 1980, no writ)." However, the court went on to state that "where the question of future taxation arises, a trial court errs in allowing a credit for a future tax figure that must be derived from speculation or surmise. Harris v. Holland, 867 S.W.2d 86, 88 (Tex.App.--Texarkana 1993, no writ)." The new statute appears to supercede this last statement.

In Baccus v. Baccus, 808 S.W.2d 694 (Tex. App. — Beaumont 1991, no writ), the court's decision to assess all of the federal income tax liability for the tax years m which parties were married and living together solely against husband was not an abuse of discretion. The court stated that:

> "repeatedly, appellate courts have held that tax consequences stemming from the division of property as well as any unpaid tax liabilities are proper factors to be considered by the trial court in deriving at a fair and just division of the community properties. McCartney v. McCartney, 548 S.W.2d 435 (Tex.Civ.App.--Houston [1st Dist.] 1976. no writ history). Furthermore, it is reversible error for a court to refuse to consider tax liability, particularly when it is substantial and one of the spouses is without means to pay the obligation. *See* McCartney, supra: Cole v. Cole, 532 S.W.2d 102 (Tex.Civ.App.--Dallas 1975) *aff'd* 568 S.W.2d 152 (1978)." Id. at 700.

The court may properly assign all of the couple's tax liability to one of the spouses. Vannerson v.

Vannerson, 857 S.W.2d 659 (Tex.App.—Houston [lst Dist.] 1993, writ denied) (assignment to husband of liability for delinquent federal income taxes was not abuse of discretion where wife testified that husband had told her he had filed the returns, and she had not known that he and not done so); Baccus v. Baccus, 808 S.W.2d 694 (Tex. App.— Beaumont 1991, no writ) (court properly assessed all of federal income tax liability for tax years in which parties were marred and living together solely against husband, where husband had invested in tax shelter without disclosing investment to wife and investment contributed to tax liability of the parties, husband had withheld from wife information concerning the tax liability resulting from the investment, and husband took no steps to pay the income tax liability, including the penalty and interest, when it was at its lowest amount, even though he had sufficient funds to do so).

Although lacking the power to relieve either spouse of personal liability to the taxing authority, the court may take tax liability into consideration, and may even require one party to assume the other party's liability for taxes or require reimbursement for taxes paid. Able v. Able, 725 S.W.2d 778 (Tex. App.–Houston [14th Dist.] 1987, no writ); Benedict v. Benedict, 542 S.W.2d 692 (Tex. Civ. App. - Ft Worth 1976, writ dism'd); Cole v. Cole, 532 S.W.2d 102 (Tex. Civ. App. - Dallas 1975, no writ).

Further, in McCartney v. McCartney, 548 S.W. 2d 435 (Tex. Civ. App - - Houston [1st Dist.]1977, no writ), the Court stated:

> The trial court was not required to afford any greater weight to the issue of tax liability than to the other factors bearing upon the fair and just division of the community properties. However, the trial court should have taken into consideration the issue of tax liability, as with other pertinent factors affecting the justness of its decree. Id. at 439.

In McCartney, the judgment of the trial court was therefore reversed with respect only to the matter of the tax liabilities, and the case was remanded to the trial court with instructions to hear only such additional evidence as may be necessary to effect an appropriate disposition of the party's income tax liability.

In Janik v. Janik, 634 S.W.2d 323 (Tex.App.—Houston [l4th Dist.] 1982, no writ), in dividing the liabilities of parties, the trial court followed a very logical approach in ordering that each debt follow the asset that secured it and that each party pay one half of income tax; and, considering the nature of debts and husband's greater earning capacity, the total debt with which husband was burdened did not come out to an improper division.

In Robbins v. Robbins, 601 S.W.2d 90 (Tex.Civ.App. Houston [1st Dist.] 1980, no writ), in its decree, the trial court found that if the proceeds from the sale of the parties' residence are not reinvested in another house within the period of time provided by the income tax laws, a capital gains tax liability may occur. The trial court therefore decreed that the husband should assume and hold the wife harmless with respect to 60% of such tax liability. In his second point of error the husband contended that the trial court abused its discretion in requiring that he assume and hold the wife harmless against such income tax liability. The trial court properly considered the income tax liability of the parties in dividing their community estate, citing McCartney. The entire amount of the capital gains realized on the sale of the parties' residence was recognized at the time of the sale. The fact that the appellant's tax liability might be later reduced through a "rollover" of the recognized capital gain upon reinvestment of the sales proceeds in another residence did not render the parties' potential tax liability incapable of determination.

The Fort Worth Court of Appeals held it permissible for a trial court to hold a spouse responsible for federal income tax liability arising out of the sale of the other spouse's separate property. Mullins v. Mullins, 785 S.W.2d 5 (Tex. App. - Fort Worth 1990, no writ).

While tax liability is not technically a debt, the trial court may take the couple's tax liability into consideration in dividing the property. Mullins v. Mullins, 785 S.W.2d 5 (Tex. App. - Fort Worth 1990,no writ); Grossnickle v. Grossnickle, 935 S.W.2d 830. 848 (Tex.App.--Texarkana 1996. writ denied).

It was not an abuse of discretion for trial court to order husband to assume 100% of marital tax liability in light of the resources and capacities of the parties, as well as the sole control husband exercised over the taxes and business. In re S.A.A., 279 S.W.3d 853 (Tex. App.–Dallas 2009, no pet.)

g. Size of Separate Estate

Even though a court may not divest a spouse of his or her separate property, the court may consider the size of a spouse's separate property estate when dividing the community estate. Padon v. Padon, 670 SW.2d 354, 358-59 (Tex. App.—San Antonio 1984,

no writ; Lucy v. Lucy, 162 S.W.3d 770 (Tex.App.—El Paso 2005, no writ); Massey v. Massey, 807 S.W.2d 391 (Tex.App.— Houston [1st Dist.] 1991, writ denied); Walter v. Walter, 127 S.W.3d 396 (Tex.App.—Dallas 2004, no pet'n); Madrid v. Madrid, 643 S.W.2d 186 (Tex.App.— El Paso 1982, no writ); Capellen v. Capellen, 888 S.W.2d 539 (Tex.App.—El Paso 1994, writ denied); Stafford v. Stafford, 726 S.W.2d 14 (Tex. 1987); Vannerson v. Vannerson, 857 S.W.2d 659 (Tex.App.— Houston [1st Dist.] 1993, writ denied); Pratt v. Pratt, 689 S.W.2d 505 (Tex.App.—Houston [1st Dist.] 1985, no writ); Smith v. Smith, 836 S.W.2d 688 (Tex.App.— Houston [1st Dist] 1992, no pet.); and Vandiver v. Vandiver, 4 S.W.3d 300 (Tex.App.—Corpus Christi 1999, no pet h.).

In Tate v. Tate, 55 S.W.3d 1 (Tex.App.—El Paso 2000, no pet.), the judge awarded the Wife a disproportionate division of the community estate and in awarding her 51 percent of the community estate, the trial judge may well have taken into consideration the $50,172.60 in the brokerage account and the $8,000 in travelers' checks which had been confirmed as her separate property and which were available for her future support. It is equally plausible that had the trial court characterized those assets as community property, the estate would have been divided disproportionately, given Wife's established need for future support. In the absence of findings of fact and conclusions of law, the Husband cannot show otherwise. On this record, we cannot conclude that a comparative 55 percent to 45 percent distribution in the Wife's favor constitutes an abuse of discretion.

In sum, the court may properly consider the size of the separate estates of the spouses in its division of the community estate. Murff v. Murff, 615 S.W.2d 696 (Tex. 1981).

h. Benefits the Innocent Spouse May Have Derived From the Continuation of the Marriage

In making a just and right division of the estate of the parties, the court may consider the benefits which the spouse not at fault would derive from continuing the marriage. Hedtke v. Hedtke, 112 Tex. 404, 248 S.W. 21 (1923). For example, this concept includes the medical benefits to which a former spouse would have been entitled as a wife of a retired Air Force officer. Hopkins v. Hopkins, 540 S.W.2d 783, 787 (Tex. Civ. App. - Corpus Christi 1976, no writ).

In Young v. Young, 609 S.W.2d 758 760-62 (Tex. 1980) the court recognized that it is possible for the trial court to make a "fair and just" division by considering fault as well as other considerations, including the benefits the innocent spouse would have received from the continuation of the marriage. Likewise, in Duncan v. Duncan, 374 S.W.2d 800 (Tex.Civ.App.—Eastland 1964, no writ) an unequal division of property was justified based on the probable future need for support, fault in breaking up the marriage and the benefits the innocent spouse would have received from a continuation of the marriage. The court in Duncan further stated that the circumstances of each marriage dictate what factors should be considered in the property division upon divorce.

i. Health of the Spouses

The physical condition of each spouse offers an additional factor to be considered in the division of the estate. Hahne v. Hahne, 663 S.W.2d 17 (Tex. App. -Houston [14th Dist] 1984, no writ); Phillips v. Phillips, 75 S.W.3d 564 (Tex.App.—Beaumont 2002, no pet. h.); Kimsey v. Kimsey, 965 S.W.2d 690 (Tex. App.— El Paso 1998, pet. denied); Vannerson v. Vannerson, 857 S.W.2d 659 (Tex.App.—Houston [1st Dist.] 1993, writ denied); Twvman v. Twyman, 855 S.W.2d 619 (Tex. 1993); Patt v. Part, 689 S.W.2d 505 (Tex. App. — Houston [1st Dist.] 1985, no writ); Price v. Price, 591 S.W.2d 601 (Tex.Civ.App.—Tyler 1979, no writ); Vandiver v. Vandiver, 4 S.W.3d 300 (Tex.App.— Corpus Christi 1999, no pet. h.); and, Magill v. Magill, 816 S.W.2d 530 (Tex.App.—Houston [1st Dist.] 1991, writ denied).

In Cravens v. Cravens, 533 S.W.2d 372 (Tex. Civ. App. - El Paso 1975, no writ), the appellate court upheld a disproportionate division based on the wife's poor physical condition and stated:

> "In this case, the Appellee testified concerning injuries she received as the result of an attack upon her by Appellant shortly before their separation. She also testified as to her disability resulting from her injuries, and her present inability to do tasks that she previously could have performed. Based upon such evidence, the trial court could have awarded her a disproportionate share of the property." Id. at 376.

j. Age of the Spouses

Age is a valid consideration of the courts in considering a proper division of community property. Mogford v. Mogford, 616 S.W.2d 936 (Tex.Civ.App— San Antonio 1981, writ ref d n.r.e.);

Tate v. Tate, 55 S.W.3d 1 (Tex.App.—E1 Paso 2000, no pet.).

The court in Thomas v. Thomas, 603 S.W.2d 356 (Tex.Civ.App.—Houston [14th Dist.] 1980, writ dism'd) held that based on the evidence, a 70/30 division of the community estate did not constitute an abuse of discretion, considering the parties' comparative ages, earning capability, education level, probable need for future support, and the facts which led to divorce.

In Roberts v. Roberts, 535 S.W.2d 373 (Tex. Civ. App.—Tyler 1976, no writ), the Court stated that Edna (wife) at age 63 is more than 20 years older than A.L. (husband) and that the trial court may well have considered this age discrepancy in awarding the 149.78 acre tract to Edna. Id. at 374. The appellate court held that there was no abuse of discretion in the award of the real property to the wife.

k. Education and Future Employability

The Court in McCartney v. McCartney, 548 S.W.2d 435 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ), considered the future employability of the wife in the division of the estate and stated:

> "The wife's physical disability and her lack of training will likely require her to deplete the estate awarded to her under the decree, while the husband's future earnings will likely increase the overall value of the estate awarded to him." Id. at 439.

Educational background is but another factor to be considered in the division of the community property estate. Cooper v. Cooper, 513 S.W.2d 229 (Tex. Civ. App. — Houston (1st Dist.) 1974, no writ); Walter v. Walter, 127 S.W.3d 396 (Tex.App.—Dallas 2004, no pet'n); Zorilla V. Wahid, 83 S.W.3d 247 (Tex.App.—Corpus Christi 2002, no pet.); Toles v. Toles, 45 S.W.3d 252 (Tex.App.—Dallas 2001, pet. denied); Vandiver v. Vandiver, 4 S.W.3d 300 (Tex.App.—Corpus Christi 1999, no pet. h.); Vannerson v. Vannerson, 857 S.W.2d 659 (Tex.App.—Houston [1st Dist.] 1993, writ denied); and Massey v. Massey, 807 S.W.2d 391 (Tex.App.—Houston [1st Dist.] 1991, writ denied).

l. Need for Future Support

The court of appeals in Goren v. Goren, 531 S.W.2d 897, 899 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism'd), held in that making its determination the trial court was justified in considering the parties' respective financial obligations and future earning capacity, and their probable respective needs for support . . . an important factor, if not the most important factor, is the parties' probable respective needs for future support.

The Court in Pickett v. Pickett, 401 S.W.2d 846 (Tex. Civ. App.—Tyler 1966, no writ), went further, theorizing that the probable future need for support seems to be the most important factor in determining the court's exercise of its discretion in dividing the community estate of the parties in a divorce. *See also* Burgess v. Burgess, 834 S.W.2d 538 (Tex.App–Houston [1st Dist.] 1992, no writ); Roever v. Roever, 824 S.W.2d 674 (Tex.App.—Dallas 1992, no writ); Padon v. Padon, 670 S.W.2d 354 (Tex.App.—San Antonio 1984, no writ); Thomas v. Thomas, 603 S.W.2d 356 (Tex.Civ.App.—Houston [14th Dist.] 1980, writ dism'd); Benedict v. Benedict, 542 S.W.2d 692 (Tex. Civ. App. - Ft. Worth 1976, writ dism'd); and, Roberts v. Roberts, 663 S.W.2d 75 (Tex. App.—Waco 1983, no writ); Patt v. Patt, 689 S.W.2d 505 (Tex. App.— Houston [1stDist.] 1985, no writ); Mogford v. Mogford, 616 S.W.2d 936 (Tex.Civ.App.—San Antonio 1981, writ ref d n.r.e.) (the probable need for future support can also be considered in the division of property); Vandiver v. Vandiver, 4 S.W.3d 300 (Tex.App.—Corpus Christi 1999, no pet. h.); Foster v. Foster, 583 S.W.2d 868 (Tex.Civ.App.–Tyler 1979, no writ).

In Tate v. Tate, 55 S.W.3d 1 (Tex.App.—E1 Paso 2000, no pet.), the judge awarded the Wife a disproportionate division of the community estate. The trial judge may well have taken into consideration the $50,172.60 in the brokerage account and the $8,000 in travelers' checks which had been confirmed as her separate property and which were available for her future support. It is equally plausible that had the trial court characterized those assets as community property, the estate would have been divided disproportionately, given Wife's established need for future support. In the absence of findings of fact and conclusions of law, Husband cannot show otherwise. On this record, we cannot conclude that a comparative 55 percent to 45 percent distribution in Wife's favor constitutes an abuse of discretion.

m. Foreign Realty

The court may consider the value of foreign realty in making its division. Although the Texas court lacks jurisdiction to determine title to such land, it may consider its existence when dividing the property over which it does have jurisdiction.

In Walker v. Walker, 231 S.W.2d 905 (Tex. Civ. App.—Texarkana 1950, no writ), the appellate court upheld the trial court's consideration of the value of funds used by husband to purchase land in Florida, a common law jurisdiction, where wife's community interests were not recognized. The Court stated:

> "The trial court in order to effect a fair, just and equitable division of the whole of the community estate was clothed with the power and authority to take into consideration the value of the community funds so invested in the Florida realty in a foreign jurisdiction and to charge the husband with one-half of the value of such funds in the allocation as here to the wife of property, real, personal or mixed, situated within the court's jurisdiction in Texas." Id. at 906.

In setting aside to one spouse property within its jurisdiction, the court may consider the property beyond its jurisdiction in possession of the other spouse. Risch v. Risch, 395 S.W.2d 709 (Tex. Civ. App.—Houston 1965, writ dism'd, cert. denied 386 U.S. 10 (1965). Also see, Ismail v. Ismail, 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

n. Credit for Temporary Alimony Paid

In Edsall v. Edsall, 240 S.W.2d 424 (Tex. Civ. App.—Eastland 1951, no writ), the wife was paid $250 per month temporary alimony and the husband was allowed $100 per month. The trial court found that the wife had received $2,200 more than the husband during the pendency of the divorce and charged the wife's interest in the community estate with $1,100 or one-half of such excess payments received by her. The appellate court held that the trial court's decision was not an abuse of discretion.

The Court of Civil Appeals assumed in Schecter v. Schecter, 579 S.W.2d 502 (Tex. Civ. App.—Dallas 1978, no writ), that the trial court had taken into consideration the temporary alimony paid to the wife since it awarded the husband the larger share of the community estate. Note, however, the case involved a premarital agreement which prohibited the wife from seeking temporary alimony. The case could be read to mean that the trial court considered the premarital agreement's prohibition, rather than temporary alimony in general.

In Loaiza v. Loaiza, 130 S.W.3d 894 (Tex.App.— Fort Worth 2004, no pet.), the amount of temporary support received and saved by wife during separation, and awarded to her in the divorce, was correctly omitted when calculating the portion of the community estate awarded to wife; both parties received temporary spousal support, but husband spent all of his; and, husband was not to be allowed to inflate wife's percentage of her award by taking into account her share of temporary support and omitting husband's share from consideration.

o. Wasting and Concealing of Community Assets

In Reaney v. Reaney, 505 S.W.2d 338 (Tex. Civ. App.—Dallas 1974, no writ), the husband testified that he went to Puerto Rico with approximately $53,000. He testified that he squandered this money, lost it and very imprudently went through it. He lost some of it gambling and that he gave some of it away, that he spent it very foolishly and that at the time of the trial he did not have any of it. The Court held that . . . . in the light of the undisputed facts in this case the trial court could not make a fair and just division of the remaining community assets without taking into account Appellant's profligate loss of a large portion of the community estate." Id. at 340.

In Grothe v. Grothe, 590 5.W.2d 238 (Tex. Civ. App.—Austin 1979, no writ), since the husband, during the pendency of the divorce, wrongfully and willfully converted a substantial amount of community funds to his own personal use, intending to deprive the wife of her interest in such property, the court was justified in awarding a disproportionate portion of the estate to the wife.

In Matter of Marriage of Moore, 890 S.W.2d 821 (Tex.App.—Amarillo 1994, no writ), the trial court held that: (1) former wife could not receive damages on a separate cause of action for "fraud on the community" or related mental anguish; (2) evidence supported a reimbursement award in favor of former wife for former husband's unfair disposition of community assets; and (3) trial court did not abuse its discretion in dividing the marital estate so that former wife received slightly more than half of the net estate.

In Osuna v. Ouintana, 993 S.W.2d 201 (Tex.App.—Corpus Christi 1999, no writ), the court stated that "money spent on another woman out of community property during the marriage requires an accounting to the community, Simpson v. Simpson, 679 S.W.2d 39. 42 (Tex.App.--Dallas 1984. no writ). This type of gift or expenditure amounts to fraud upon the community estate. Grossnickle v. Grossnickle, 935 S.W.2d 830, 848 (Tex.App.--Texarkana 1996. writ denied)." Id. at 209.

In Loaiza v. Loaiza, 130 S.W.3d 894 (Tex.App.— Fort Worth 2004, no pet.), the court held that the evidence conclusively established that husband breached his fiduciary duty to wife and committed fraud on the community estate. The record established that the trial court considered evidence that husband committed fraud and waste of the community estate. The trial court did not abuse its discretion when it made a disproportionate award of community estate; and, the trial court's dismissal, for insufficient evidence, of wife's tort claims against husband for fraud, waste, and breach of fiduciary duty, did not require reversal of divorce decree.

Money spent by a spouse on a paramour during the pendency of a divorce is a factor to be considered by the court in dividing the estate. Leal v. Leal, 628 S.W.2d 168 (Tex. App.—San Antonio 1982, no writ), Simpson v. Simpson, 679 S.W.2d 39 (Tex. App.—Dallas 1984, no writ). However, bad investments and poor judgment alone in the absence of fraud will not justify a disproportionate division of the community estate. Andrews v. Andrews, 677 S.W.2d 171 (Tex. App.—Austin 1984, no writ).

Due to the trust relationship between spouses as to community property controlled by each, the burden of proof is upon the disposing spouse to prove the fairness of the disposition of community assets. Mazique v. Mazigue, 742 S.W.2d 805 (Tex.App.—Houston [1st Dist.] 1987, no writ), Morrison v. Morrison, 713 S.W.2d 377 (Tex.App.—alias 1986, writ dism'd).

If the trial court finds that a spouse has concealed community property, it may award that property to that spouse as their share of the community estate. Rafidi v. Rafidi, 718 S.W.2d 43 (Tex.App.—Dallas 1986, no writ): Arrington v. Arrington, 613 S.W.2d 565 (Tex. Civ.App.—Fort Worth 1981, no writ).

p. Attorney's Fees

The award of attorney's fees is another factor to be considered in making an equitable division of the estate in a divorce. Thomas v. Thomas, 525 S.W.2d 200, 201 (Tex. Civ.App.—Houston [1st Dist.] 1975, no writ); Simpson v. Simpson, 727 S.W.2d 662 (Tex.App.— Dallas 1987, no writ); Harleaux v. Harleaux, 154 S.W.3d 925 (Tex.App.—Dallas 2005); and Vandiver v. Vandiver, 4 S.W.3d 300 (Tex.App.—Corpus Christi 1999, no pet. h.).

Another factor the court can consider in a divorce proceeding in making an equitable division of the community estate is *appellate* attorney's fees. In re Garza, 153 S.W.3d 97 (Tex.App.—San Antonio 2004).

A decree that one party pay the other's attorney's fees may be to award the paying party less of the estate. This is but one factor to be considered in making an equitable division of the estate. Cane v. Cane, 234 S.W.2d 1002, 1005 (Tex. 1950). *See also* Haggard v. Haggard, 550 S.W.2d 374, 378 (Tex.Civ.App.—Dallas 1977, no writ); Fortenberrv v. Fortenberry, 545 S.W.2d 40 (Tex.Civ.App.—Waco 1976, no writ).

q. Nature of the Property

Among the many factors considered in its division, the court may consider the nature of the property itself. In Waggener v. Waggener, 460 S.W.2d 251 (Tex.Civ.App.—Dallas 1970, no writ) and Thomas v. Thomas, 525 S.W.2d 200 (Tex.Civ.App.—Houston [1st Dist.] 1975, no writ), the appellate courts recited this factor as part of a pre-Murff laundry list.

In Jones v. Jones, 699 S.W.2d 583, (Tex. App.—Texarkana 1985, no writ), the trial court found the nature of the property to be a very important factor in its division. The husband's community partnership interests were closely related to and dependent upon his brother's separate business interests. *See also* Vandiver v. Vandiver, 4 S.W.3d 300 (Tex.App.—Corpus Christi 1999, no pet. h.).

Numerous cases cite this factor when citing the Murff laundry list, however most cases citing this factor do not give clear examples of what is meant by "nature of the property." "Nature of the property" may be synonymous with size of the community estate or sizes of the spouses' respective separate estates. "Nature of the property" could also refer to cases where the primary assets are not readily partitionable, such as stock in a closely-held corporation controlled by one spouse or a partnership interest controlled by one spouse, or not available for disposition.

r. Debts and Liabilities

Imposition of liability for the discharge of an obligation is yet another factor to be considered in the division. Failure to do so may be error. Cole v. Cole, 532 S.W.2d 102 (Tex.Civ.App.—Dallas 1975, no writ) (substantial liabilities left with the wife justifies a disproportionate division in her favor); McKnight v. McKnight, 535 S.W.2d 658 (Tex.Civ.App.—E1 Paso) rev'd on other grounds), 543 S.W2d 863 (Tex. 1976); Horlock v. Horlock, 533 S.W.2d 52 (Tex.Civ.App.—Houston [14th Dist.] 1975, writ dism'd) (community estate's debt structure considered in detail by trial court). *See also* Vandiver v. Vandiver, 4 S.W.3d 300

(Tex.App.—Corpus Christi 1999, no pet. h.). It is important to also see the section herein above on tax consequences and tax liabilities.

A debt created by a spouse during marriage is presumed to be an obligation of the community, and the court must divide the parties' debts as well as their assets upon divorce. Taylor v Taylor, 680 S.W.2d 645 (Tex.App.—Beaumont 1984, writ refused, n.r.e.). In dividing the couple's debt as part of its division of the community property, the court may not modify the creditor's rights with regard to the debt. Blake v. Amoco Federal Credit Union, 900 S.W.2d 109 (Tex.App.—Houston [l4th Dist.] 1995, no writ) (divorce court cannot alter ex spouse's liability on joint debt).

In Smith v. Smith, 143 S.W.2d 206, (Tex.App.—Waco, 2004), the court ordered Karen to assume three community debts of an unspecified amount. Because the debt owed by a spouse is a legally relevant factor in dividing the community estate, a court may abuse its discretion if it fails to consider such a factor, citing Murff (spouse's debt as a factor in property division). The record did not disclose the amount of these debts, so the court could not have considered the amount of these debts in dividing the community estate, which was error.

Vannerson v. Vannerson, 857 S.W.2d 659 (Tex.App.—Houston [1st Dist.] 1993, writ denied). Appellant contended the trial court erred in assigning to him all income tax liabilities of the parties from the date of marriage through the calendar year 1986, and all debts incurred by either party during marriage and not expressly assumed by Mrs. Vannerson. The court stated:

> "The division of debts was made by the trial court as part of its division of community property. The parties' liabilities are factors to be considered in making a just and right division. Finn v. Finn, 658 S.W.2d 735, 748 (Tex.App.Dallas 1983. writ refd n.r.e.). A divorce court has authority and discretion to impose the entire tax liability of the parties on one spouse. Benedict v. Benedict, 542 S.W.2d 692. 698 (Tex.Civ.App.--Fort Worth 1976. writ dism'd) (husband failed to file tax returns and trial court assigned all tax liability to him). Considering appellee's testimony that she did not know that appellant did not file tax returns, it cannot be said the trial court abused its discretion in assigning responsibility for the taxes to appellant. Additionally, given appellee's testimony of the numerous judgments against Mr. Vannerson, it was not error for the trial court to assign responsibility for those judgments to appellant."

Id. at 673.

In Horlock v. Horlock, 533 S.W.2d 52, 61 (Tex.Civ.App.—Houston [l4th Dist.] 1975, writ dism'd) the court of civil appeals held that factors which may be considered by the trial court in dividing the property include support provisions for the parties' son and the debts and other liabilities imposed on the husband.

s. Reimbursement

Rather than ordering an immediate payment or money judgment, the trial court may adjust the division of the estate to compensate the spouse entitled to reimbursement. Morrison v. Morrison, 713 S.W.2d 377 (Tex.App.—Dallas 1986, writ dism'd); Jones v. Jones, 699 S.W.2d 583, 586 (Tex.App.—Texarkana 1985, no writ). *See also* Kimsey v. Kimsey, 965 S.W.2d 690 (Tex.App.— El Paso 1998, pet. denied). Further, there was sufficient evidence to support the trial court's consideration of the community estate's right of reimbursement due to the enhancement of husband's separate estate after the date of cause of the action. Jones v. Jones, 699 S.W.2d 583, (Tex. App.— Texarkana *1985,* no writ). *See also* Harrell v. Harrell, 591 S.W.2d 324 (Tex.Civ.App.—Corpus Christi 1979, no writ).

In Beavers v. Beavers, 675 S.W.2d 296 (Tex.App.—Dallas 1984), the court did not abuse its discretion in concluding that a community claim for reimbursement from wife's separate property was approximately equal to a community claim for reimbursement from husband's separate property and in excluding the reimbursement claims from further consideration in dividing the community property.

In Vandiver v. Vandiver, 4 S.W.3d 300 (Tex.App.—Corpus Christi 1999, no pet. h.), the trial court found that evidence was presented supporting the following factors for consideration by the court: (1) E. L.'s greater earning power and ability to support himself; (2) his education and further employability; (3) his fault in the breakup of the marriage; (4) Joan's need for further support; (5) the nature of the property involved in the division; (6) E. L.'s failure to follow court orders; (7) Joan's health problems; (8) needs of the child of the marriage; (9) community indebtedness and liabilities; (10) *reimbursement;* (11) the size and nature of the separate estates; and (12) attorney's fees to be paid by

each party. We hold that the trial court did not abuse its discretion in finding that the division of the property is just and right.

In Morrison v. Morrison, 713 S.W.2d 377 (Tex. App.— Dallas 1986, dism'd), the trial court stated that:

> "Carolyn was entitled to reimbursement to her half of the community property because of David's misuse of community funds. The right of reimbursement is an equitable right which may be considered by the trial court in determining the division of community property. Horlock v. Horlock, 533 S.W.2d 52. 60-61 (Tex.Civ.App.--Houston [14th Dist.] 1975, writ dism'd). We presume, therefore, that when the court divided the community, it awarded Carolyn a substantial reimbursement for the assets David diverted from her half of the community. See Robbins v. Robbins, 519 S.W.2d 507. 510-11 (Tex.Civ.App--Fort Worth. 1975, no writ) (the appellate court presumed that the wife's entitlement to reimbursement of her separate estate was taken into calculation by the trial court when it divided the parties' community property); Tex.R.Civ.P. 299. Furthermore, the trial court found David at fault in the breakup of the marriage because of his adultery. We presume that the trial court also considered this factor when it divided the community. Gutierrez, 643 S.W.2d at 787. Based on the evidence of Carolyn's right to reimbursement and David's adultery, we hold that the trial court did not abuse its discretion in awarding a disproportionate amount to Carolyn. See Murff, 615 S.W.2d at 698." Id. at 379.

VIII. METHODS OF PROPERTY DIVISION

A. GENERAL

In dividing a community estate, the Texas divorce law practitioner has many available options.

The point of the beginning is the inventory. A complete inventory and appraisement forms a roadmap for the property division. With respect to one's own client, a party who must devote the time to complete an inventory, category by category, may remember an asset or liability that otherwise may have been inadvertently omitted. Requiring the opposing party to set forth every asset and liability under oath establishes the assets to be divided. By avoiding the "catch alls" that exist in many forms, and by limiting the award of significant assets to those specifically listed in the inventory, one avoids the nightmarish possibility of inadvertently awarding an undisclosed asset.

B. DIVISION IN KIND

The most obvious means to divide an asset is division in kind. Even something as simple as dividing an asset in kind, however, poses problems. Further, some assets are not subject to division in kind. If an estate can be divided equity by partitioning the assets in kind, this is the preferred method as oppose to utilization of a money judgment. Hanson v. Hanson, 672 S.W.2d 274 (Tex.App.–Houston[14th Dist.] 1984, writ dism'd w.o.j.). *In re* Marriage of Jackson, 506 S.W. 2d 261, 266 (Tex.Civ.App. – Amarillo 1974, writ dism'd).

If a brokerage account is being divided, the decree should specify how the securities in the account are to be divided. For example, securities in an account may have the same market value, but dramatically different holding periods and a dramatically different basis. In addition, certain securities may be traded only in "blocks". Each of these issues should be addressed in the decree.

C. DIVISION BY SALE

Ordering the sale of an asset and the distribution of the sales proceeds is a common means of dividing an asset. Once again, however, the devil is in the details. For example, if real property is being sold, the decree should address issues such as interim occupation, methodology of making mortgage payments until the sale is consummated, the identity of the agent who shall list the property, a methodology for resolving disputes over the terms and sales price of the property, should also be included. Finally, a provision providing for receivership if problems arise is appropriate. If property is not to be partition in kind, a trial court may appoint a receiver and order so much of the property as is incapable a partition to be sold and the proceeds be divided between the parties, as may be just. Hailey v. Hailey, 160 Tex. 372, 331 S.W.2d 299, 303 (Tex. 1960), *but see* discussion below regarding receivers. When drafting a receivership provision, it is wise to identify the amount of the bond that will be required for the receivership action, as well as, the amount of the bond the receiver must post. Otherwise, a party could demand a very high bond equal to the value of the

property for the receivership and a like bond for the receiver.

D. OWELTY PAYMENTS

In dividing community property so as to achieve an equitable balance, the court may order either party to pay a sum to the other. *In re* Marriage of Jackson, 506 S.W.2d 261 (Tex.Civ.App.–Amarillo 1974, writ dism'd). Weaks v. Weaks, 471 S.W.2d 454 (Tex.Civ.App.–Beaumont 1971, writ dism'd). An owelty is a scheme for the equalization of awards of community property in divorce cases. Rusk v Rusk, 5 S.W.3d 299, 308 n.11 (Tex. App. – Houston [14th Dist.] 1999, pet. denied). Equalization by owelty may be used to equalize the property division for any reason. Massey v. Massey, 807 S.W.2d 391, 404 (Tex. App. – Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766, (Tex. 1993). Some courts hold that an equitable lien may be imposed, even on a party's separate property, to secure payment of a money judgment as part of the division a spouse's interest in the estate of the parties, Jackson, 506 S.W.2d at 266. One court has held that, under the facts presented in that particular case, it was error for a trial court not to secure a money judgment with an equitable lien. Hanson v. Hanson, 672 S.W.2d 274, 278 (Tex.Civ.App.–Houston[14th Dist.] 1984, writ dism'd w.o.j.). Some courts have held that the equitable lien can only be placed on separate property to secure a reimbursement claim. Smith v. Smith, 715 S.W.2nd 154 (Tex.Civ.App. – Texarkana, 1986, no writ) and another case held that separate property cannot be encumbered by an equitable lien for any reason. Duke v. Duke, 605 S.W.2d 408 (Tex.Civ.App. – El Paso, 1980, writ dism'd).

E. CORPORATE REDEMPTION

A problem often arise when one spouse has been involved in the ownership, management and operation of a closely held business. In many cases, the business is the largest single asset in the estate. Quite commonly, insufficient other assets exist to permit the award of the business to one party, with an offsetting award of other assets to the other party. In such circumstances, a corporate redemption, or a staged corporate redemption of stock may be a means to achieve a division.

A redemption occurs whenever a corporation acquires its stock from a shareholder in exchange for corporate property. A redemption can be utilized as a useful planning tool in a divorce to divest a spouse of his or her position as a shareholder of a family owned business. A corporation can choose to redeem its shares with debt obligations rather than cash; thereby, one may allow a former spouse a fixed income.

Practitioners must exercise caution in this area, however, with regard to taxes. If properly completed, a redemption may qualify as a capital gains transaction to the shareholder. The danger, however, is that such a redemption can be treated as a dividend.

A discussion of the tax ramifications of such a transaction is beyond the scope of this article. A practitioner considering this option is cautioned to secure the services of a tax professional.

F. RECEIVERSHIPS

The use of receiverships in family law proceedings has become increasingly common in Texas family law cases - especially cases pending in the more populated counties. Section 64.001 of the Texas Civil Practice and Remedies Codes contains the provisions applicable generally to appointment of receivers. Although multiple courts, such as Vannerson v. Vannerson, 857 S.W.2d 659, 673 (Tex.App.–Houston [1st Dist. 1993 writ denied) have held that, in family code actions, complete compliance with Section 64.001 of the Civil Practice and Remedies Code is not required, in Rusk v. Rusk, the 14th Court of Appeals held this compliance with section is the better practice when appointing receivers. Rusk v. Rusk, 5 S.W.3d 299, 307 (Tex.App. – Houston[14th Dist.] 1999, writ denied). The majority opinion in Rush and the dissent contain an excellent summary of the law. In Hailey v. Hailey, 160 Tex. 372, 331 S.W.2d 299 (Tex. 1960) the Texas Supreme Court ruled that appointing a receiver in a final decree of divorce is permissible. If property is not subject to partition in kind, the trial court can appoint a receiver and order so much set property as is incapable the partition to be sold and the proceeds divided between the parties in such portion as may be just, fair and equitable. *Id*.

G. ALIMONY

In Texas, the ability of a court to award post-judgment alimony by court order is sharply limited. (*See* Tex.Fam.Code.§8.001 providing for court ordered maintenance). However, in Texas parties are free to agree to contractual alimony. Often, contractual alimony providing a continuing source of support for one spouse is a factor that may be considered in an appropriate division of property.

Contractual alimony provides potential benefits. If properly drafted, and provided that the "front-end

loading" rules are avoided, payments are deductible to a higher income payor at his tax rate. At the same time, the payments are includable in the income of the receiving spouse at a potentially lower tax rate. Moreover, alimony payments generally receive favorable treatment in bankruptcy proceedings.

IX. CONCLUSION

In order to provide an appropriate division of assets and liabilities in a Texas divorce, one must first determine the proper characterization of property. One must consider the mechanics required for tracing and how they are employed in the litigation process. Understanding characterization is intricate, detailed and in depth. However, if this were easier, it would not be nearly so much...fun.