

**THE NEW REIMBURSEMENT STATUTE:  
THE RETURN OF COMMON LAW?**

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## I. INTRODUCTION

Reimbursement under the new statute does not replace common law reimbursement. There are differences between common law reimbursement (i.e. Jensen) and the reimbursement statute and both standards should be pled and proved if appropriate. The statute simply provides another avenue for reimbursement, and both statutory and common law reimbursement will be discussed.

## II. REIMBURSEMENT BY STATUTE

### A. Statutory Reimbursement

During the last legislative session, economic contribution was repealed, and the reimbursement statute was amended. The amendments in the statutes regarding claims for reimbursement and marital property rights are as follows:

#### § 3.401 DEFINITIONS

(1), (2), (3) *repealed*

(4) "Marital estate" means one of three estates:

(A) the community property owned by the spouses together and referred to as the community marital estate;

(B) the separate property owned individually by the husband and referred to as a separate marital estate; or

(C) the separate property owned individually by the wife, also referred to as a separate marital estate.

(5) "Spouse" means a husband, who is a man, or a wife, who is a woman. A member of a civil union or similar relationship entered into in another state between persons of the same sex is not a spouse.

#### § 3.402 CLAIM FOR REIMBURSEMENT; OFFSETS [~~ECONOMIC CONTRIBUTION~~]

(a) For purposes of this subchapter, a claim for reimbursement includes

(1) payment by one marital estate of the unsecured liabilities of another marital estate;

(2) inadequate compensation for the time, toil,

talent, and effort of a spouse by a business entity under the control and direction of that spouse;

(3) [~~"economic contribution" is the dollar amount of:~~

(1) the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage;

(2) the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received;

(3) the reduction of the principal amount of that part of a debt, including a home equity loan:

(A) incurred during a marriage;

(B) secured by a lien on property; and

(C) incurred for the acquisition of, or for capital improvements to, property;

(4) the reduction of the principal amount of that part of a debt:

(A) incurred during a marriage;

(B) secured by a lien on property owned by a spouse;

(C) for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and

(D) incurred for the acquisition of, or for capital improvements to, property;

(5) the refinancing of the principal amount described by Subdivisions (3)-(6) [(1)-(4)], to the extent the refinancing reduces that principal amount in a manner described by the applicable [appropriate] subdivision; ~~and~~

(6) capital improvements to property other than by incurring debt; and

(7) the reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses.

(b) The court shall resolve a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate.

(c) Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate, except that the separate estate of a spouse may not claim an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by the separate estate against contributions made by the community estate to the separate estate.

(d) Reimbursement for funds expended by a marital estate for improvements to another marital estate shall be

measured by the enhancement in value to the benefited marital estate.

(e) The party seeking an offset to a claim for reimbursement has the burden of proof with respect to the offset [~~"Economic contribution" does not include the dollar amount of:~~

[~~(1) expenditures for ordinary maintenance and repair or for taxes, interest, or insurance; or~~

[~~(2) the contribution by a spouse of time, toil, talent, or effort during the marriage~~].

### § 3.403 CLAIM BASED ON ECONOMIC CONTRIBUTION *REPEALED*

**Source:** S.B. 866 § 11, eff. 9/1/09; *applies only to claim in suit for dissolution filed on or after 9/1*

### § 3.404 APPLICATION OF INCEPTION OF TITLE RULE; OWNERSHIP INTEREST NOT CREATED

(a) *[no change]*

(b) A [~~The~~] claim for reimbursement [~~economic contribution created~~] under this subchapter does not create an ownership interest in property, but does create a claim against the property of the benefited estate by the contributing estate. The claim matures on dissolution of the marriage or the death of either spouse.

**Source:** S.B. 866 § 4, eff. 9/1/09; *applies only to claim in suit for dissolution filed on or after 9/1 (§ 13)*

### § 3.406 EQUITABLE LIEN

(a) On dissolution of a marriage, the court may [~~shall~~] impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against [~~economic contribution in~~] that property by a contributing [~~another~~] marital estate.

(b) On the death of a spouse, a court may [~~shall~~], on application for a claim for reimbursement [~~of economic contribution~~] brought by the surviving spouse, the personal representative of the estate of the deceased spouse, or any other person interested in the estate, as defined by Section 3, Texas Probate Code, impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against that property [~~economic contribution~~] by a contributing marital estate.

(c) *repealed*

**Source:** S.B. 866 §§ 5, 11, eff. 9/1/09; *applies only to claim in suit for dissolution filed on or after 9/1*

### § 3.407 OFFSETTING CLAIMS *REPEALED*

**Source:** S.B. 866 § 11, eff. 9/1/09

### § 3.408 CLAIM FOR REIMBURSEMENT *REPEALED*

**Source:** S.B. 866 § 11, eff. 9/1/09

### § 3.410 EFFECT OF MARITAL PROPERTY AGREEMENTS

A premarital or marital property agreement, whether executed before, on, or after September 1, 2009 [~~1999~~], that satisfies the requirements of Chapter 4 is effective to waive, release, assign, or partition a claim for economic contribution, reimbursement, or both, under this subchapter to the same extent the agreement would have been effective to waive, release, assign, or partition a claim for economic contribution, reimbursement, or both under the law as it existed immediately before September 1, 2009 [~~1999~~], unless the agreement provides otherwise.

**Source:** S.B. 866 § 6, eff. 9/1/09; *applies only to claim in suit for dissolution filed on or after 9/1*

### B. Statutory Types of Reimbursement - Tex. Fam. §3.402

There are 9 separately listed types of statutory reimbursement:

1. PAYMENT OF UNSECURED LIABILITIES (Tex. Fam. § 3.402 (1)). Payment of unsecured liabilities owed by one marital estate by another marital estate.
2. STATUTORY JENSEN (Tex. Fam. § 3.402 (2)). Inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse.
  - a. Be aware that a statutory Jensen claim has substantial differences from a common law Jensen reimbursement claim:
    - i. You do not have to own the property to have this claim;
    - ii. The claim is limited to the inadequate compensation for the spouse who controls or directs the business;
    - iii. There is no suggestion as to how to value the claim - in Jensen, depending on which portion of Jensen you are using, the value is the difference between the

compensation that should have been paid and the value of all of the different types of compensation and/or benefits received (with perhaps a further reduction for the value of the time, toil, talent and effort necessary to preserve and protect the property); and

iv. Additionally, the original Jensen claim seemed to limit itself to those instances where the separate property had increased in value. The statutory Jensen claim does not have this restriction.

3. **PAYMENT OF DEBT SECURED BY SEPARATE PROPERTY - OWNED BEFORE MARRIAGE** (Tex. Fam. § 3.402 (3)). The reduction of the principal amount of a debt of a debt secured by a lien on property owned before marriage to the extent the debt existed at the time of marriage.

4. **PAYMENT OF DEBT SECURED BY SEPARATE PROPERTY - GIFT** (Tex. Fam. § 3.402 (4)). The reduction of the principal amount of a debt secured by a lien on property received by gift, devise or descent during the marriage to the extent the debt existed at the time the property was received.

5. **PAYMENT OF DEBT** (Tex. Fam. § 3.402 (5)). This section merely creates a reimbursement claim for the reduction of the principal amount of that part of a debt incurred during a marriage, secured by a lien on property and incurred for the acquisition of or for capital improvements to, property.

a. This provision seems to allow a statutory claim reimbursement if there is a loan that has been paid during the marriage that secured property.

6. **PAYMENT OF PRINCIPAL DEBT WHERE CREDITOR AGREED TO LOOK SOLELY TO SEPARATE ESTATE** (Tex. Fam. § 3.402 (6)). The reduction of the principal amount of that part of debt incurred during a marriage, secured by a lien on property owned by a spouse for which the creditor agreed to look for repayment solely to the separate material estate of the spouse on whose property the lien attached and incurred for the acquisition of, or for capital improvements to, property.

7. **REFINANCING OF PRINCIPAL** (Tex. Fam. § 3.402 (7)). The refinancing of the principal amount described by Subdivisions (3)-(6) , to the extent the refinancing reduces that principal amount in a

manner described by the applicable subdivision;

8. **CAPITAL IMPROVEMENTS** (Tex. Fam. § 3.402 (8)). Capital improvements to property other than by incurring debt

9. **REDUCTION OF UNSECURED DEBT BY COMMUNITY INCURRED BY A SPOUSE'S SEPARATE ESTATE** (Tex. Fam. § 3.402 (9)). The reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses.

a. Note: How is this any substantively different than Paragraph 1 above. The differences are:

i. Paragraph 1 applies to all estates and paragraph 9 only to the community estate;

ii. Paragraph 1 talks of "payment" and paragraph 9 states "the reduction"; and

iii. Paragraph 1 identifies "unsecured liabilities" and Paragraph 9 identifies only "unsecured debt". Can an argument be made that a debt refers only to a contract and a liability is any type of obligation - for example, income taxes are not a debt but a liability - a tort subjects one to liability and not to a debt.

b. Note: Neither paragraph limits the reimbursement claim to a reduction of principal (see Paragraphs 3, 4 and 7 above).

**C. Equitable Principals to be Applied (Tex. Fam. § 3.402 (b))**

"The court shall resolve a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate." This is a restatement of the common law.

**D. Offsets for Use and Enjoyment (Tex. Fam. § 3.402 (c))**

If a claim for reimbursement is made against a separate estate, that spouse cannot claim an offset against the community for use and enjoyment of the property if it is a primary or secondary residence.

**E. Measurement of Claim for Enhanced Value (Tex. Fam. § 3.402(d))**

If the reimbursement claim is for improvements to another marital estate, the claim is measured by the enhancement in value to the benefited estate.

In *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620, 628 (1935) it was stated that "... in case of reimbursement for improvements, the amount of recovery is limited to the amount of enhancement of the property at the time of partition by virtue of the improvements placed thereon. *Clift v. Clift*, supra, [72 Tex. 144, 149, 10 S.W. 338 (1888)]."

But in *Anderson v. Gilliland*, 684 S.W. 2d 673, 675 (Tex. 1985), the Texas Supreme Court, in announcing the rule that enhanced value is the proper measure of damages, used the "enhanced value" as of the date of the death of spouse. The court observed that the confusion in regard to the type of valuation came about because of two different statements in *Dakan*, one regarding enhancement and the other regarding costs.

#### **F. Burden of Proof (Tex. Fam. § 3.402(e))**

The party making the claim for reimbursement has the burden of proof with respect to the offset.

#### **G. Application of Inception of Title Rule (Tex. Fam. § 3.404)**

The reimbursement statute does not affect the rule of inception of title, nor does a claim for reimbursement create an ownership interest in property. However, a claim for reimbursement does create a claim against the benefited estate by the contributing estate. The claim for reimbursement matures on the dissolution of the marriage or death of either spouse.

#### **H. Management Rights (Tex. Fam. § 3.405)**

The reimbursement statute does not affect the right to manage, control or dispose of marital property as provided by "this chapter" - (meaning Chapter 1 Tex. Fam. §§1.001 to 9.302 (General Provisions)).

#### **I. Equitable Lien (Tex. Fam. § 3.406) (must be read with §7.007 - Disposition of claim for reimbursement).**

The trial court MAY impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against that property by a contributing marital estate - either in divorce or as the result of the death of a spouse (probate).

#### **J. Nonreimbursable Claims (Tex. Fam. § 3.409)**

The following events do not give rise to a claim for reimbursement:

- i. Payment of child support;
- ii. Payment of alimony;
- iii. Payment of spousal maintenance;

- iv. The living expenses of a spouse or child of a spouse;
- v. Contributions of property of a nominal value;
- vi. The payment of a liability of a nominal amount; or
- vii. A student loan owed by a spouse.

#### **K. Effect of Marital Property Agreements (Tex. Fam. § 3.410)**

If the parties have entered into premarital agreement or marital property agreement that waived either reimbursement claims and/or economic interest claims, then the waiver will apply to any reimbursement claims that could be made pursuant to the statutes relating to reimbursement.

#### **L. Disposition of Claim for Reimbursement (Tex. Fam. §7.007)**

The court shall determine the rights of both spouses in a claim for reimbursement as provided by §§3.401 to 3.410, and "shall apply equitable principles to:

- (1) Determine whether to recognize the claim after taking into account all the relative circumstances of the spouses; and
- (2) Order a division of the claim for reimbursement, if appropriate, in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage."

This statute allows the trial court to apply all of its equity to make its decision. It may be wise to cite all of the common law reasons a court could use equitable principals in addition to the statutory claims.

### **III. REIMBURSEMENT FAUX**

In Thomas P. Goranson's paper, "Reimbursement", he discussed the concept of Reimbursement Faux, as follows:

Reimbursement Faux is when the term and concepts of reimbursement are used by an attorney or court when they really mean something else - most commonly "fraud on the community."

For example, In *Re. JGL*, 295 S. W.3d 424 (Tex. App.-Dallas, 2009, no pet.), a husband complained about wife being awarded excessive amounts of community property. The appellate court in its decision stated:

"Wife testified as to expenses she incurred with respect to another property of Husband's. Thus, the trial court had more than a scintilla of evidence before it



relating to the issue of reimbursement, and the evidence was legally sufficient to allow the trial court to determine whether to include reimbursement claims in the division of residential equity. See *In re K.N.C.*, 276 S.W.3d at 626. We conclude that the trial court did not abuse its discretion in dividing the equity of the marital residence in the award of \$55,000 to Wife."

This was an appeal without findings of fact or conclusions of law, but the description of the claim and proof offered hardly seems to qualify for any types of reimbursement claims discussed in the two other sections of this outline.

An even more entertaining view of reimbursement was provided in *Haining v. Haining*, 2010 WL 1240752 (Tex.App.-Hous. (1 Dist.) March 25, 2010 - memorandum opinion). The trial court awarded the wife a judgment against the husband for \$70,189 because he had committed "...fraud on the community estate and wasted community assets..." The appellate court, using reimbursement cases and analogy found that the trial court did not abuse its discretion in allowing "reimbursement to the community estate."

In *Lucy v. Lucy*, 162 S. W. 3d 770 (Tex. App. - El Paso 2005, no pet.), the El Paso court was analyzing a case that had apparently been argued by counsel as a reimbursement (or lack thereof case). "At issue is an amorphous award of 'reimbursement'. The court in its opinion gives the standard statements about reimbursement, many of which are cited in the Common Law Section above. The opinion used the infamous "Walking Duck Theory" (although "Quacking Duck" might have been more appropriate choice of terms):

"If It Walks Like a Duck ...

"We come now to the central issue. Must we reverse because the trial court mislabeled the proper theory of recovery? Is it error to compensate the community estate for economic torts committed by a spouse simply because the court labeled the relief as 'reimbursement?'" *Lucy* at 777.

The Appellate Court found that the "constituent elements are properly aligned..." and affirmed the trial court's decision.

#### IV. REIMBURSEMENT BY COMMON LAW

##### A. The Nature of Reimbursement

In *Phillips v. Phillips*, 296 S.W.3d 656, 664 (Tex. App. - El Paso 2009, pet. denied), Justice Ann McClure gives a comprehensive review of common law reimbursement.

*"The Nature of Reimbursement*

*The rule of reimbursement is purely an equitable one. Vallone v. Vallone, 644 S.W.2d*

*455, 458 (Tex.1982); Lucy v. Lucy, 162 S.W.3d 770, 776 (Tex.App.-El Paso 2005, no pet.). It is not an interest in property or an enforceable debt, per se, but an equitable right which arises upon dissolution of the marriage through death, divorce, or annulment. Lucy, 162 S.W.3d at 776. An equitable right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit. Id. A claim for reimbursement includes payment by one marital estate of the unsecured liabilities of another marital estate. Tex.Fam.Code Ann. § 3.408(b)(1)(Vernon Supp.2008)( Note 1: since repealed and replaced by §3.402). The trial court resolves a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset if the court determines it to be appropriate. Tex.Fam.Code Ann. § 3.408(c) (Note 2: Now Sec. 3.402 (b)). Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate on property that does not involve a claim for economic contribution to the property. Tex.Fam.Code Ann. § 3.408(d) (Note 3 - Now Sec. 3.402(c) and restricted). The party seeking reimbursement has the burden of pleading and proving that the expenditures and improvements were made and that they are reimbursable. Vallone, 644 S.W.2d at 459." (Notes added).*

##### B. Other basic elements of Common Law Reimbursement include:

Reimbursement is not available as a matter of law but lies within the discretion of the court. *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex.1982).

The discretion to be exercised in evaluating a claim for reimbursement is equally as broad as the discretion exercised in making a just and right division of the community estate. *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex.1988); *Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex.App.-Houston [14th Dist.] 1996, no writ) (op. on reh'g).

In a case where a spouse claimed that the reimbursement claim approved by the trial court was not large enough, it was stated:

*"Great latitude is accorded the trial court in applying equitable principles to value a reimbursement claim...Such a claim is not merely a balancing of the ledgers between the marital estates. Rather, the discretion to be*

*exercised in evaluating a reimbursement claim is equally as broad as the discretion subsequently exercised by the trial court in making a just and right division of the community estate." Bell v. Bell, 2005 WL 1538275 (Tex. App.- Tyler, June 30, 2005 (memorandum opinion)) citing Penick.*

### **C. Determining Value and Measuring Reimbursement**

For reimbursement claims for enhancements made to property, the measurement of the claim is the difference in value caused by the enhancement, and not the cost of the enhancement.

For repayment of debt, the first step to valuing the amount of the claim is determining the amount of the reduction of the principal of the debt. Penick clearly states that offsets should be allowed in determining the equitable nature of the claim based on reduction of principal. There is dicta in the decision that has been used to suggest that the value of the claim is not the reduction of the principal.

Another issue arises when determining when to value enhancement. Is it at the time of the enhancement or is it at the time of divorce? In Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620, 628 (1935), it was stated that "... in case of reimbursement for improvements, the amount of recovery is limited to the amount of enhancement of the property at the time of partition by virtue of the improvements placed thereon. Clift v. Clift, supra, [72 Tex. 144, 149, 10 S.W. 338 (1888).]"

However, in Anderson v. Gilliland, 684 S.W. 2d 673, 675 (Tex. 1985) - a probate case- the Texas Supreme Court, announced the rule that enhanced value is the proper measure of damages and used the "enhanced value" as of the date of the death of spouse. The court observed that the confusion in regard to the type of valuation came about because of two different statements in Dakan, one regarding enhancement and the other regarding costs.

Due to differing opinions, it is suggested that if one is making a claim for enhanced value reimbursement, one should produce both evidence of enhancement at the time of enhancement and at the time of divorce.

### **D. Burden of Proof**

The party claiming the right of reimbursement has the burden of pleading and proving that the expenditures and improvement were made and that they are reimbursable. Vallone v. Vallone, 644 S.W. 2d 455, 458-459 (Tex. 1982).

### **E. The Jensen Claim - Time and Effort (Jensen v. Jensen, 665 S.W. 2d 107 (Tex. 1984)).**

The Texas Supreme Court was considering how to

handle in a divorce the question of a separate property business that increased greatly in value during the parties' marriage. Two theories were being examined - "reimbursement theory" or "ownership theory." The Court adopted the "reimbursement theory," stating that:

"...the community will be reimbursed for the value of time and effort expended by either or both spouses to enhance the separate estate of either, other than 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." Jensen at 109.

The court then stated how the rule was to be applied:

"The right to reimbursement is only for the value of the time, toil and effort 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. Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex.1982)." Jensen at 109.

Then the Supreme Court stated:

"...we remand this cause to the trial court for the limited purpose of determining the amount of reimbursement, if any, due to the community as a result of the time, toil and talent expended by Mr. Jensen toward enhancement of the stock of RLJ. From the value of the time, toil and talent expended is to be subtracted the compensation paid to Mr. Jensen for such time, toil and talent in the form of salary, bonuses, dividends and other fringe benefits. Any remainder is the reimbursement due the community. This reimbursement, if any, shall be distributed by the trial court in addition to the property division heretofore made to the parties." Jensen at 110.

Further, a successful Jensen reimbursement claim should be evidenced by a money judgment: "...if the right to reimbursement is proved, a lien shall not attach to Mr. Jensen's separate property shares. Rather, a money judgment may be awarded." Jensen at 110.

### **V. CONCLUSION**

In conclusion, we have finally been successful in repealing the economic contribution statute and have restored reimbursement. The intention of the new reimbursement statute is to restore common law reimbursement without limiting scenarios where reimbursement could be granted by either statute or common law. Because the statute does not necessarily replicate the common law claim of reimbursement, both statutory claims and common law claims of reimbursement should be pled and proved as appropriate.

Both statutory reimbursement and common law reimbursement call on the court to use “equitable principles” in considering claims for reimbursement, which gives the court wide discretion in determining whether and how much reimbursement is warranted on a case by case basis.

