TRACING CASH AND OTHER LIQUID ASSETS

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CHAPTER 4.4

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I. DEFINITION OF SEPARATE PROPERTY.

Separate property is defined by the Texas Constitution, Art. XVI, § 15, as follows:

> "Section 15. All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; 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 may also 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 income or property which might arise from that gift of property; and 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."

A. If Traced, Mutations of Separate Property are Separate Property.

Although such property may undergo changes or mutations, as long as it is traced and properly identified it will remain separate property. *Norris v. Vaughan*, 260 S.W.2d 676, 679 (Tex. 1953). *See also Beck v. Beck*, 814 S.W.2d 745 (Tex. 1991), cert. denied, 503 U.S. 907 (1992); *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982); *Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.-Houston [1st Dist.] 1989, no writ); *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.-Dallas 1987, writ ref'd n.r.e.).

To maintain the character of separate property, it is not necessary that the property be preserved *in specie* or in-kind; it may undergo mutations and changes and still remain separate property–so long as it can be clearly and satisfactorily traced and identified to its separate origin, its distinctive character will remain.

Example: H owned a separate property house (House 1) which had an outstanding mortgage balance. W acknowledges that the property was owned by H prior to marriage. The home was insured, which was fortunate, because during marriage a flood occurred and damaged the home. Insurer pays funds to H. H sells the separate property house; he uses the sales proceeds along with a portion of the insurance proceeds to purchase House2. What is the character of House 2? House 2 would be H's separate property.

The court in *Burgess v. Burgess*, 2007 WL 1501117 (Tex. App. - Beaumont, 2007) dealt with this issue. There, the court found that the residence was separate property because the evidence was sufficient to demonstrate that the residence was H's separate property.[1] Citing Texas Family Code §3.008,[2] the court opined that the proceeds were also H's separate property because the proceeds from a casualty insurance payment takes on the character of the insured property. Would the payment of the insurance premiums create reimbursement?

B. Tex. Fam. Code § 3.001.

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

C. Property Owned or Claimed Before Marriage, Inception of Title.

The terms "owned and claimed" as used in the Constitution and the Tex. Fam. Code mean that where the right to the property accrued before the marriage, the property would be 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. *Welder v. Lambert*, 44 S.W. 281 (Tex. 1898). 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). Acquiring an ownership interest or claim to property refers to the inception of the right, rather than the completion or ripening thereof. The existence or non-existence of the marriage at the time of incipiency of the right of which title finally vests determines whether property is community or separate. *Creamer v. Briscoe*, 109 S.W. 911 (Tex. 1908). Inception of title occurs when a party first has a right of claim to the property. Thus, land acquired by an earnest money contract that is signed prior to the marriage but the deed is not acquired until after the marriage, is separate property.

Assets that are a spouse's separate property include, but are not limited to:

1. Assets owned or claimed prior to marriage[3]
2. Gifts[4]
3. Property acquired by devise or descent[5]
4. Partitioned property/income[6]
5. Personal injuries sustained during marriage, except loss of earning capacity during marriage[7] – to the extent that any insurance payment or workers compensation is intended to replace earnings while the disabled or injured person is not married, the recovery is the separate property of the disabled/injured spouse[8]
6. Assets acquired from advances of separate debt
7. Mutations or exchanges of separate property[9]

D. The Inception of Title Rule has been codified by Tex. Fam. Code § 3.006.

"If the community estate of the spouses and the separate estate of a spouse have an ownership interest in property, the respective ownership interests of the marital estates are determined by the rule of inception of title." Tex. Fam. Code § 3.006. Section 3.006 does not change the law about the inception of title rule, but simply codifies the inception of title rule as it has evolved from Texas case law over many years of Texas jurisprudence.

II. COMMUNITY PROPERTY.

There is no definition of community property in the Texas Constitution. The Tex. Fam. Code and case law define community property as follows: "Community property consists of the property, other than separate property, acquired by either spouse during marriage." Tex. Fam. Code § 3.002; *Douglas v. Delp*, 987 S.W.2d 879, 882 (Tex. 1999).

A. Proving Up Separate Property

Once you have identified the source of separate property, you must trace the separate property. Tracing 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.[10] In the marital dissolution context, tracing the property means that you must follow the separate property asset from the time it is identified (at the date of marriage or when received if during marriage) through the date of divorce. For example, Mom gifted W cash which was deposited in a bank account; a portion of the cash gift was used to acquire stock; the stock was then sold and the sales proceeds were expended to acquire the parties' current residence. W has the burden to prove that the funds used to acquire the residence stemmed from the original cash gift.

The party seeking to prove an asset as his/her separate property has to prove it by *clear and convincing evidence.*[11] The "clear and convincing" standard is something greater than the "preponderance of evidence" standard, but less than "beyond a reasonable doubt." *Clear and convincing* is the degree of evidence necessary to produce in the mind of the trier of fact a firm belief or conviction about the allegations sought to be established.[12] The requirement of clear and convincing evidence is way of stating that the assertion(s) must be supported by factually sufficient evidence.[13]

B. Presumption of Community.

Tex. Fam. Code § 3.003 states that all property possessed by either spouse during or at the dissolution of the marriage is presumed to be community property and that the degree of proof necessary to establish that property is separate property, rather than community property, is clear and convincing evidence. Based on the fact that the Texas Constitution and the Tex. Fam. Code specifically delineate and define what is separate property, if property cannot be proved to be separate property within the definition by clear and convincing evidence, it is community property. By deductive reasoning, if property does not fit the definition of separate property, it is community property.

C. Quasi-Community Property.

Tex. Fam. Code § 7.002 deals with quasi-community property and requires that a court divide property at divorce or annulment as community property, wherever the property is situated, if (1) the property was acquired by either spouse while domiciled in another state and the property would have been community property if the spouse who acquired the property had been domiciled in Texas at the time of the acquisition; or (2) property was acquired by either spouse in exchange for real or personal property and that property would have been community property if the spouse who acquired the property so exchanged had been domiciled in Texas at the time of the acquisition. Sometimes this property is referred to as

quasi-community property. It is treated as community property for purposes of division in a divorce or annulment, even though it is considered separate property for probate purposes. Quasi-community property is inapplicable in probate proceedings. *Estate of Hanau*, 730 S.W. 2d 663 (Tex. 1987).

III. CHARACTERIZATION GENERALLY.

Characterization of property is a process of identifying the property owned by the spouses as separate property or community property. Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. Tex. Fam. Code § 3.003(a). *Tate v. Tate*, 55 S.W.3d 1, 4 (Tex.App.-El Paso 2000, no writ). The degree of proof necessary to rebut the community property presumption and establish that property as separate property is clear and convincing evidence. § 3.003(b). Only community property is subject to the trial court's "just and right" division. *Cameron v. Cameron*, 641 S.W.2d 210, 220 (Tex. 1982). Separate property is confirmed to the owner of the separate property. The court shall divide the community property 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. Tex. Fam. Code § 7.001. The appellate court will reverse a trial court if a trial court mischaracterizes separate property as community property and does not award separate property to the owner thereof. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977). Tate v. Tate, supra at p. 6.

A. The Burden of Proof.

To rebut the community-property presumption, a party must present "clear and convincing" evidence of the property's separate character. Tex. Fain. Code §3.003(b); *see McKinley v. McKinley*, 496 S.W.2d 540, 543-44 (Tex. 1973). The clear-and-convincing standard requires evidence on which "a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *Stavinoha v. Stavinoha*, 126 S.W3d 604, 607 (Tex.App.—Houston [14th Dist.] 2004, no pet.). Because of this heightened evidentiary standard, a spouse generally will have to use both testimonial and documentary evidence to support her claim of separate property. *See, e.g., Boyd v. Boyd*, 131 S.W.3d 605, 616-17 (Tex.App.—Port Worth 2004, no pet.) (H's testimony, without specific tracing or corroborating evidence, was not clear and convincing evidence). The evidence presented should establish the time and manner the property was acquired (inception of title) and all of its mutations (tracing). But minor gaps in the tracing and corroboration of an asset's transactional history will not necessarily prevent a spouse from establishing her separate-property claim by clear and convincing evidence. *See, e.g., Faram v. Gervitz-Faram*, 895 S.W.2d 839, 843-44 (Tex.App.—Fort Worth 1995, no writ) (incomplete records on investment accounts); Newland v. Newland, 529 S.W.2d 105, 108-09 (Tex.App.—Fort Worth 1975, writ dism'd) (documentary evidence of "factual resegregation" of separate property existed only for most of period involved).

1. Expert Testimony**.**

Expert testimony can be used to establish the character of property. *See, e.g., Beard v. Beard*, 49 &W.3d 40, 61-62 (Tex.App.—Waco 2001, pet. denied) (CPA traced and characterized W's separate property by using community-out-first method). Experts are often used to characterize property in complex cases when cash assets have been commingled in different financial accounts with community property and when the property itself is of a unique nature. *See, e.g., Loaiza a Loaiza*, 130 S.W.3d 894, 906-07 (Tex.App.—Fort Worth 2004, no pet.) (expert testified about character of baseball contract); *Welder v. Welder*, 794 S.W.2d 420, 429 (Tex.App. – Corpus Christi 1990, no writ) (experts used to trace deposits and withdrawals from spouses' joint account). Experts used to characterize marital property are subject to the same qualification rules that apply to experts in civil cases generally. *See* Tex. R. Evid. 702.

2. Lay testimony**.**

A spouse is competent to testify about the character of her property. Because a spouse is an interested witness, in most cases the testimony of a spouse will have to be corroborated by other evidence (i.e., the testimony of another witness or documentation) to rebut the community property presumption. *See, e.g., Bahr v. Kohr*, 980 S.W.2d 723, 730 (Tex.App. – San Antonio 1998, no pet.) (testimony that proceeds from bank account were separate was insufficient without documentation showing date account was opened, its beginning balance, and debits and credits to account); *Robles v. Robles*, 965 S.W2d 605, 620 (Tex.App. – Houston fist Dist.J 1998, pet. denied) (testimony that property was purchased with inheritance was insufficient without copy of will); *Johnson v. Johnson*, 804 S.W2d 296, 300 (Tex.App. – Houston fist Dist.) 1991, no writ) (testimony that guns were inherited from father was insufficient without documentation distinguishing those guns from other guns listed on inventory). Whether uncorroborated testimony of a spouse will be sufficient to constitute clear and convincing evidence depends on whether the spouse's testimony is contradicted and how clear, direct, and positive the spouse's testimony is.

a. Uncorroborated & Contradicted.

A spouse's uncorroborated testimony that is contradicted will not be sufficient to constitute clear and convincing evidence. *See Pace v. Pace*, 160 S.W3d 706,

714 (Tex. App.—Dallas 2005, pet. denied); *Robles*, 965 S.W2d at 620.

b. Uncorroborated & Uncontradicted.

Generally, a spouse's uncorroborated and uncontradicted testimony will not be sufficient to constitute clear and convincing evidence. *See Boyd*, 131 S.W3d at 617; *Robles*, 965 S.W2d at 620; *Kirtley v. Kirtley*, 417 S.W2d 847, 853 (Tex.App. – Texarkana 1967, writ dism'd). But when the testimony of an interested party is uncontradicted and is clear, direct, positive, and free from inaccuracies, and when there are no circumstances tending to cast suspicion on it, the testimony is taken as true as a matter of law. *Cochran v. Wool Growers Central Storage Co.*, 166 S.W2d 904, 908 (Tex.1942). This exception to the interested-witness rule is more compelling when the opposing party has the means and opportunity of refuting the testimony but does not do so. *See Collora v. Navarro*, 574 S.W2d 65, 69 (Tex.1978). Several appellate courts have found a spouse's uncorroborated and uncontradicted testimony to be sufficient to constitute clear and convincing evidence. *See Pace*, 160 S.W.3d at 714; *Vannerson v. Vannerson*, 857 S.W2d 659, 668 (Tex.App. – Houston [1st Dist.] 1993, writ denied).

c. Specific Examples.

A witness may testify concerning the source of funds in a bank account without producing bank records of the deposits. *Holloway v. Holloway*, 671 S.W.2d 51, 56 (Tex.App.-Dallas 1983 writ dism'd).

"The mere fact that the proceeds of the sale were placed in a joint account does not change the characterization of the separate property assets. The spouse that makes a deposit to a joint bank account of his or her separate property does not make a gift to the other spouse." *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.--Tyler 1993, no writ). *See also Higgins v. Higgins*, 458 S.W.2d 498, 500 (Tex. Civ. App.--Eastland 1970, no writ).

Mere testimony that property purchased with separate property funds, without any tracing of the funds, is generally insufficient to rebut the community property presumption. *McElwee v. McElwee*, 911 S.W.2d 182, 188 (Tex.App.-Houston [1st Dist.] 1995, writ denied).

In *Harris v. Venture*, the only evidence in the record with reference to two disputed accounts by the party claiming the funds were her separate property was her statement that the source of the funds was "some was gifts and some may have been my social security check. I don't remember." The court held that this testimony was no more than a scintilla of proof of the vital fact needed to be provided, i.e., that the accounts consisted of money acquired in one of the ways recognized to create separate property, and therefore the proponent did not carry her burden of proof. *Harris v. Venture*, 582 S.W.2d at 856. Note also that the testimony of an interested witness without corroboration, even when uncontradicted, only raises an issue of fact and is not conclusive. *Purser v. Purser*, 604 S.W.2d 411, 413 (Tex.Civ. App.-Texarkana 1980, no writ). *See also Hilliard v. Hilliard*, 725 S.W.2d 722, 723 (Tex.App.-Dallas 1985, no writ);

3. Documentation.

In most cases, documentation will need to be presented in addition to expert and lay testimony to rebut the community-property presumption. The most important documents are those establishing the time and manner in which the property was acquired and any later sales or exchanges of the property *See, e.g., Balir*, 980 S.W2d at 730 (to prove character of proceeds in bank account, spouse should have provided documentation showing date account was opened, its beginning balance, and debits and credits to account); *Robles*, 965 S.W2d at 620 (to prove property was purchased with inheritance, spouse should have provided copy of will).

IV. MIXED TITLE PROPERTY.

When property is acquired during the marriage partly with community property funds and partly with separate property funds (which can be clearly traced) the property is of mixed characterization, being partially separate property and partially community property, to the extent and in the proportion that the property was purchased with separate property funds and with community property funds. *Cook v. Cook*, 679 S.W.2 581, 583 (Tex.App.-San Antonio 1984, no writ). Similarly, if a purchase is made partly with separate property and partly with community property credit, the separate and community estates own the property as tenants in common. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975). Each estate owns an undivided interest in the proportion that it supplies to the consideration. *Gleich v. Bongio*, 99 S.W.2d 881, 883 (Tex. 1937); *Jacobs v. Jacobs*, 669 S.W.2d 759, 763 (Tex.App.-Houston [14th Dist.] 1984, aff'd in part, 687 S.W.2d 731 (Tex. 1985)); *Scott v. Scott*, 805 S.W.2d 835, 838 (Tex.App.-Waco 1991, writ denied).

V. COMMINGLING.

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 for $9,062.87 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) (wife given money judgment for her share of $3,000 cash concealed in hole in floor and not accounted for); *Swisher v. Swisher*, 190 S.W.2d 382 (Tex. Civ. App.-Galveston 1945, no writ); *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.")

A. Burden to Produce Records.

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 is upon the disposing spouse to show fairness). If the managing spouse is in fact 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 v. Farrow*, *supra*, and *Sibley v. Sibley*, *supra*, the interests of the managing spouse in the community are lost and the mixture becomes the other spouse's separate property.

B. Background in Trust Accounting Rules.

Farrow v. Farrow, 238 S.W.2d 255 (Tex.Civ.App.-Austin 1951, no writ) was the first of the modern tracing cases to apply trust doctrine to the tracing or commingling of community and separate funds in a marriage:

(a) 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.
(b) 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.
(c) But there must be a willful or wrongful invasion of rights in order to induce the merited consequences of forfeiture.
(d) 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.

Under *Sibley v. Sibley*, 286 S.W.2d 657, 659 (Tex.Civ.App.-Dallas 1955, writ dism'd), the application of the trust doctrine in a divorce case meant that "the trustee (husband) is presumed to have checked out his money first."

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 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.

C. Community Out First or Community Out Last.

The character of separate property is not changed by the sale, mutation, exchange, substitution or change in form of separate property. *Gleich v. Bongio*, 99 S.W. 2d 881 (Tex. 1937). If separate property can be definitely and accurately traced and identified, it remains separate property regardless of the fact that the separate property undergoes mutations or changes in form. To overcome the presumption of community, the party asserting separate property must trace and clearly identify the property which is claimed to be separate property by clear and convincing evidence. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965).

The "community out first" rule of tracing is now firmly established in our Texas jurisprudence. Though criticized, this rule has seemingly taken on a "life of its own" and no longer relies on trust law. *Welder v. Welder*, 794 S.W.2d 420 (Tex.App.-Corpus Christ 1900, no writ); *DePuy v. DePuy*, 483 S.W.2d 883 (Tex.Civ.App.-Corpus Christi 1972, no writ); *Horlock v. Horlock*, 533 S.W.2d 52 (Tex.Civ.App.-Houston [14th dist.] 1975, writ dism'd); *Harris v. Venture*, 582 S.W.2d 853 (Tex.Civ. App.-Beaumont 1979, no writ); *Snider v. Snider*, 613 S.W.2d 8 (Tex.App.-Dallas 1981, no writ); *Gibson v. Gibson*, 614 S.W.2d 487 (Tex.Civ.App.-Tyler 1981, no writ); *Kuehn v. Kuehn*, 594 S.W.2d 158 (Tex.Civ.App.-Houston [14th Dist.] 1980, no writ).

1. Trace & Identify**.**

The Court of Appeals in *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 842 (Tex.App.-Fort Worth 1995, no writ) explained tracing as follows:

> "...the party claiming separate property must trace and identify the property claimed as separate property by clear and convincing

> evidence. Tracing 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. *Hilliard v. Hilliard*, 725 S.W.2d 722, 723 (Tex. App. – Dallas 1985, no writ). Separate property will retain its character through a series of exchanges so long as the party asserting separate property ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character. *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975)..."

2. Rebutting the Presumption**.**

In order to rebut the community property presumption, the party claiming separate property must trace and identify the property claimed as separate property by clear and convincing evidence. Tex. Fam. Code § 3.003(b); *Cockerham* 527 S.W.2d at 167; *Celso*, 864 S.W.2d at 655. Tracing 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. Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character. *Cockerham*, 527 S.W.2d at 167; Celso, 864 S.W.2d at 654.

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. *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 667 (Tex. 1987); *Norris v. Vaughn*, 260 S.W.2d at 679; *Harris v. Harris*, 765 S.W.2d 798, 802 (Tex.App.- Houston [14th Dist.] 1989, writ denied). However, if separate property and community property have been so commingled as to defy segregation and identification, the statutory community property presumption applies. *Estate of Hanau*, 730 S.W.2d at 667. Also *see Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975). When tracing separate property, it is not enough to show that separate funds could have been the source of a subsequent deposit of funds. *Gibson v. Gibson*, 614 S.W.2d 487, 489 (Tex. Civ. App. – Tyler 1981, no writ).

3. Purposes of Tracing

The most common reasons for tracing are:

(1) to establish the separate character of funds or assets held on account during marriage;
(2) to establish the separate character of an asset acquired during marriage from separate funds or assets;
(3) to support an economic contribution claim by demonstrating the use of funds or assets of one marital estate to benefit or enhance another marital estate; and economic contribution.
(4) to defeat an economic contribution claim from one marital estate to another by demonstrating that the benefit or enhancement was paid by the estate receiving the benefit.

4. Tracing Rules

There are six principal rules or presumptions for tracing and clearly identifying separate property. Commentators have labeled these theories as: the clearinghouse method of tracing or the identical sum inference; the minimum sum balance method; the community out first rule; pro-rata approach; item tracing; and value tracing. 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.

The true impact of tracing might hinge on the intent of the parties, as many of the tracing rules are nothing more than presumptions that take the place of intent. To understand the true intent of the parties requires the client and/or the expert to determine the characterization of the withdrawals based upon the client's intent. To lend credibility to a spouse's testimony regarding intent, attempt to obtain supporting documents such as written notes around the time of the transaction, communications with third parties, or other evidence which supports the intent. The challenge in relying on intent is that the client or your expert will need to explain the story(ies) regarding the various types of withdrawals that occurred–why the other withdrawals were intended or not intended to be funded with separate funds. In our simple hypothetical, it may be easy to explain the intent or the history of the account since it contains limited transactions; however, where there are thousands of transactions in a single account used for multiple purposes, the task is more challenging.

(1) Clearinghouse and Identical Sum Inference 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 e.g. Estate of Hanau v. Hanau*, 730 S.W.2d 664 (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 clearinghouse method loses its persuasiveness if long periods of time separate the transactions.

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 e.g., McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973). The identical sum inference method is sometimes referred to as identification of specific transaction method.

(2) Minimum Sum Balance Method

The minimum sum balance method is used when you have an account with separate property funds in it, into which community funds are deposited and when there have only been a few 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 Pardon v. Pardon*, 670 S.W.2d 354, 357 (Tex.App.-San Antonio 1984, no writ). Snider v. Snider, 613 S.W.2d 8, 11 (Tex. Civ. App. – Dallas 1981, no writ) (probate suit).

(3) 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, e.g., Sibley v. Sibley, 286 S.W.2d 658 (Tex. 1955); *Welder v. Welder*, 794 S.W.2d at 428-29; Gibson, 614 S.W.2d at 489 (court required proponent to prove separate character of funds by community out first theory); *Harris v. Venture*, 582 S.W.2d 853 (Tex. Civ. App. – Beaumont 1979, no writ). 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. *Welder v. Welder*, 794 S.W.2d at 434. This is the most common method of tracing we encounter. *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App. – Dallas 1955, writ dism'd) (*per curiam*) is the often-cited case and viewed by some as the case which established the acceptability of such a method. In *Sibley*, H deposited W's separate property cash in an account that contained community property funds. On October 11, a 160-acre farm was acquired with $1,929.08 cash withdrawn from the account and a note for the balance. In determining the character of the farm, the court had to determine which funds were withdrawn. The court stated that "[e]quity impresses a resulting trust on such funds in favor of the W and where a trustee [H] 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,..."[14] "The community moneys in joint bank account of the parties are therefore presumed to have been drawn out first, before the separate moneys are withdrawn."[15]

Under the hypothetical, if the *community out first* method is used, the ABC, Inc. shares would be 100% community property; the remaining balance is $50,000 community property and $125,000 separate property.

In *Smith v. Smith*, 22 S.W.2d 140 (Tex. App. - Houston [14th District], 2000) the *separate out first* method was referenced. The court there appears to suggest that the party seeking to use a method other than *community out first* has the burden of citing evidence to apply another method. What evidence or factors would a court consider sufficient to justify using something other than *community out first* method? Would it matter to the court what the account was primarily used for, i.e. to pay living expenses? If *separate out first* is used, then the spouse loses his/her separate property if there is no reimbursement for living expenses.

In *Smith*, the court stated that evidence revealed that the account in dispute received both community funds and H's separate funds.[16] In determining that the balance in the account was H's separate property, the court stated:

> [g]enerally, when separate property and community property are commingled in a single bank account, we presume 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, we presume that the balance remains separate property. The only requirement for tracing and the application of the community out first presumption is that the party attempting to overcome the community presumption is that the party attempting to overcome the community presumption produce clear evidence of the transactions affecting the commingled account.[17]

The court further stated that the *community out first* presumption is a rebuttable one; however, W did not cite evidence to rebut the presumption.[18] In a footnote, the court also stated:

> ...a blind application of the community out first presumption does not uphold the policy reason for

> the presumption's original application...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 preserving his separate estate at the expense of the community. Were we to view 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 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. Husband would have the burden of rebutting the separate out first presumption. We apply the community out first presumption because it seems to be established law.[19]

Under the hypothetical, the ABC shares would be 100% separate property, and the remaining balance in the account would be $150,000 community property and $25,000 separate property.

(4) Pro Rata Approach

Under the *pro rata approach*, when an account contains both community funds and separate funds, the withdrawals are presumed to be made pro rata in proportion to the balance in the account.[20] 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 in which the deceased employee's wife had to prove what 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. *Marineau 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.

The court of appeals disagreed. The court relied on *G & M Motor Co. v. Thompson*, 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.

In the hypothetical, the balance in the account prior to the withdrawal was 55% community property ($150,000/$275,000) and 45% separate property. The ABC shares would be a mixed character asset: 55% community property and 45% separate property; the percentages also apply to the remaining cash balance: $95,455 community property and $79,545 separate property. Assume also that the next deposit of $25,000 was separate funds. After the deposit, the account balance is $200,000, of which the community amount is still $95,455 and the separate amount is $104,545 (48% and 52%, respectively). The withdrawal that immediately follows the transaction would be in the same proportion, i.e 48% community property and 52% separate property.

(5) Item Tracing

An item of separate property on hand at dissolution of marriage must be traced to its inception of title. Proponent of the separate property characterization must establish by clear and convincing evidence that the item on hand was either acquired as separate property before marriage or by gift, devise or descent during marriage, or by the use of separate property funds or separate property credit. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975).

(6) Value Tracing

Value tracing is used to trace cash assets in order to determine the character of cash on hand at the dissolution of marriage. The proponent of separate property must trace all funds brought into and out of an account. Each deposit and each check must be accounted for. *In re Marriage of Tandy*, 532 S.W.2d 714 (Tex. Civ. App. – Amarillo 1976, no writ).

(7) Exhaustion Method/Family Expense Method[21]

The approach assumes that all family living expense are to be charged against community funds. The separate characterization can be established by showing that on a particular date a withdrawal occurs, the community funds were already exhausted on payment of family living expenses. Under this method, the community money will be used to pay family expenses before separate money will be used for family expenses. Therefore, it is not necessary to document every deposit and every expenditure as it occurred–no running balance is required. All of the family money that went into the

account, up to the date in question, is calculated. Then all of the family expenses that were paid out of the account in the same time period are computed. If the family expenses are equal to, or greater than, the family income, what is left is separate property. Hence, the remainder of the account at the date or the asset purchased on that date with the "leftover" separate money is separate property.

In *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App. - Houston [14th Dist.] 2003, pet denied), W challenged the trial court's determination that H had separate funds in a disputed account, and she asserted that the funds should have been community property since the account was commingled. H provided evidence showing the separate balance prior to marriage, the interest income earned from the account during marriage of $115,000, and a listing of withdrawals made for living expenses during the same period of $366,000.[22] The court noted that W did not provide evidence rebutting the *community out first* presumption and decided that, because the withdrawals for community expenses depleted community funds in the account, H rebutted the statutory presumption that the account was a community asset.[23]

What is considered a living expense? "Needs" are arguably a living expense, but are "wants" or luxuries considered living expenses? Would there be a limit on the number of vehicles? Are charitable donations considered living expenses? Are there limits on spending for clothing or other items–does it vary with the size of the potential community estate?

(8) Maximum Community

Duncan v. United States, 247 F.2d 845 (5th Cir. 1957) involved an action where co-executors sought recovery of a portion of the estate taxes paid. The Commissioner of the Internal Revenue Service determined that various assets were separate property. The estate asserted that the records did not indicate how the disputed assets were acquired and, therefore, the community presumption should apply and the disputed assets should be characterized as community property. It was acknowledged that H had significant separate property. The records reflected that for the period between 1947-1949, the total possible community sources of income totaled approximately $17,000 after deductions for income taxes. Information regarding disbursements for living and household expenses was not established. The court stated that there was no other source whatever from which presumed community property funds were available to acquire the disputed assets; therefore, the total community interest in the disputed assets could not exceed the approximate $17,000, assuming that all of the income available for spending was used to accumulate the assets in question.

VI. BIDIRECTIONAL COMMINGLING, APPLICATION OF TRUST LAW

Commingling refers to a process by which community property and separate property are mixed together so that they cannot be separately identified or resegregated, commonly resulting in treatment of the entire mass as community property. In other words, if separate property gets too commingled with community property that the separate property loses its identity, separate property is treated as community property. *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973); *Jackson v. Jackson*, 524 S.W.2d 308 (Tex. Civ. App.-Austin 1975, no writ).

The source of the commingling rule is from 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.

A. Normal Commingling

Normal or regular commingling occurs when community property and separate property have been mixed, causing the entire mass to become community property. If community and separate property have been hopelessly commingled as to defy resegregation and identification, the presumption of community property controls and the entire amount is community property. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975).

B. Reverse Commingling

Reverse commingling occurs when community property and separate property have been hopelessly mixed, and the entire mass becomes separate property. In *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App. – Dallas 1955, writ dism'd), husband commingled community property with wife's separate property to the extent that the community property and wife's separate property became so commingled as to defy resegregation and identification. Based on the application of trust principles, husband had a fiduciary duty to protect wife's separate property, thus the entire mass became wife's separate property. Therefore, commingling can be bidirectional, where separate property and community property funds are commingled and the entire mass becomes community property (normal or regular commingling) or where separate funds and community funds are commingled and the entire mass becomes separate property (reverse commingling).

C. Important Exception

Sibley v. Sibley, 286 S.W.2d 657 (Tex. Civ. App.-Dallas, 1955, writ dism'd) sets out the general rule and the exception. 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 rules or presumptions. In divorce proceedings our courts have found no difficulty in following separate funds through bank accounts. *Farrow v. Farrow*, 238 S.W.2d 255 (Tex. Civ. App. – Austin, 1951, no writ); *Coggin v. Coggin*, 204 S.W.2d 47 (Tex. Civ. App. – Amarillo 1947, no writ). 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 withdrawn his own money first, and is therefore an exception to the general rule.

The rule is that 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 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 v. Farrow*, 238 S.W.2d 255, 256 (Tex.Civ.App.-Austin 1951, no writ).

In *Andrews v. Brown*, 10 S.W.2d 707 (1928), cited with approval in *Mooers v. Richardson Petroleum Company*, 146 Tex. 174, 204 S.W.2d 606 (Tex. 1947), the following appears:

> "'If a man mixes trust funds with his own,' it is said, 'the whole will be treated as trust property, except so far as he may be able to distinguish what is his own.' ..., That principle seems to have recognition in most, if not all, American jurisdictions...
>
> "Analogous doctrines are part of the law of accession and specification..., and of confusion of goods ... The principle, we apprehend is but a part of equity's declination to extricate the wrongdoer from self-imposed hard conditions, or to tax the innocent, where one of two not in pari delicto must suffer."

If a managing spouse mixes his separate funds with community funds and fails to meet his burden to trace and prove what portion belongs to his separate estate, then the whole will become community property (normal commingling). On the other hand, if the managing spouse mixes his wife's separate funds with community funds and fails to meet his burden to trace and prove what portion is her separate property and what portion is the community estate (in which he owns an interest), then the whole will become the wife's separate property (reverse 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, *mand. overruled*); *Carnes v. Meador*, 533 S.W.2d 365, 370 (Tex. Civ. App. – Dallas 1975, writ ref'd n.r.e.); *Brownson v. New*, 259 S.W.2d 277, 281 (Tex. Civ. App. – San Antonio 1953, writ dism'd w.o.j.). The burden is on the managing spouse to prove that a gift or disposition of community funds was not unfair to the other spouse. *Mazique v. 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 had 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; *Maxell's Unknown Heirs v. Bolding*, 36 S.W.2d 267, 268 (Tex. Civ. App. – Waco 1931, no writ).

D. 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 for $9,062.87 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) (wife given money judgment for her share of $3,000 cash concealed in hole in floor and not accounted for); *Swisher v. Swisher*, 190 S.W.2d 382 (Tex. Civ. App.-Galveston 1945, no writ); *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 is upon the disposing spouse to show fairness).

If the managing spouse is in fact 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 v. Farrow, supra, and *Sibley v. Sibley, supra*, the interests of the managing spouse in the community are lost and the mixture becomes the other spouse's separate property.

E. Background in Trust Accounting Rules

Farrow v. Farrow, 238 S.W.2d 255 (Tex.Civ.App.-Austin 1951, no writ) was the first of the modern tracing cases to apply trust doctrine to the tracing or commingling of community and separate funds in a marriage:

(a) 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.
(b) 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.
(c) But there must be a willful or wrongful invasion of rights in order to induce the merited consequences of forfeiture.
(d) 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.

Under *Sibley v. Sibley*, 286 S.W.2d 657, 659 (Tex. Civ. App. – Dallas 1955, writ dism'd), the application of the trust doctrine in a divorce case meant that "the trustee (husband) is presumed to have checked out his money first."

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 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 (Tex.App.-Corpus Christ 1900, no writ); *DePuy v. DePuy*, 483 S.W.2d 883 (Tex. Civ. App. – Corpus Christi 1972, no writ); *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App. – Houston [14th dist.] 1975, writ dism'd); *Harris v. Venture*, 582 S.W.2d 853 (Tex. Civ. App. – Beaumont 1979, no writ); *Snider v. Snider*, 613 S.W.2d 8 (Tex. App. – Dallas 1981, no writ); *Gibson v. Gibson*, 614 S.W.2d 487 (Tex. Civ. App. – Tyler 1981, no writ); *Kuehn v. Kuehn*, 594 S.W.2d 158 (Tex. Civ. App. – Houston [14th Dist.] 1980, no writ).

Similarly, if a person has been given managerial powers over the other spouse's estate and uses the separate funds as collateral to obtain loans to purchase assets and the lender intends to only look to the separate funds for repayment, should not all of the assets be the separate property of the wife? What if her separate estate paid off that loan? Would this create a constructive or resulting trust?

The Court of Appeals in *Farrow v. Farrow*, 238 S.W.2d 255 (Tex. Civ. App. – Dallas 1955, writ dism'd) 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.

Applying this principle to the situation described above would indicate that the burden would be on the managing spouse to disclose facts insuring a fair division, or risk forfeiture of the property in which he has an interest whether community or separate, and awarding the property or its value to the injured party.

ENDNOTES

1. *Burgess v. Burgess*, 2007 WL 1501117 (Tex. App. - Beaumont, 2007).

2. Texas Family Code § 3.008(a) provides that 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.

3. Tex. Fam. Code §3.001(1).

4. Tex. Fam. Code §3.001(2).

5. Tex. Fam. Code §3.001(2).

6. Tex. Fam. Code §4.102 "At any time, the spouse may partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouse may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. The partition or exchange may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse."

7. Tex. Fam. Code §3.001(3).

8. Tex. Fam. Code §3.008(b).

9. *Norris v. Vaughan*, 152 Tex. 491 260 S.W.2d 676 (Tex. 1953).

10. *Smith v. Smith*, 22d S.W.3d 140, 144 (Tex. App. - Houston [14th Dist.], 2000, no pet.).

11. Tex. Fam. Code §3.003(b).

12. *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex.1965).

13. *Carter v. Carter*, 736 S.W.2d 775 (Tex. App. - Houston [14th Dist.], 1987, no writ) citing *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975).

14. *Sibley* at 659.

15. *Id.*

16. *Smith v. Smith*, 22d S.W.3d 140, 145-146 (Tex. App. - Houston [14th Dist.], 2000, no pet.).

17. *Id*, citing *Welder v. Welder*, 794 S.W.2d 420, 433-434 (Tex.App. - Corpus Christi 1990, no writ); *Horlock v. Horlock*, 533 S.W.2d 52, 58 (Tex. Civ. App. - Houston [14th Dist.] 1975, writ dism'd w.o.j.; *but cf. Goodridge v. Goodrige*, 591 S.W.2d 571, 573 (Tex. Civ. App. - Dallas 1979, writ dism'd wo.o.j).

18. *Smith v. Smith*, 22d S.W.3d 140, 147 (Tex. App. - Houston [14th Dist.], 2000, no pet.).

19. *Id.*

20. Shelly D. Merritt, *Planning for Community Property in Colorado*, 31 Jun Colaw 79,80 (2002).

21. Joan F. Kessler, Allan R. Koritzinsky, Marta T. Meyers, *Tracing to Avoid Transmutations*, 17 JAMAML 371, 375 (2001). See also Richard Orsinger's paper in Acknowledgment section of this paper.

22. *Zagorski v. Zagorski*, 116 S.W.3d 309,320 (Tex. App. - Houston [14th Dist.] 2003, pet denied).

23. *Id.* at 321.